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MARKETABLE TITLE
TO
REAL ESTATE

BEING ALSO

A TREATISE

ON THE

RIGHTS AND REMEDIES OF VENDORS AND PURCHASERS
OF DEFECTIVE TITLES (AS BETWEEN THEMSELVES)

INCLUDING THE

Law of Covenants for Title, the Doctrine of Specific
Performance, and other Kindred Subjects

THIRD EDITION

BY

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OF THE WASHINGTON, D. C., BAR

NEW YORK
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PREFACE.

This work is a treatise on the law of title to real property, as that law is applied between vendor and purchaser. The material which composes it has been drawn principally from cases that have arisen between the buyer and seller of lands, and not from decisions in ejectment, or other possessory actions, though of course these latter cases have been availed of whenever they supply principles which affect the rights of the vendor or purchaser with respect to the title that is to be conveyed. The work is, therefore, in no respect a treatise upon real property, real property tenures, nor titles to real estate, in the sense in which this last term is commonly used, but is, instead, a collation of the laws and decisions which govern the rights of both parties with respect to the title, and prescribe the remedies of the purchaser; precautionary, where it is anticipated that the title may prove defective, and compensatory, where it has proven to be so. Therefore, what circumstances will entitle a vendee to protection as a *bona fide* purchaser for value without notice, or will sustain his title in ejectment, or will support his bill to remove a cloud from the title, have not been made the subject of separate and independent treatment in this work, and have been considered only so far as they have served to illustrate some principle of the law of defective titles, as applied between vendor and purchaser. That law is to be found dispersed through the text books, and through the reports and digests under the several heads of Vendor and Purchaser, Covenants for Title, Specific Performance, Equity Jurisprudence, Deeds, Titles to Real Estate, Real Property, Abstracts of Title, Judicial Sales. Subrogation, and many other minor heads of the law. The effort of the writer has been to collect the relevant matter from these different sources in one volume, and so to arrange and to dispose it as to render the whole easily accessible to the profession.

Some difficulty has been experienced in choosing between several apparently appropriate titles for the work. That which has been selected, "Marketable Title," is satisfactory, but requires a word of explanation. The modern use and acceptation of this term it is believed justifies its employment as the title of a treastise upon

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the rights of vendors and purchasers of defective titles, including as well the law of covenants for title as the equitable doctrine of doubtful titles. But originally the term was narrow and technical in its meaning, being used in equity to denote a title concerning which there was no reasonable doubt. The term was not known in the law courts, where titles were treated either as good or bad, and judgment rendered accordingly. Hence at law a title might be adjudged good which in equity the purchaser would not be compelled to accept. A small but learned and abstruse treatise upon the equitable doctrine of marketable titles by S. Atkinson was published in London and republished in America (1838) in the "Law Library;" from this work the limited and technical significance of the expression will appear. Of late years, however, the American courts have very generally applied the term "unmarketable" to any title which a purchaser cannot be required to accept, without discriminating between titles absolutely bad and those merely doubtful, so that now "unmarketable" is commonly employed by the courts and the profession as a synonym for "defective" title. This is probably due to the fact that in most of the States legal and equitable relief are administered in one and the same court and form of action without distinction, or at least equitable defenses are allowed to be interposed in actions at law. Hence there is no longer any occasion for treating the expression "marketable title" as limited and technical in its character. The term then, or rather its negative form, being applicable to all defective titles whether absolutely bad or merely doubtful, it is apprehended that no inconvenience can arise from treating under that head such subjects as Covenants for Title, Estoppel, Action for Damages, Right to Perfect the Title, and so on, none of which belong to the original equitable doctrine of marketable titles, but obviously pertain to the law of defective titles.

The author desires to acknowledge the many facilities for the prosecution of his labors which have been afforded him in a generous manner by his publishers, Messrs. Baker, Voorhis & Co., of the city of New York; and courtesies extended to him by Messrs. B. Kennon Peter and F. S. Key Smith, in charge of the law library of the Bar Association of the District of Columbia.

C. W. M.

WASHINGTON, D. C., *May 1st*, 1896.

PREFACE TO THIRD EDITION.

Since the year 1907, more than twelve hundred decisions have appeared in the reports under the several heads of the law of Vendors & Purchasers that are treated of in this work. These cases have been examined by the author and have been cited or referred to in their proper places throughout the work. Many of them have furnished valuable material for the enlargement of the text, and for the introduction of explanatory and illustrative notes. Many of them are no more than the reaffirmation of settled principles of law, but they have been cited because of the well-known desire of the practical lawyer to have a reference to every decision of his own court involving the particular question which he has under consideration.

C. W. M.

WASHINGTON, D. C., *October*, 1921.

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MARKETABLE TITLE TO REAL ESTATE

AND

PURCHASERS OF DEFECTIVE TITLES.

BOOK I.

OF REMEDIES IN AFFIRMANCE OF THE CONTRACT OF SALE.

OF AFFIRMANCE BY PROCEEDINGS AT LAW.

OF PROCEEDINGS AT LAW WHILE THE CONTRACT IS EXECUTORY.

CHAPTER I.

INTRODUCTORY.

Title to real estate has been defined to be "the means whereby the owner of lands hath the just possession of his property,"[1] but the expression is commonly used in a figurative sense to denote the muniments of title of the owner, or that whole body of documents or facts which evidence the just ownership of lands.

Titles are either (1) good; (2) doubtful; or (3) absolutely bad. A good title consists in the rightful ownership of the property and in the rightful possession thereof, together with the appropriate legal evidence of rightful ownership.[2] The rightful owner of an estate may be in the rightful possession thereof, but unless he is supplied with documentary evidence of title, where he holds by purchase, or can prove his right by the testimony of witnesses or other instruments of evidence, where he holds as heir, that is, by descent, his title cannot be said to be good. Sir William Blackstone declares that a perfect title consists in the union of the possession, the right of the possession and the right of property in one and the same person.[1] This is true in a general sense, but the definition scarcely embraces all the elements of a good title, as that term is employed between vendor and purchaser. A purchaser in possession who has paid the whole purchase money, but who has not received a conveyance, may be said to have the possession, the right of possession and the right of property, but not having received a deed, the indispensable evidence of legal title in such a case, his title cannot be said to be good.

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[1] 1 Co. Inst.345.

[2] In Jones v. Gardner, 10 Johns. (N. Y.) 269, it was said that title, as between vendor and purchaser, means the legal estate in fee, free and clear of all valid claims, liens or incumbrances whatever.

In our definition of a good title we have not considered as an element the freedom of the estate from liens, charges or incumbrances of any kind. Strictly speaking, an incumbrance, unless created by deed, such as a mortgage or deed of trust, operates no change in the title, though it is common, as between vendor and purchaser, to speak of the title as bad when the estate is incumbered. And even mortgages and deeds of trust, though there is in each case a nominal transfer of the legal title, being mere securities for the payment of debts, are very generally held to create chattel interests only in the mortgagee or grantee, the legal title really remaining in the mortgagor or grantor.[2] But, while technically the title to an incumbered estate may be good, in the sense that it would support an action of ejectment, a purchaser, without notice of the incumbrance, who by his contract is entitled to demand a good title, can no more be required to accept the title if the estate is incumbered than he could be if the paramount title were outstanding in a stranger.

Doubtful titles are those which turn upon some question of law or fact which the court considers so doubtful that the purchaser will not be compelled to accept the title and incur the risk of a lawsuit by adverse claimants. A subsequent chapter of this work is devoted to the equitable doctrine of doubtful titles; it is, therefore, deemed unnecessary to consider them further here.[3]

Absolutely bad titles are those which lack not necessarily all, but some one or more of the essentials of a good title, and, as between vendor and purchaser, may be such though the paramount title be really in the vendor. Thus, if the vendor, being the rightful owner, is out of possession, and an adverse claimant is wrongfully in possession, the title will be bad so far as the purchaser is concerned, though amply sufficient to enable the vendor to recover the premises in ejectment.[1]

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[1] 1 Bl. Com. 195.

[2] 2 Warvelle Vend. 649.

[3] Post, ch. 31.

When a purchaser of real property discovers that the title is bad he must choose between a large variety of measures which may be taken for his relief. The most important thing to be considered, in the first place, is, whether the contract is *executory* or *executed*. A contract for the sale of lands is said to be executory until the purchaser has received a conveyance; after a conveyance has been made the contract is said to be executed, whether the purchase money has or has not been paid. If the contract remains executory, he is next to determine whether he will adopt a remedy which affirms the agreement or one which rescinds or disaffirms the contract. If he elects to affirm, there are several courses open to him. At law he may maintain an action to recover damages for a breach of the vendor's express or implied contract to convey a good title;[2] or, he may buy in the rights of one having the better title, or an incumbrance on the premises, and set off the amount so expended against the vendor's action for the purchase money,[3] or for damages for breach of the contract.[4] Or, if the facts as to the title were falsely and fraudulently represented to him, he may keep the estate, agree with the rightful owner, or take the risk of eviction, and maintain against the vendor the common-law action of trespass on the case for deceit, or the equivalent of that action under modern codes of practice.[5] And lastly, in the way of affirmance, instead of adopting any one of these courses, he may file his bill in equity, or bring his equitable action, praying that he be permitted to apply the unpaid purchase money to the removal of objections to the title, or that he be allowed compensation for defects, and that the vendor be compelled to specifically perform the contract, and that, if specific performance be impossible, damages in lieu thereof be awarded the plaintiffs.[1] In all these cases the purchaser elects to abide by the contract and keep the estate.

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[1] Post, § 290, ch. 31.

[2] Ch. 2.

[3] Ch. 24.

[4] Ch. 2.

[5] Ch. 11.

But the contract being still executory, the purchaser, on discovery that the title is bad, may determine upon rescission. To rescind a contract is to annul or abrogate it, the consideration which passed from either party being returned, and both parties being placed *in statu quo*, that is, as nearly as possible in the same condition in which they were before they entered into the contract. Rescission of an executory contract for the sale of lands may be accomplished in three ways: First, by the act of the parties themselves.[2] The vendor may agree to take back the estate and to permit the purchaser to keep the purchase money if it has not been paid. This is frequently done. Secondly, by proceedings at law. Of course a court of law proper is not competent to pronounce a decree of rescission directing either party to restore what he has received by virtue of the contract. But the purchaser may simply abandon the possession of the premises and set up the want of title as a defense when sued for the purchase money;[3] or, if he has paid a part or the whole of the purchase money, he may sue in a court of law to recover it back, having in the meanwhile abandoned the premises or restored them to the vendor. In this way rescission is virtually accomplished at law. Thirdly, the purchaser may file his bill in equity on failure of the title, praying that the contract be in terms rescinded; or to a bill filed by the vendor for specific performance, he may set up as a defense the plaintiff's want of title, provided he has restored, or offers to restore, the premises to the vendor.[4] The rescission of executory contracts is peculiarly a ground of equitable jurisdiction. Courts of equity possess all the machinery for ascertaining what is necessary to put the parties *in statu quo*, and to compel either party to do whatever is required to that end.

So much for the remedies of the purchaser, either by way of affirmance or rescission, while the contract is executory. They are all co-existent, and his choice of the one or the other is to be controlled by the particular circumstances of his case. He may conceive it to be an advantage to him to keep the estate with damages or compensation for defects, or he may deem it best to restore the estate and have back his purchase money. But while the remedies by way of action to recover back the purchase money and action to recover damages for fraudulently imposing a bad title on the plaintiff are concurrent, they are not co-extensive in respect to the relief that is to be afforded; and this should be considered by the purchaser in choosing his remedy. In the former action he recovers no more than the consideration money and interest; and the same may be said of an action to recover damages for a breach of the contract to convey a good title, in which there is no averment of fraud on the part of the defendant.[1] But where the action for damages is expressly grounded upon the defendant's fraudulent representations as to the title or concealment of defects, and the plaintiff establishes his case, he will be entitled to recover damages for the loss of his bargain, that is, the value of the estate at the time when the contract should have been completed by the conveyance of a good title.[2] Therefore, in a case in which the value of the estate has materially increased between the inception of the contract and the time when it should have been completed, and the purchaser can show that the defendant was guilty of fraud with respect to the title, he should take care so to frame his declaration or complaint that his action shall be the equivalent of the action of deceit at common law, so that he may recover as damages the increased value of the estate.

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[1] Chs. 17, 18 and 19.

[2] Ch. 23.

[3] Ch. 24.

Ch. 30. Newberry v. Ruffin, 102 Va. 73; 45 S. E. 73, citing the text.

The defenses or answers to the purchaser's application for relief while the contract is executory, most frequently met with in the reports, are that the purchaser in the first instance agreed to take the title such as it was, or that he had since, by his conduct, waived all objections to the title;[3] that the vendor has the right to perfect the title,[4] or to require the purchaser to take the title, with compensation for defects;[5] that the purchaser has not placed the vendor

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[1] Ch. 10, § 91.

[2] Ch. 10, § 97.

[3] Ch. 8.

[4] Ch. 32.

[5] Ch. 33.

in statu quo, and that the positions of the parties with respect to the subject-matter of the contract have so materially changed that it will be impossible to place them *in statu quo*;[1] and, where the gravamen of the action or defense is the vendor's fraud in concealing the state of the title, that the defects complained of all appear from the public records, and that the vendor is not bound to call the attention of the purchaser to defects which are thus open to his inspection.[2]

We have now presented a brief outline of the courses open to the purchaser, and the attitude of the vendor on failure of the title, where the contract is executory. It remains to indicate, in a like manner, their respective rights and remedies where the contract has been executed by the delivery and acceptance of a conveyance. First, it is to be observed that except in cases in which the purchaser has been fraudulently induced to enter into the contract or to accept a conveyance, or unless there has been some such mistake as will entitle him to relief, his remedies are all necessarily in affirmance of the contract, for, as a general rule, there can be no such thing as the rescission of an executed contract for the sale of lands. The reason is that the parties can seldom, if ever, be placed *in statu quo*. We shall see hereafter, however, that there is a tendency in some of the States to modify this rule.[3] And not only are the remedies of the purchaser, in the absence of fraud or mistake, necessarily in affirmance of the contract after a conveyance has been accepted, but the existence of those remedies themselves depend largely upon his own foresight and prudence. The law protects the purchaser, at least where the vendor sells in his own right, by its implication of a contract that a good title is to be conveyed, up to the time when the parties are ready to complete the contract by the payment of the purchase money, the delivery of possession, and the execution and acceptance of a conveyance. But any implication in his favor ceases at this point, and to protect himself against loss in the future, in the event that the title shall prove bad, he must see that covenants for title by the vendor, adequate for that purpose, are inserted in the conveyance. The maxim *caveat emptor* applies.[1] This is the rule which prevails in most of the American States, though in some of them it is qualified to a certain extent, as will be hereafter noted. It may be doubted whether a rigid application of this rule will subserve the ends of justice in all cases, particularly those in which the purchase money remains unpaid when the purchaser is evicted, or when it is discovered that the title is bad. The maxim or rule *caveat emptor* has no place in the civil law. By that law the purchaser, whether he has or has not received a conveyance, is always to be reimbursed if he loses the estate through a defect in the title, unless, indeed, it was expressly understood that the title was bad, and the purchaser bought only such right or interest as the vendor might have. At common law, of course, no hardship results in refusing relief to a purchaser who, with knowledge that the title is bad, accepts a conveyance without covenants for title. He simply gets what he buys, and he has no ground for complaint if he loses the estate. But hardship does often result in cases in which covenants for title were unintentionally omitted, through the ignorance and inexperience of the parties and their advisers, a circumstance likely to occur in rural districts, where the village blacksmith frequently acts in the capacity of justice of the peace and legal adviser for the community. Assuming, however, that the conveyance contains the usual covenants for title, the remedy of the purchaser is by action for breach of covenant if he be evicted, or if the title prove to be bad or the estate incumbered, in which action he will recover real or nominal damages, according to whether he has suffered real or nominal injury from the breach. If, however, he was fraudulently induced to accept a conveyance with covenants for title, he is not obliged to bring his action for breach of covenant, but may have his action on the case for deceit, just as if the contract were executory, the better opinion being that the vendor's fraud is not merged in his covenants for title.[2] And instead of taking the initiative, and suing for breach of covenant, the purchaser may, where the purchase money is still unpaid, detain the same in his hands, and, when sued by the vendor, set up the breach of covenant as a defense by way of recoupment or counterclaim, provided he has then a present right to recover substantial, and not merely nominal damages, for breach of the plaintiff's covenants.[1] These, then, are the remedies of the purchaser *at law* by way of affirmance of the executed contract. In equity he may file his bill, praying that the grantor be compelled to perform specifically certain of the covenants for title, for example, the covenant against incumbrances, by removing an incumbrance from the estate; and the covenant for further assurance, by the execution of such further assurance as may be reasonably required.[2] And where, through error or mistake, the conveyance does not contain such covenants for title as the purchaser may demand, he may file his bill praying that the conveyance be reformed, so as to express the true intention of the parties.[3]

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[1] Chs. 25 and 30.

[2] Ch. 11, § 104.

[3] Ch. 26.

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[1] Ch. 27.

[2] Ch. 27.

We have already observed that an executed contract for the sale of lands cannot, as a general rule, in the absence of fraud or mistake, be rescinded, either at law or in equity. There is, however, a certain kind of relief contended for in some cases at law, which, if conceded, amounts to a virtual rescission of the contract. The general rule is that in an action for breach of the covenant of seisin the plaintiff can recover nominal damages only, unless he has been actually or constructively evicted from the premises. This rule, however, has been modified in some of the States, and the purchaser permitted to recover the whole consideration money, provided he has reconveyed the estate to the grantor. This of itself practically amounts to a rescission of the contract. And if he may thus recover the consideration money as damages in an action for breach of the covenant of seisin, no reason is perceived why he may not avail himself of that breach as a defense when sued for the purchase money, provided, of course, that he reconveys or offers to reconvey the premises to the plaintiff. The effect would be merely to avoid circuity of action.[4] But the contrary rule, namely, that a breach of the covenant of seisin is no defense to an action for the purchase money unless the defendant has been actually or constructively evicted from the estate is undoubtedly established in most of the American States.[5]

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[1] Ch. 16.

[2] Ch. 21.

[3] Ch. 22.

[4] Ch. 26.

[5] Ch. 16.

As to the rescission of an executed contract on the ground of fraud or mistake, it is only necessary to say that this is one of the principal heads of equitable jurisdiction.[1] The vendor's fraud is not merged in his covenants for title. Equitable relief is also given the purchaser by way of injunction against proceedings to collect the purchase money where the grantor is insolvent or a non-resident, in which case there is no adequate remedy upon the covenants for title.[2] And in one or two of the States this relief is afforded on a clear failure of the title without even a suggestion of non-residence or insolvency of the grantor.[3] This, of course, is equivalent to a rescission of the contract if the injunction is made perpetual.

The defenses to the purchaser's measures for relief on failure of the title, where the contract has been executed, most frequently met with in the reports, are that the purchaser accepted a conveyance without covenants for title, or that the covenants have not been broken, or, at least, that there has been no such breach as will entitle the purchaser to substantial damages; or that the right to recover for a breach of covenants executed by the defendant as a remote grantor did not pass to the plaintiff, being a chose in action, and incapable of assignment at common law; or that the paramount title was acquired by the defendant after the conveyance was executed, and had, by operation of law, inured to the benefit of the plaintiff and taken away his right of action; or, in a case of alleged fraud, that the plaintiff by his conduct had waived all ground of complaint, or that there was in fact no fraud, the true state of the title being apparent from the public records, which the purchaser will be presumed to have examined.

From the foregoing outline of the remedies of the purchaser and the defenses of the vendor on failure of the title, the utility and convenience of the plan or analysis of this work, and the order in which those remedies and defenses are treated, will be perceived. The term "marketable" or "defective" title, as between vendor and purchaser, is relative as well as substantive, and has reference alike to the remedies of the parties, the incidents of those remedies, and the essential elements of a good title. Accordingly, it has been deemed proper and convenient to consider, under that head, not only the equitable doctrine of marketable title proper, but the law of covenants for title, the nature and incidents of each of those covenants, the extent to which they run with the land, the doctrine of estoppel, or after-acquired title, and the specific performance of covenants for title, as well as the specific performance of executory contracts for the sale of lands. The subject of the work naturally divides itself into the two principal heads of remedies in affirmance, and remedies in rescission of the contract, together with their incidents. One advantage anticipated from this classification is that it will serve to impress upon the mind of the student the cardinal principle that the purchaser cannot, because the title is bad or doubtful, escape the obligation his contract, and at the same time retain its benefits. Restitution of the consideration on one side, and of the subject-matter of the contract on the other, is an invariable condition precedent to rescission.

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[1] Ch. 35.

[2] Ch. 34.

[3] Ch. 34, § 337

CHAPTER II.

ACTION FOR BREACH OF CONTRACT.

GENERAL PRINCIPLES. FORM OF ACTION. § 1.
DOUBTFUL TITLE IN ACTION FOR DAMAGES. § 2.
PURCHASER IN POSSESSION MAY SUE. § 3.
DEFENSES TO THE VENDOR'S ACTION FOR BREACH OF CONTRACT. § 4.

§ 1. **GENERAL PRINCIPLES. FORM OF ACTION.** Usually a contract for the sale of real estate allows time for the examination of the title, and fixes a day in the future for the payment of the purchase money and the execution of a conveyance.[1] If, when that day arrives, the purchaser shall have performed, or offered to perform, everything on his part necessary to entitle him to a conveyance, and the vendor be unable to convey such a title as the purchaser may demand, the contract is broken, and the purchaser is as much entitled to an action for damages as if the vendor, being able to convey a good title, had willfully refused to perform the contract.[2] If the contract was not under seal the proper action for the breach will be trespass on the case in assumpsit;[3] if the contract was under seal, as in the case of a title bond, the proper action will be covenant.[4]

In most cases the purchaser may elect between his right to recover damages for breach of the contract in failing to convey a good title and his right to rescind the contract and recover back the purchase money, or such part thereof as may have been paid,[1] and where the contract is not under seal, the form of action is the same in either case — trespass on the case in assumpsit. The two causes of action, however, must not be confounded, as seems sometimes to have been done. The action of assumpsit is adapted to the recovery of moneys due by implied contract, and also to the recovery of damages for the breach of a contract, but the plaintiff must so frame his declaration as to entitle him to the particular relief desired. Thus, if he desires merely to recover back the purchase money, ignoring the contract and treating the purchase money as so much money paid out to the use and benefit of the vendor, he will employ the common money counts, while, if he intends to affirm the contract he will set out the substance of it in his declaration, and claim damages for the breach.[1a] He may, however, if he chooses, employ the money counts and add a count upon the contract, so that if his proof fails him upon the one count it may entitle him to recover upon the other.[2] Thus proof that the title is merely doubtful and not absolutely bad will entitle the purchaser to have back his purchase money, but would give him no right to damages,[3] and, according to the English decisions, he could not under the common counts recover back the costs of examining the title.[4] The rule that the extent of the purchaser's recovery is to be governed by the nature of the relief sought, that is, whether in affirmance or disaffirmance of the contract, prevails, it is apprehended, as well under the Code practice as at common law. The petition or complaint should be so drawn as to indicate whether the plaintiff seeks merely to recover back the purchase money or whether he claims damages for breach of the contract.

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[1] In Bennet v. Fuller, 29 La. Ann. 663, a distinction was drawn between an actual sale and a contract "to sell on a future day;" but the court held that if, in the latter case, at the appointed day the vendor was unprepared to sell and convey a clear title, he would be liable in damages.

[2] Sugd. Vend. (8th Am. ed.) 357 (236). Jenkins v. Hamilton, 153 Ky. 163; 154 S. W. 937. Grant v. McArthur, 153 Ky. 356; 155 S. W. 732.

[3] Bac. Abr. Assumpsit (C).

[4] 3 Bl. Com. 155; Haynes v. Lucas, 50 Ill. 436. But he may recover back the purchase money under the common counts, though the contract was under seal. Greville v. Da Costa, Peake Add. Cas. 113. In a suit on a title bond conditioned to make title as soon as procured by the vendor, the complaint will be fatally defective if it do not allege that the vendor had obtained the title. Stone v. Young, 4 Kans. 11. In such a suit an averment that the defendant failed and refused, and still fails and refuses to perform the stipulations and conditions of the bond, is sufficient under the Code. Holman v. Criswell, 15 Tex. 395, the court saying that the common-law rule, *contra*, in 1 Chitty Pl. 363 does not apply to the system of Code pleading in Texas.

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[1] Janulewycz v. Quagliano, 88 Conn. 60; 8 Atl. 9 897.

[1a] Chitty Cont. (10th Am. ed.) 339; 1 Sugd. Vend. (8th Am. ed.) 537 (358).

[2] See Camfield v. Gilbert, 4 Esp. 221. In Doherty v. Dolan, 65 Me. 87; 20 Am. Rep. 667, the purchaser, after paying $1,000 of the purchase money, brought an action against the vendor for damages, alleging inability to convey a good title. In Maine the measure of damages in such a case is the value of the land at the time the conveyance should have been made, and where part of the purchase money has been paid, the plaintiff is entitled to recover this value, less what remains due on the contract price. The necessary consequence of this rule is that where part payment has been made and the value of the land has decreased, and is less at the time fixed for performance than the contract price, the plaintiff will not be entitled to recover as damages as much as he has paid on the land. To obviate this difficulty, the plaintiff in this case was permitted to amend his declaration by adding a count for money had and received, under which he might recover all that he had paid on the contract.

[3] Ingalls v. Hahn, 47 Hun (N. Y.), 104.

[4] 1 Sugd. Vend. (8th Am. ed.) 547 (362); Chit. Cont. (10th Am. ed.) 339; Chit. Pl. (2d ed.) 196, n.

The remedy by action for breach of contract is concurrent with the action of deceit when fraud exists,[1] but is seldom resorted to in such a case, the plaintiff being entitled to a greater measure of damages in the action of deceit. He may also elect between these remedies and his remedy in equity by suit for rescission,[2] or for specific performance, or damages in lieu thereof.[3] But the action for damages is broader than the latter remedy, for the purchaser's bill is frequently dismissed without prejudice to his remedy at law on the contract.[4] Where the purchaser may elect between several remedies he cannot, of course, be required to adopt one in preference to another.[5] Nor, if the purchaser has a right to recover damages for breach of the contract, can the vendor insist upon taking back the property and returning the consideration. It is with the purchaser to say whether he will affirm or rescind the contract.[6]

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[1] 2 Warvelle Vend. 955; Lynch v. Merc. Trust Co., 18 Fed. Rep. 486.

[2] Reese v. Kirk, 29 Ala. 406; Alvarez v. Brannan, 7 Cal. 503; 68 Am. Dec. 274; Wright v. Carillo, 22 Cal. 604.

[3] Haynes v. Farley, 4 Port. (Ala.) 528; Greene v. Allen, 32 Ala. 215.

[4] Sugd. Vend. (8th Am. ed.) 357.

[5] Barron v. Easton, 3 Iowa, 76; Katz v. Henig, 66 N. Y. Supp. 530; 32 Misc. 672.

[6] Lynch v. Merc. Trust Co., 18 Fed. Rep. 486; Krumm v. Beach, 96 N. Y. 406, the court saying: "The contention of the vendors is that the defrauded vendee has but one remedy, and that consisted of a rescission of the contract and the recovery back of the consideration paid, after an offer to reconvey and a tender of what had been received. Doubtless this remedy existed, but the vendee was not compelled to adopt it. He had a right, instead of rescinding the contract, to stand upon it and require of the vendor its complete performance, or such damages as would be the equivalent of that complete performance. The vendee, acting honestly on his own part, was entitled to the full fruit of his bargain, and could not be deprived of it without his consent by the fraud of the vendor. That such an action, proceeding upon an affirmance of the contract as actually made, founded upon actual fraud, and asking damages in the room of an impossible specific performance, can be maintained at law, has been sufficiently adjudged. Wardell v. Fosdick, 13 Johns. (N. Y.) 325; 7 Am. Dec. 383; Culver

But, having recovered a judgment for damages in an action for breach of the contract to convey, he cannot afterward bring a second action or resort to any other means to enforce the contract.[1] If he elects to rescind he cannot afterwards affirm the contract and *vice versa*.[2] There can be but one satisfaction of the injury.

Under the English common-law system of pleading the purchaser's expenses incurred in examining the title could not be recovered by him if he disaffirmed the contract and brought his action to recover back his deposit as such; it was necessary for him to insert a count in the declaration claiming damages for breach of the contract.[3] The reason for this rule was that moneys so paid out could not be regarded as paid out to the vendor's use, but were expended for the purchaser's own satisfaction. Perhaps the same rule would be applied in America in a case in which the pleadings demand only a return of the purchase money and contain no demand for damages.[4]

If the purchaser accept a conveyance of the premises, he cannot

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v. Avery, 7 Wend. (N. Y.) 386; 22 Am. Dec. 586; Whitney v. Allaire, 1 Comst. (N. Y.) 305; Clark v. Baird, 9 N. Y. 197; Graves v. Spier, 58 Barb. (N. Y.) 385. And that is so whether the representations relate to the title or to matters collateral to the land. The measure of damages in such a case is full indemnity to the injured party; the entire amount of his loss occasioned by the fraud."

[1] 1 Sudg. Vend. (8th Am. ed.) 357 (236); Orme v. Boughton, 10 Bing. 537; 25 E. C. L. 254; Hopkins v. Lee, 6 Wheat. (U. S.) 109; Buckmaster v. Grundy, 3 Gil. (Ill.) 626, 636; Hill v. Hobart, 16 Me. 169.

[2] Schiffer v. Dietz, 83 N. Y. 300, 308, citing Mason v. Bovet, 1 Den. (N. Y.) 69; 43 Am. Dec. 651; Cobb v. Hatfield, 46 N. Y. 533; Lawrence v. Dale, 3 Johns Ch. (N. Y.) 23. White v. Harvey, 175 Iowa 213; 157 N. W. 152. Remedies in affirmance and remedies in disaffirmance or rescission of the contract are non-concurrent and inconsistent with each other. Bowen v. Mandeville, 95 N. Y. 240.

[3] Sugd. Vend. (8th Am. ed.) 547 (362); 1 Chit. Cont. (10th Am. ed.) 339; Camfield v. Gilbert, 4 Esp. 221.

[4] In the State of New York the cases do not show that this distinction has been observed. An action there for damages in failing to perform the contract to convey a good title seems to be regarded as in effect the same as an action to recover back the purchase money *co nomine*, probably because in such an action the damages are, as a general rule, limited to the purchase money paid, interest, costs and expenses. There can be no question, however, as to the right to recover the expenses of examining the title as a part of the damages. Higgins v. Eagleton, 34 N. Y. Supp. 225. See post, § 93. The expenses of examining the title may be recovered in an action to recover back the deposit. Effenheim v. Von Hafen, 23 N. Y. Supp. 348 (N. Y. City Court).

afterwards maintain an action to recover damages from the vendor for breach of his contract to convey a good title. His remedy is upon the covenants of his deed if any. If there are no covenants, he is, in the absence of fraud or mistake, without remedy.[1]

If the title fail, the purchaser by bringing an action for damages affirms the contract, and will not be entitled to recover unless he shows that he has performed his part of the contract by tender or payment of the purchase money in full. If the purchase money be not paid in full, he should bring an action for money had and received to his use (trespass on the case in assumpsit), which disaffirms the agreement.[2] This distinction appears not to be observed in those States in which the common-law system of pleading has been abolished. Thus, in New York it has been held that if the vendor be unable to make title at the time fixed for completing the contract, the purchaser is not in default in failing to tender the purchase money, and may maintain an action for damages though no such tender has been made.[3] If the parties agree to rescind the contract, and the vendor fails to return the purchase money, the purchaser cannot maintain an action for breach of the contract and recover back his purchase money in the form of damages. He should sue in assumpsit for money had and received to his use, or frame his complaint upon that hypothesis in States in which the common-law system of pleading no longer exists.[4] If no time be fixed by the contract in which the vendor must convey, he will be entitled to a reasonable time, after the payment of the purchase money, in which to execute the conveyance.[5] We will consider elsewhere under what circumstances the vendor will be allowed time in which to remove objections to the title.[1]

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[1] Shurtz v. Thomas, 8 Barr (Pa.), 363; Carter v. Beck, 40 Ala. 599.

[2] Clarke v. Locke, 11 Humph. (Tenn.) 300; Hurst v. Means, 2 Swan (Tenn.), 594. But see 1 Sugd. Vend. (8th Am. ed.) 357 (236) where it is said that "if the purchaser has paid any part of the purchase money" and the seller does not complete his engagement, the former may have his action for damages. Humpkey v. Norris, (Ky.) 7 S. W. Rep. 888.

[3] Morange v. Morris, 34 Barb. (N. Y.) 311. This proposition, it is conceived, must be strictly limited to those cases in which the contract expressly requires the vendor to remove incumbrances or other objections to the title before the time fixed for completing the contract, else it will conflict with that eminently just and reasonable rule that the vendor may rely upon the unpaid purchase money as a means with which to discharge incumbrances. Post, § 308.

[4] Conley v. Doyle, 50 Mo. 234.

[5] Eames v. Savage, 14 Mass. 428; Newcomb v. Brackett, 16 Mass. 165.

In another part of this work it has been attempted to show that wherever the purchaser seeks relief from the obligation of the contract, or to assert a liability against the vendor, on the ground that the title is bad, the duty devolves upon him to point out the particulars in which the title is wanting.[2] This rule especially applies in an action for breach of contract to convey a good title.[3]

In America actions to recover damages on the ground that the vendor is unable to convey a good title, are comparatively infrequent, while the reports teem with cases in which the purchaser seeks to rescind the contract and recover back his purchase money. The reasons for the comparative disuse of the action affirming the contract and seeking damages for the breach, doubtless are that practically the same relief is obtained in the action to recover back the purchase money, since, as a general rule, the purchaser could not recover damages in excess of the purchase money; and in the latter action the purchaser is not obliged to show that he has fully performed the contract on his part by payment of the entire purchase money,[4] nor to show that the title is absolutely bad and not merely doubtful, as he must do where he affirms the contract.[5] Where, however, the contract provides for liquidated damages in excess of the purchase money, or where by the law of the jurisdiction the purchaser is entitled to recover damages in excess of the purchase money, that is, damages for the loss of his bargain, he may find it to his advantage to bring his action on the contract.

§ 2. **DOUBTFUL TITLE IN ACTION FOR DAMAGES.** A distinction is to be observed between the action to recover damages for breach of the contract or failure of the title and an action to recover back the purchase money in this respect, namely, that in the former action the plaintiff cannot recover unless he shows that the title is absolutely bad, while in the latter he will be entitled to a return of the purchase money if there be a reasonable doubt about the title.[1] So far as the measure of relief is concerned, the distinction is unimportant except where, by express contract between the parties or by the law of the jurisdiction, the purchaser would be entitled to recover damages in excess of the purchase money, the general rule being that the purchaser can recover, in the action for damages, nothing beyond the purchase money and interest. But in respect to the remedy and the pleadings the distinction is vitally important; for if he declares upon the contract and claims damages for the breach, and the evidence shows that the title is merely doubtful, he can recover nothing; while, if he had counted for money had and received to his use, he would have been entitled to judgment.

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[1] Post, ch. 32.

[2] Post, §§ 117, 244, 281. Mesa Market Co. v. Crosby, 174 Fed. 96; 98 C. C. A. 70. There are many cases which sustain this view. But see Wilson v. Holden, 16 Abb. Pr. (N. Y.) 133, where it is intimated that if the defense of defective title is made in an action by the vendor for breach of the contract, the burden devolves on him to show a good title.

[3] Gammon v. Blaisdell, 45 Kans. 221.

[4] Hurst v. Means, 2 Swan (Tenn.), 594.

[5] Post, § 2.

§ 3. **PURCHASER IN POSSESSION MAY MAINTAIN ACTION.** It will be seen hereafter that a purchaser cannot, on failure of the title, *disaffirm* the contract and recover back the purchase money unless he has been evicted or has surrendered the premises to the vendor.[2] But no such rule applies when he affirms the contract and brings an action to recover damages for the vendor's breach in failing to convey a good title. By affirming the contract he elects to hold himself answerable to the true owner. He is under no obligation to rescind on failure of the title. He may rely on his vendor's agreement to make a good title and take the chances of eviction by an adverse claimant.[3] Hence it has been held that the purchaser's possession of the premises is immaterial and cannot affect his right to maintain his action for damages and to recover substantial and not merely nominal damages.[4]

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[1] Ingalls v. Hahn, 47 Hun (N. Y.), 104; Post, § 286, "Doubtful Titles at Law." Roberts v. McFadden, (Tex. Civ. App.) 74 S. W. 105, citing the text. Mesa Market Co. v. Crosby, 174 Fed. 96; 98 C. C. A. 70.

[2] Post, ch. 25.

[3] Oakes v. Buckley, 49 Wis. 592.

[4] Bedell v. Smith, 37 Ala. 619. The reasons for this rule were thus stated by ALLEN, J., in Fletcher v. Button, 6 Barb. (N. Y.) 646, which was an action to recover damages for the vendor's refusal to convey for want of title: "It is insisted that the plaintiff, being in possession of the premises up to the time of the commencement of the action, he can recover but nominal damages; that actual eviction was necessary to entitle him to recover the entire purchase money by way of damages for the non-conveyance. I am unable to discover upon what principle the possession of the premises by the plaintiff can affect his remedy in this action. The contract, for the non-performance of which this action is

§ 4. **DEFENSES TO THE VENDOR'S ACTION FOR BREACH OF CONTRACT.** If the vendor should bring an action to recover damages for breach of the contract, the purchaser may, of course, set up the defense that the plaintiff has no title,[1] or that the title is doubtful,[2] or that the estate is incumbered,[3] or that the plaintiff has made fraudulent representations[4] in respect to the title. Inasmuch as such an action is rarely, if ever, brought in cases in which the contract has been partly performed by delivery of the possession to the purchaser, it seldom happens that the right of the latter to show a want of title in the vendor is complicated with any question

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brought, was for the title to, and not the possession of, the premises. The possession of the premises could not have been in part performance of such contract; and although it may have been beneficial to the plaintiff, it did not at all mitigate the damages sustained by him by the inability or unwillingness of the defendant to convey the premises. Again, if the defendant had title to the premises and a right to convey them, and has willfully refused to perform his contract, he has done so in his own wrong, and has voluntarily placed himself in a position in which he may lose the use of the premises for the time during which the plaintiff has occupied them; but he cannot be permitted by his own wrongful act to change the character of the possession of the plaintiff and make him a tenant against his will instead of a vendee in possession under a contract of purchase. If the defendant was not the owner, but had the right to occupy, or permit the plaintiff to occupy the premises, then having contracted to convey them to the plaintiff and suffered him to go into possession under the contract, although he may have acted under a mistake, still he must bear the consequences of that mistake. The plaintiff had a right to suppose that the defendant was familiar with his own title, and had the right to sell what he agreed to convey. If the defendant neither owned the premises nor had the right to occupy them, or to suffer the plaintiff to occupy them, then it is very clear that he should not in any manner have the benefit of the possession by the plaintiff. The plaintiff, by his occupation, has made himself a trespasser, and is liable to the true owner for the value of such occupation." See, also, Haynes v. Farley, 4 Port. (Ala.) 528; Gray v. Mills, 83 Fed. 824.

[1] 2 Warvelle Vend. 963; Lewis v. White, 16 Ohio St. 444.

[2] Post, ch. 31.

[3] Gilbert v. Cherry, 57 Ga. 129. If the purchaser rejects the title on the ground that the property is incumbered, the fact that the seller had perfected an arrangement to discharge the incumbrance out of the purchase-money, does not support his action for damages, in the absence of anything to show that the purchaser was advised of the arrangement and refused to permit reasonable steps to be taken for its consummation. Manitoba Fish Co. v. Booth, 100 Fed. 394 (C. C. A.).

[4] Gilbert v. Cherry, 57 Ga. 129.

as to the restoration of the premises to the plaintiff, or as to difficulty in placing him *in statu quo.* If, however, such an action should be brought after possession delivered to the purchaser, instead of an action to recover the purchase money or to compel specific performance, it is apprehended that the defense of want of title in the vendor, amounting in substance to an election to rescind the contract, could not be made without surrendering, or offering to surrender, the premises to the plaintiff.

The vendor can maintain no action against the purchaser for breach of the contract to purchase, until after the expiration of the time fixed for completing the contract, even though the purchaser has absolutely refused to perform or accept performance of the contract.[1] Until the time arrives when, by the terms of the agreement, the vendor is or might be entitled to performance, he can suffer no injury or deprivation which can form a ground of damages.[2] If a purchaser of lands, to be conveyed free of incumbrances, absolutely refuse to take a deed or to accept performance of the contract on grounds other than failure of the title, or the existence of an incumbrance upon the premises, he cannot afterwards, when sued for a breach of the contract, avail himself of defects in the deed which was tendered to him, or of the fact that the property was incumbered. His absolute refusal to perform is a waiver of the right to require performance on the part of the vendor.[3]

The vendor will be restrained from bringing an action at law to recover damages for breach of the contract, if his bill for specific performance has been dismissed for want of title, unless dismissed without prejudice to his remedy at law.[4]

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[1] Daniels v. Newton, 114 Mass. 530; 19 Am. Rep. 384, disapproving Frost v. Knight, L. R. 7 Exch. 111, and Hochster v. De la Tour, 2 E. & B. 678.

[2] Language of WELLS, J., in Daniels v. Newton, *supra.*

[3] Carpenter v. Holcomb, 105 Mass. 280; Wells v. Day, 124 Mass. 38. In this case the purchaser of three separate and distinct lots of land refused absolutely to complete the contract on grounds which applied only to the first two lots. The vendor resold the third lot at a considerable loss and brought an action against the purchaser for breach of the contract, and it was held that defects in a deed which had been tendered to him, and the existence of a mortgage on the third lot constituted no defense to the action.

[4] 1 Sugd. Vend. (8th Am. ed.) 356; McNamara v. Arthur, 2 Bal. & Beat. 349.

CHAPTER III.

IMPLIED AND EXPRESS AGREEMENTS AS TO THE TITLE

IMPLIED AGREEMENTS.
- **General Rule.** § 5.

EXPRESS AGREEMENTS.
- **General Principles.** § 6.
- **Terms and Conditions of Sale.** § 7.
- **Parol Evidence. Auctioneer's Declarations.** § 8.
- **English Rules as to Conditions.** § 9.
- **Agreement to make "Good and Sufficient Deed."** § 10.
- **Agreement to convey by Quit Claim.** § 11.
- **Agreement to sell "Right, Title and Interest."** § 12.
- **Agreement to sell subject to Liens.** § 13.

§ 5. **IMPLIED AGREEMENTS — General Rule.** The purchaser is entitled to require from the vendor, in the absence of any provision in the contract, a good marketable title, free from all defects or incumbrances. The right to a good title does not grow out of the contract between the parties, but is given by law and is implied in every contract of sale.[1] And the rule is general that a contract for the sale of lands which is silent as to the title or interest to be conveyed, implies an agreement to convey not only an unincumbered and indefeasible estate, but such an estate in fee simple, that is, the largest estate that can be had in the premises,[1] though of course it may be shown that a less interest was sold.[2]

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[1] Dart Vend. & Purch. (4th ed.) 104; 1 Sugd. Vend. (8th Am. ed.) 24 (16), 456 (298), 510 (337); Rawle Cov. for Title (5th ed.), § 32; Hall v. Betty, 4 M. & G. 410; Geoghegan v. Connolly, 8 Ir. Ch. 598; Souter v. Drake, 5 B. & Ad. 992; Purvis v. Rayer, 9 Pri. 488; Doe v. Stanion, 1 M. & W. 701; Hughes v. Parker, 8 M. & W. 244; Sharland v. Leifchild, 10 Ad. & El. 529; Flinn v. Barber, 64 Ala. 193; Easton v. Montgomery, 90 Cal. 314; 27 Pac. Rep. 280; 25 Am. St. Rep. 123; Krause v. Krause, 58 Ill. App. 559; Schreck v. Pierce, 3 Clarke (Iowa), 350; Puterbaugh v. Puterbaugh, (Ind.) 34 N. E. Rep. 611; Durham v. Hadley, (Kans.) 27 Pac. Rep. 105; Swan v. Drury, 22 Pick. (Mass.) 485; Dwight v. Cutler, 3 Mich. 566; 34 Am. Dec. 105; Murphin v. Scoville, 41 Minn. 262; Drake v. Barton, 18 Minn. 414 (462); Donlon v. Evans, 40 Minn. 501; 42 N. W. Rep. 472; New Barbadoes Toll Bridge Co. v. Vreeland, 3 Green Ch. (N. J.) 157; Newark Sav. Inst. v. Jones, 37 N. J. Eq. 449; Burwell v. Jackson, 9 N. Y. 535, 543, a much cited case; Pomeroy v Drury, 14 Barb. (N. Y.) 418; Inness v. Willis, 48 N. Y. Super. Ct. 192; In re Hunter, 1 Edw. (N. Y.) 1; Wheeler v. Tracy, 49 N. Y. Super. Ct. 208; Tharin v. Frickling, 2 Rich. (S. C.) 361; Breithaupt v. Thurmond, 3 Rich. (S. C.) 216; Green v. Chandler, 25 Tex. 157; Nelson v. Matthews, 2 H. & M. (Va.) 164; 3 Am. Dec. 620; Moulton v. Chaffee, 22 Fed. Rep. 26.

It has been held that in every contract for the sale of land there is implied, also, an agreement that the title of the vendor shall be fairly deducible of record.[2a]

An agreement to sell land which contains no restrictive expressions is an agreement to sell the whole of the vendor's estate or

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New Cases; Gervaise v. Brookins, 156 Cal.; 103 Pac. 329; Winkler v. Jerrue, 20 Cal. App. 555; 129 Pac. 804; Hixson v. Hovey, 18 Cal. App. 230; 122 Pac. 1097; Malloy v. Foley, 155 Iowa 447, 133 N. W. 778; Smith v. McMahon, 197 Mass. 16, 83 N. E. 9; Justus v. Button, 89 Neb. 367, 131 N. W. 736; Brisbane v. Sullivan, 83 N. J. Eq. 182, 93 Atl. 705; Behr v. Hurwitz, 90 N. J. Eq. 110, 105 Atl. 486; Wallach v. Riverside Bank, 206 N. Y. 434, 100 N. E. 50; Curtis Land Co. v. Land Co., 137 Wisc. 341, 118 N. W. 853, 129 Am. St. Rep. 1068. The vendor in an executory contract for the sale of lands, in the absence of express statements to the contrary, represents and warrants that he is the owner of the property which he assumes to sell, and that he has a good title thereto. Innes v. Willis, 16 Jones & S. (N. Y.) 188. In Owings v. Thompson, 3 Scam. (Ill.) 502, the broad rule is laid down that, in the absence of any express contract as to what kind of title a purchaser in any case is to receive, he must take the title at his own risk; in other words, that there is no implied contract that the title shall be indefeasible. And such, the court adds, is the rule in England and in most of the American States. It is submitted with deference that such is not the rule either in England or in America (see authorities, ante, this note), except in the case of judicial and ministerial sales, and that the rule announced in this case in which the purchase was made at a judicial sale, should have been limited to sales of that kind, as indicated in the qualified concurrence by TREAT, J., in the opinion of the court. See post, "Caveat Emptor," ch. 5.

[1] Cases cited in last note. Hughes v. Parker, 8 M. & W. 244; Cattell v. Corrall, 4 Yo. & C. 228; Burns v. Witter, 56 Oreg. 368, 108 Pac. 129; Ginther v. Townsend, 114 Md. 122, 78 Atl. 908; Elkins v. Seigler, 154 N. C. 374, 70 S. E. 636.

[2] Cowley v. Watts, 17 Jur. 172; Cox v. Middleton, 2 Dru. 217.

[2a] Cabrera v. Payne, 10 Cal. App. 103 Pac. 176; Reed v. Sefton, 11 Cal. App. 88, 103 Pac. 1095; Title Doc. Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682. See post, § 289 as to express agreements in respect to the title.

interest therein.[3] It will be presumed that the estate sold was to be accompanied by all of its legal incidents,[4] such as a right of way,[5] and that which springs from the rule *cujus est solum ejus est usque ad cœlum,*[6] or the right to the undisturbed enjoyment of the space above or the ground below the surface of the area of the estate. But the implication that the purchaser was to receive a title free from incumbrance may be rebutted by showing that he had notice of the existence of the incumbrance.[7]

If the sale is made subject to a specified incumbrance, there is an implied warranty that there are no other incumbrances on the property.[7a]

If the vendor agree to convey by quit claim deed he merely contracts to sell such interest as he then has, and cannot be required to convey an interest subsequently acquired.[8] But the fact that he agrees to convey by quit claim does not affect the right of the purchaser to rescind on the ground of defects in the title.[8a]

The sale of a lease implies a contract on the part of the seller that he will show a good title in the landlord.[9] A contract, however, to sell an *agreement* for a lease, does not imply a title in the lessor to make the lease, and an action on the contract by the seller cannot be defended on the ground that the lessor had no title.[2] Nor in an assignment of an executory contract for the sale of lands, is there any implication of good title in the original vendor.[3] Nor is there any such implied warranty in the assignment of a land-office certificate.[4]

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[3] 1 Sugd. Vend. (8th Am. ed.) 24 (16); Bower v. Cooper, 2 Ha. 408.

[4] Skull v. Clenister, 16 C. B. (N. S.) 81; 33 L. J. C. P. 135.

[5] Langford v. Selmes, 3 K. & Jo. 220; Denne v. Light, 3 Jur. (N. S.) 627; Stanton v. Tattersall, 1 Sm. & G. 529, where the purchaser was relieved for want of proper access to a house.

[6] Lewis v. Braithwaite, 2 B. & Ad. 437; Keyes v. Powell, 2 El. & Bl. 132; Sparrow v. Oxford R. Co., 2 DeG., M. & G. 108; Pope v. Garland, 4 Y. & C. 403; Whittington v. Corder, 16 Jur. 1034, where there was a failure of title to an underground cellar.

[7] Newark Sav. Inst. v. Jones, 37 N. J. Eq. 449.

[7a] McPherson v. Kissee, 239 Mo. 664; 144 S. W. 410; Smiddy v. Grafton, 163 Cal. 16, 124 Pac. 433, Ann. Cas., 1913 E. 921.

[8] Post, § 218. Woodcock v. Bennet, 1 Cow. (N. Y.) 711; 13 Am. Dec. 568.

[8a] Wallach v. Riverside Bank, 206 N. Y. 434, 100 N. E. 50.

[9] 1 Sugd. Vend. 368; Tweed v. Mills, L. R., 1 C. P. 39; Purvis v. Rayer, 9 Pri. 488; Gaston v. Frankum, 2 De G. & Sm. 561; Clive v. Beaumont, 1 De G. & Sm. 397; Hall v. Betty, 4 Mann. & G. 410; Souter v Drake, 5 B. & Ad. 992; Drake v. Shiels, 7 N. Y. Supp. 209; Burwell v. Jackson, 9 N. Y. 539.

Inasmuch as a contract to convey a clear title is implied in the sale of lands, an agent of the vendor does not exceed his authority by inserting such a provision in a written contract of sale.[5] If it appear that the premises were sold at a fair price, the presumption would be that the contract entitled the purchaser to an indefeasible title. If, on the other hand, the price was merely nominal, the reasonable presumption would be that the purchaser could require from the vendor no more than a quit claim, or release of his rights, and that he had agreed to take the title such as it might be. The legal implication of an agreement on the part of the vendor that the title he is to convey shall be clear, unincumbered and indefeasible, is to be limited strictly to cases in which the vendor sells in his own right. Where the sale is made in a ministerial, representative or official capacity the conclusive presumption of law is that the vendor sells merely such interest as may happen to be vested in him, be the same defeasible or indefeasible. The maxim *caveat emptor* applies, and the purchaser can neither rescind the contract nor maintain an action for damages if the title turns out to be defective. This class of cases is considered at some length hereafter.[6] If the vendor fails or is unable to convey at the time fixed for the completion of the contract such a title as the purchaser may demand, there is a breach of the contract of sale, and the latter may, if time was of the essence of the contract, have his action for damages, unless the title is merely doubtful and not absolutely bad. In that case, as we have seen, he may rescind the contract and recover back his deposit, but is not entitled to damages.[1]

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[2] Kintrea v. Preston, 1 H. & N. 357.

[3] Thomas v. Bartow, 48 N. Y. 193.

[4] Johnston v. Houghton, 19 Ind. 309.

[5] Keim v. Lindley, (N. J. Eq.) 30 Atl. Rep. 1063.

[6] Post, ch. 5, "Caveat Emptor."

§ 6. **EXPRESS AGREEMENTS. General Principles.** Upon the sale of real property it is customary for the parties to enter into a written contract containing their names, a description of the property, the quantity of the estate sold, such as a fee simple or life estate, and the terms or conditions of the sale, and fixing a time when the contract shall be fully executed by payment of the purchase money and a conveyance to the purchaser.[2] The contract also usually specifies the kind of title the purchaser is to receive, and sometimes it is in the form of a sealed obligation under penalty on the part of the vendor to convey a good title, in which case the instrument is known as a "title bond."[3]

The contract usually also provides, especially when the sale is made at public auction, that the purchaser shall have a specified time within which to examine the title, and that if the title should prove bad or unsatisfactory, the earnest money shall be refunded.[4]

If the purchaser contract for a title deducible of record, he cannot be compelled to accept a title resting altogether upon matters

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[1] Ante, § 2.

[2] Warvelle Vend. ch. III. Special agreements as to title, post § 288.

[3] Vardaman v. Lawson, 17 Tex. 16. The court said in this case that a bond for title is an instrument which evidences a contract for the sale of land, and is substantially an agreement by the vendor to make to the vendee a title to the land described. It seems scarcely necessary to say that many of the decisions used in the following pages as illustrations of the rules of law governing express contracts with respect to the title were not rendered in actions by the purchaser for breach of the contract of sale. The principles are the same whether the action be by or against the purchaser in affirmance or rescission of the contract. In each of these cases the rights of the purchaser are, of course, governed by the express terms of the contract, and no inconvenience, it is apprehended, can result from considering the cases founded on express contracts under the head of affirmance of the contract and action for breach, without regard to the nature of the proceedings in which the decisions were made.

[4] 1 Warvelle Vend. 327. In Smith v. Schiele, 93 Cal. 150, the question was raised whether an agent was competent to make the agreement, "title to prove good or no sale," but was not decided.

in pais,[1] such, for example, as a title by adverse possession.[2] A stipulation in a contract of sale that the vendor shall furnish an abstract showing title to the property has been said to be equivalent to an agreement that the purchaser shall receive a good title of record.[3] It has been held that an agreement to furnish a satisfactory abstract of title referred only to the fullness or completeness of the abstract, and not to the quality of the vendor's title.[1] But in some of the States the rule is that an agreement to convey a fee simple title clear of all incumbrances by warranty deed and abstract of title, entitles the purchaser to rescind if the abstract does not show a good title.[1a]

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[1] Page v. Greeley, 75 Ill. 400; Noyes v. Johnson, 139 Mass. 436.

[2] Post, § 292.

[3] 2 Warvelle Vend. 764. Cabrera v. Payne, 10 Cal. App. 675, 103 Pac. 176. Hooe v. Callahan, 10 Cal. App. 567, 103 Pac. 175. See upon this point 2 Sugd. Vend. (8th Am. ed.) 27 (427). In Smith v. Taylor, 82 Cal. 533, the contract contained the following provision: "The title to said above lands to prove good or no sale, five days being allowed to examine abstract or certificate, and pass upon title after abstract or certificate is delivered." The court, after observing that this was not simply a contract to make good title, continued: "The only fair interpretation of this contract is that he (the vendor) was to furnish an abstract of title — a paper prepared by a skilled searcher of records, which should show an abstract of whatever appeared on the public records of the county affecting the tile — and that the abstract must show good title, or there was no sale * * *. Under that contract the plaintiff (purchaser) was not bound to make any investigation outside the abstract, or to take the chances of any litigation which the abstract showed to be either pending or probable." In Boas v. Farrington, 85 Cal. 535, the provision of the contract was: "Title to be good or the money to be refunded, party of the first part (vendor) to furnish an abstract of the title to said land." The abstract furnished did not show a good title, and in an action by the purchaser to recover his deposit, judgment was rendered in his favor though the court below found that as a matter of fact the vendor had a good title. This judgment was affirmed on appeal, the court saying: "The appellant contends that the contract did not require him to furnish an abstract showing a good title, or at most that he was not bound to furnish it at the time the defective one was furnished, or at any time before the time for the final payment of the purchase money, and that as it appeared at the trial that he had a good title to the property he was entitled to judgment. We cannot so construe the contract * * * certainly when the abstract was furnished, the purchaser had the right to act upon it, and as it failed to show a good title in the vendor, the vendee was not bound to lay out of the use of his money, and pay the whole balance of the purchase money before he could recover back any part of what he had paid. If the vendor had a good title, as the court below found he had, he should have furnished an abstract showing it, and upon it being called to his attention, either by the demand for a rescission or otherwise, that it was defective, he should have at once caused a perfect abstract to be furnished. He did neither, and in his answer stands by the abstract furnished by him, and

If the vendor agrees to furnish an abstract showing a clear title, and the abstract furnished shows a defective title, the vendor cannot avoid a rescission on the part of the purchaser, with proof that adverse claims appearing from the abstract are in fact groundless. In such a case it has been held that the purchaser may rescind, notwithstanding the sufficiency of the title.[2] It has been held, however, that if a contract provide for an abstract showing title, and the abstract furnished did not show title, it might be supplemented by written evidences of title.[3]

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asserts that it was a good one. If the abstract was a good one it shows that his title was bad. It is too late now for him to assert that he was not bound to furnish an abstract at all, or that he was not bound to furnish it at the time he did." As to when the purchaser may be compelled to accept a title resting upon adverse possession, see post, § 292. The vendor's title cannot be deduced from the record in a case in which the public records have been totally destroyed by fire. Certified copies put upon record cannot take the place of the destroyed records. Crim v. Ubsen, 155 Cal. 697, 103 Pac. 178, 132 Am. St. Rep. 127.

[1] Fitch v. Wollard, 73 Ill. 92. In England it is said that an agreement to furnish a "perfect abstract" means a complete abstract, that is, the best that the vendor can furnish though the title itself be defective. Dart. Vend. (5th ed.) 126, citing Hobson v. Bell, 2 Beav. 17; Morley v. Cook, 2 Ha. 111. But see Gilman v. Eichler, 265 Ill. 579, 107 N. E. 180, where held that a contract to convey by warranty deed a fee simple title, clear of all incumbrances, and to deliver a "good merchantable abstract of title," requires the vendor to deliver, not merely a merchantable abstract, but an abstract showing a merchantable title.

[1a] Post, § 288. Austin v. Shipman, 160 Mo. App. 206, 141 S. W. 425.

[2] Smith v. Taylor, 82 Cal. 538; see extracts from this case, *supra*. Taylor v. Williams, 2 Colo. App. 559, 31 Pac. Rep. 505.

[3] Welch v. Dutton, 79 Ill. 465.

The vendor, insisting upon a forfeiture of the purchaser's deposit, will be held to a strict performance of his contract to furnish an abstract showing a perfect title to the property.[3a]

A contract to convey with full covenants of warranty obligates the vendor to convey free of incumbrances.[3b]

Where the written contract between the parties requires the vendor to convey a title free from defects, parol evidence is inadmissible to show a contemporaneous agreement that the purchaser was to take the title such as it was.[3c]

§ 7. **Terms and conditions of sale.** In the American practice there seems to be nothing so elaborate as the English "particulars and conditions of sale," or "common conditions," as they are sometimes called.[4] Auction sales of real estate are, with us, usually preceded by a newspaper advertisement or "hand bill" containing a description of the property and the terms and conditions of the sale,[5] and these are frequently supplemented, so far as the title is concerned, by the verbal declarations of the auctioneer at the time of the sale.[6]

§ 8. **Parol evidence — Auctioneer's declarations.** Whenever specific performance of a contract of sale is sought in equity, parol evidence of declarations by the auctioneer before the sale, adding to or altering the terms of the sale, is admissible on behalf of the defendant, whether vendor or purchaser.[7] In this particular the law is the same in America as in England.[8]

[3a] Wright v. Bolt, (Tex. Civ. App.) 163 S. W. 360.

[3b] Tague v. McColm, 145 Iowa 179, 123 N. W. 960.

[3c] McCulloch v. Bauer, 24 N. D. 109, 139 N. W. 318.

[4] Post, this chapter.

[5] See King v. Knapp, 59 N. Y. 462.

[6] Averett v. Lipscombe, 76 Va. 404, affords an illustration of this common practice.

[7] Averett v. Lipscombe, 76 Va. 404.

[8] Post, § 9.

§ 9. **English rules respecting contracts as to the title.** Much of the learning that is found in the English treatises on the law of vendor and purchaser will be found inapplicable in America, owing to the diversity between the rules and practice of conveyancing in the two countries. At the same time much that is to be found there would seem to be applicable here, especially the general rules restricting or enlarging the liabilities and rights of the parties with respect to the title to be conveyed or acquired under the express terms of the contract of sale.[1]

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[1] In England a highly artificial system of conveyancing prevails, a fact due to the intricacies of landed settlements, and to the obscurity in which, from the want of a general registration law, title to real estate is there involved. A glance at the pages of Dart or Sugden, the principal Eng'ish treatises on the law of vendor and purchaser, will suffice to show the wide difference which exists between the English and American practice in respect to the formalities and preliminaries attending the execution of a contract for the sale of lands. In America, where land in some sections changes owners with almost the rapidity of personal property, the contract, particularly in rural districts, is usually drawn by the parties themselves, and consequently often abounds with loose and ambiguous expressions, or contains technical terms to which the law gives a force and effect different perhaps from that which was intended by the parties. Even in the large cities the terms and conditions upon which real property is sold are usually brief and simple. In England, however, transfers of landed property, especially of the fee simple, are comparatively rare occurrences, and, it would seem, are seldom or never undertaken without the advice and assistance of a skilled conveyancer. The "particulars and conditions of the sale," as they are called, are carefully prepared and circulated before the sale, and incorporated in the contract when the sale is made; and as a general rule they set forth explicitly the character of title which the vendor will undertake to convey. The same degree of care and precaution is exercised in the case of private sales. If the vendor intends to sell only such interest as he has, be what it may, the technical expression employed is, "that he shall not be required to produce a title," apparently a figure of speech, meaning that the vendor shall not be required to furnish an abstract, or to produce deeds, affidavits, pedigrees or other documents showing a marketable title in himself. In the absence of a general registry of deeds and incumbrances, the purchaser can have, of course, no opportunity to judge of the sufficiency of the vendor's title, unless the instruments by which it is evidenced are produced, and to take a title without the exhibition of such evidences necessarily means to take just such title as the vendor has. Perhaps the most important point to be considered in determining the application of English decisions, in American cases, affecting the rights of the parties with respect to the title, as dependent on the express terms of their contract, is the fact that in England the purchaser can only require covenants against defects of title arising from the acts of the vendor himself, while in America, except in a few of the

"Particulars" or "conditions" of the intended sale are prepared by the vendor's counsel and circulated in the auction room before the sale as well as announced by the auctioneer at the time of sale.[1] These, it is presumed, while much more elaborate, correspond to some extent with the "hand bill" or "advertisement" commonly employed in America, containing a description of the property and terms of the sale, and any other matter to which the attention of prospective buyers is to be called. If the sale is by private contract, the same rules apply as in the case of ordinary conditions of sale by auction.[2] The particulars usually give a description of

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States, the rule is that the purchaser may demand a conveyance with general covenants, that is, against the acts of all persons whomsoever, no matter how far back in the chain of title. As the intention of the parties must govern in the construction of the contract, and as that intention must be largely affected by the extent of the rights which they acquire or lose by the terms of the contract, it is obvious that the difference is one of vital importance, and should constantly be borne in mind. Of course the purchaser may in America, as in England, agree to take the title of the vendor such as it is, good or bad, and language sufficiently evidencing such an agreement in England may have the same effect in America. But it by no means follows that language which in England would require the purchaser to take such title as the vendor had, would in all cases in America be followed by the same consequences, and deprive the purchaser of his right to maintain or defend an action for breach of contract, on the ground of inability of the vendor to convey a marketable title, or to require covenants adequate for his protection. For these reasons it has been deemed best to separate in the following pages the English rules respecting contracts in relation to the title from the American doctrine, except in those cases where the rules in question have been approved or adopted by the American courts.

[1] "The conditions of the sale should be printed and circulated some time previously to the sale or at any rate in the auction room, so as to give each person an opportunity of ascertaining the terms on which the property is sold. The system which is adopted by some of the provincial law societies of having printed common form conditions, which are used on every sale, and to which are prefixed the special conditions under which the particular property is sold, has much to recommend it; the effect of the common form conditions is well understood, and the attention of the purchaser and his solicitor is at once directed to the special restrictive conditions. The practice, which still prevails in some parts of the country, of having written conditions which are merely produced and read over, but not circulated in the auction room, cannot be too strongly reprobated; and, if the purchaser is thereby misled or not fully informed on a material point, may result in the rescission of the contract." Dart V. & P. (5th ed.) 124, citing Torrance v. Bolton, L. R., 14 Eq. 124; 8 Ch. App. 118.

[2] Rhodes v. Ibbetson, 4 De G., M. & G. 787; Bulkley v. Hope, 1 Jur. (N. S.) 864.

the property and the nature and extent of the vendor's interest. The conditions state the terms on which the property is sold, including the undertakings of the vendor with respect to the title.[1] When the sale is made the auctioneer usually indorses the agreement on a copy of the particulars and conditions, thereby embodying them in the contract of sale.[2]

Every condition intended to relieve the vendor from his *prima facie*[3] liability to deduce a marketable title and verify the abstract by proper evidence at his own expense must be expressed in plain and unambiguous language.[4] The purchaser, however, will be bound by a clear stipulation as to the title;[5] for example, an agreement by assignees in bankruptcy to sell the estate of the bankrupt "under such title as he recently held the same, an abstract of which may be seen;"[6] or that the purchaser should only have the receipt and conveyance of an equitable mortgagee and his assignees;[7] an agreement by the vendors that they should convey only "such title as they had received from A.;"[8] that the purchaser should accept the vendor's title "without dispute;"[9] that he should accept "such title as the vendor has."[1] So where the agreement provided that the title should "not be inquired into."[2] So, also, where the defect of title was clearly stated in the conditions of sale.[3]

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[1] Dart V. & P. (5th ed.) 114. In Torrance v. Bolton, L. R., 14 Eq. 130, it appeared that the particulars erroneously described the quantity of the vendor's estate, but that the conditions contained a correct description. It also appeared that the conditions were read by the auctioneer at the sale, but it did not appear that they had been distributed among the bystanders. The purchaser was allowed to rescind.

[2] Dart V. & P. (5th ed.) 114. Where the auctioneer read from an altered copy the particulars and conditions, but inadvertently signed an agreement on an unaltered copy, it was held that the purchaser was bound, though it did not appear that he had heard the auctioneer read the altered copy. Manser v. Buck, 6 Ha. 443.

[3] Sugd. 17; Dart. V. & P. (5th ed.) 109; Rawle Cov. § 32; Souter v. Drake, 5 B. & A. 992; Doe v. Stanion, 1 M. & W. 695; Hall v. Betty, 4 Mann. & G. 410; Worthington v. Warrington, 5 C. B. 636.

[4] Drysdale v. Mace, 2 Sm. & Giff. 225; Symons v. James, 1 Y. & C. (C. C.) 490; Osborne v. Harvey, 7 Jur. 229; Clark v. Faux, 3 Russ. 320; Morris v. Kearsley, 2 Y. & C. 139; Waddell v. Wolfe, L. R., 9 Q. B. 515; Blake v. Phinn, 3 C. B. 976; Madely v. Booth, 9 De G. & S. 718; Webb v. Kirby, 7 De G., M. & G. 376; Edwards v. Wickwar, L. R., 1 Eq. 68; Jackson v. Whitehead, 28 Beav. 154.

[5] Seaton v. Mapp, 2 Coll. 556; Forster v. Hoggart, 15 Q. B. 155; Worthington v. Warrington, 5 C. B. 636; Lethbridge v. Kirkman, 2 Jur. (N. S.) 372.

[6] Freme v. Wright, 4 Madd. 364.

[7] Groom v. Booth, 1 Dre. 548.

[8] Wilmot v. Wilkinson, 6 B. & C. 506; Ashworth v. Mounsey, 9 Exch. 175.

[9] Duke v. Barnett, 2 Coll. 337. Molloy v. Sterne, 1 Dru. & Wal. 585.

It seems, however, to be by no means clear that in England a condition of sale that the vendor should not be required to produce a title, will prevent the purchaser from showing *aliunde* that the title is bad. There have been, apparently, conflicting decisions upon the point.[4]

But while the purchaser will be bound by a clear stipulation in the conditions of sale respecting the title, the vendor will be strictly held to any representations he has made regarding the title.[5] And if there be any reasonable doubt or misapprehension as to the meaning of the particulars and conditions, they will be construed in favor of the purchaser.[1] It seems, also, that any undertaking on the part of the vendor with respect to the title will, as a general rule, be strictly construed in favor of the purchaser.[2]

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[1] Keyse v. Heydon, 20 L. T. 244; Tweed v. Mills, L. R., 1 C. P. 39.

[2] Hume v. Bentley, 5 De G. & S. 520. Compare Darlington v. Hamilton, Kay, 550, and Waddell v. Wolfe, L. R., 9 Q. B. 515.

[3] Nichols v. Corbett, 3 De G., J. & S. 18.

[4] In Spratt v. Jeffery, 5 Mann. & Ry. 188; 10 B. & C. 249, the agreement was in the following words: "And the said (purchaser) doth hereby agree to accept a proper assignment of the said two leases and premises, as above described, *without requiring the lessor's title.*" BAYLEY, J., for the court, said that "the fair and reasonable construction of those words is the purchaser shall not be at liberty to raise any objection to the lessor's title." In Shepherd v. Keatley, 1 Crompt., M. & R. 117, the agreement was "that the vendors should deliver an abstract of the lease, and of the subsequent title under which the leasehold lots are held, *but should not be obliged to produce the lessor's title.*" In this case the language italicised was held distinguishable from that in Spratt v. Jeffery, *supra*, and that it did not preclude the purchaser from taking any objections to the title which he might discover. These cases are apparently in conflict, but have been held reconcilable in Duke v. Barnett, 2 Coll. 337. Sugden says that Spratt v. Jeffery would probably not now be followed. Sugd. Vend. (8th Am. ed.) 26. See, also, Fry Sp. Perf. (3d Am. ed.) 614, where that case is said to have been overruled. In Hume v. Pocock, L. R., 1 Eq. 428, Sir JOHN STUART, V. C., said: "There is no doubt that in contracts for the sale and purchase of property the terms of the contract must be clear, in order that the court may see how far the subject-matter of the purchase can be given by the party who contracts to sell to him who contracts to buy. But the owner of a disputed title may make a valid contract for the sale of that title, such as it may be. No doubt, with reference to the terms of a contract, it is implied that the purchaser is to have an indefeasible title; and although the vendor may have entered into a contract that he shall not be bound to produce a title, yet the terms of the contract may be such that if it appears *aliunde* that he has no title, and can, therefore, give the purchaser nothing, the court, in such a case, would not make a decree for specific performance. The meaning of specific performance is that there shall be conveyed what the vendor has contracted to sell to the purchaser."

[5] Sugd. 17; Forster v. Hoggart, 15 Q. B. 155; Hume v. Bentley, 5 De G. & Sm. 520; Hoy v. Smythies, 22 Beav. 510; Nott v. Ricard, 22 Beav. 307.

Independently of any express stipulation in the particulars and conditions, there may be special circumstances showing that the vendor's title was not to be called for, and that the purchaser was to take the title such as it was.[3] But if the contract stipulate that the vendor shall deduce and make a good title, he must do so, although the purchaser be aware of objections to the title.[4]

Charges upon the estate, or restrictions upon the purchaser's right of absolute enjoyment, the release of which cannot be procured by the vendors, or which do not fairly admit of compensation,[5] or of which the purchaser has no notice,[6] should be stated in the particulars of sale, otherwise the purchaser may, in many cases, avoid the sale.[7]

If the attention of the purchaser be drawn to objectionable conditions of sale, he may be bound by them if he makes his bid without objection.[8]

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[1] Dart V. & P. (5th ed.) 109; Taylor v. Martindale, 1 Y. & C. (C. C.) 661; Symons v. James, Id. 490; Seaton v. Mapp, 2 Coll. C. C. 562; Nouaille v. Flight, 7 Beav. 521; Smith v. Ellis, 14 Jur. 682; Graves v. Wilson, 25 Beav. 290; Brumfit v. Morton, 3 Jur. (N. S.) 1198; Jackson v. Whitehead, 28 Beav. 154; Swaisland v. Dearsley, 29 Beav. 430.

[2] Dart V. & P. (5th ed.) 110; Dawes v. Betts, 12 Jur. 412.

[3] Dart V. & P. (5th ed.) 151; Richardson v. Eyton, 2 De G., M. & G. 79. Godson v. Turner, 15 Beav. 46.

[4] 1 Sugd. Vend. 337; Burnett v. Wheeler, 7 M. & W. 364.

[5] Sugd. 5, 6, 311, 312; Dart. V. & P. (5th ed.) 116, 117; Torrance v. Bolton, L. R., 14 Eq. 124; 8 Ch. App. 118. See "Compensation for Defects," *post*, § 325.

[6] Hall v. Smith, 14 Ves. 426; Pope v. Garland, 4 Y. & C. 394; Patterson v Long, 6 Beav. 590; Lewis v. Bond, 18 Beav. 85.

[7] Turner v. Beaurain, Sugd. 312; Burwell v. Brown, 1 Jac. & W. 72; Seaman v. Vawdrey, 16 Ves. 390; Ramsden v. Hirst, 6 W. R. 349; Shackleton v. Sutcliffe, 1 De G. & Sm. 609; Coverly v. Burrell, Sug. 27; Ballard v. Way, 1 M. & W. 520.

[8] Dart V. & P. 110. Thus, when the conditions were "catching" or deceptive, and the purchaser inquired whether a good marketable title could be made, and the vendor's agents refused to insert any such statement in the contract, but declared that a good title could be made under the existing conditions, the

A stipulation that the sale shall be void if the purchaser does not pay the purchase money, or if the vendor cannot make a good title, at a specified time, will not justify either party in arbitrarily defeating the sale by declaring that he cannot pay the purchase money in the one case or make the title in the other at the appointed time. Either party, upon the default of the other, may avoid the sale, but cannot elect to avoid it by merely declaring his inability to perform the contract.[1]

Verbal declarations by the auctioneer, at the time of sale, will not, as a general rule, be admitted for the purpose of contradicting, explaining or adding to the particulars and conditions of the sale.[2] But, while such declarations are inadmissible at law on behalf of

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purchaser was required to take the title. Hyde v. Dallaway, 6 Jur. 119; 4 Beav. 606.

[1] 1 Sugd. 23; Roberts v. Wyatt, 2 Taunt. 268; Rippingall v. Lloyd, 2 Nev. & Man. 410; Page v. Adam, 4 Beav. 269; Malins v. Freeman, 4 Bing. N. C. 395; Wilson v. Carey, 10 M. & W. 641. The following observations by Mr. Dart, on the utility of unusual conditions of sale, may be of use in those localities where it is the custom to pay particular attention to conditions respecting the title: "Lastly, it may be remarked that those conditions which to an unprofessional eye appear the simplest, are often the most dangerous, and those which appear difficult and complex to the unlearned purchaser may not unfrequently produce an impression favorable to the title upon the mind of his legal adviser. The conveyancer who, upon the purchase of a large estate, peruses a series of special stipulations, which have evidently been framed with reference to points which might be made matters of serious annoyance by litigious, but are of little practical importance to the willing purchaser, is naturally disposed to believe that no real difficulties exist where minor objections have been so carefully anticipated; and, on the other hand, nothing is more common than to see conditions whose concise simplicity disarms the suspicion of the unprofessional reader, but whose sweeping clauses reduce counsel to the dilemma of either advising a client to complete, under serious uncertainty, whether he will acquire even a tolerably safe holding title, or of involving him in inquiries which are almost sure to be heavily expensive, and may probably prove wholly unsatisfactory. The writer may also be allowed to add, as the result of a somewhat wide experience, that, in his opinion, the number of seriously defective and dangerous titles, which, at the present day, are brought into market and passed off upon purchasers under the cover of special conditions of sale, is much larger than is commonly supposed." Dart V. & P. (5th ed.) 176.

[2] Sugd. Vend. 15, where such declarations are referred to as the "babble of the auction room." Dart V. & P. (5th ed.) 110; 1 Jac. & W. 639; Higginson v. Clowes, 15 Ves. 521; Manser v. Back, 6 Ha. 443; Goss v. Lord Nugent, 5 B. & A. 58; 2 N. & M. 28; Vandever v. Baker, 13 Pa. St. 121.

either plaintiff or defendant,[1] they will in equity be admitted in favor of the purchaser when sued for specific performance.[2] Parol evidence of declarations at the time of sale is inadmissible in equity in favor of the vendor-plaintiff, even though the purchaser expressly agreed to abide by the declarations.[3] Nor can the purchaser avail himself of such evidence as plaintiff in equity.[4] If statements be made at the sale varying from the particulars and conditions, the purchaser should require them to be put in writing, so as to preserve his rights as plaintiff in equity.[5]

Personal information given to the purchaser as to incumbrances on the estate, or even declarations by the auctioneer on such points, may be given in evidence, either by the vendor or the purchaser, as a defense in a suit for specific performance, but, as a general rule, has been held inadmissible on behalf of the plaintiff.[6]

If there is a discrepancy between the particulars of sale and an instrument of title to which they refer, and the instrument be the more favorable to the purchaser, the vendor will be bound by the instrument and must show a title in conformity thereto.[7]

§ 10. **Agreements to make "good and sufficient deed."** Inasmuch as the law implies a contract that the purchaser shall receive a good title to the land, free from all defects, charges and incumbrances, it would seem unnecessary that the purchaser should insert in the contract any provision assuring him such a title. Indeed, the anxiety of the purchaser to protect himself by such a precaution appears sometimes to have resulted in disaster, for there have been several decisions that an agreement to give a sufficient warranty deed referred only to the sufficiency of the instrument tendered by the vendor, and that the contract was satisfied if the instrument was sufficient as a conveyance, though the vendor's title was bad.[1] Unless the facts clearly showed that the parties were contracting especially with reference to known defects of title, it would be difficult to perceive any grounds upon which such decisions could be rested, since no man in his senses would bargain for a shadow when the substance was equally within his reach. In the absence of any evidence to the contrary, it would seem that in a contract to "give a good and sufficient deed," the words "good and sufficient deed" are a mere figure of speech, meaning a clear and unincumbered title,[1] especially where, as is frequently the case, the contract was the work of an unskilled draughtsman.[2] Accordingly the decisions mentioned have been frequently overruled or disapproved, and the established doctrine now is that an agreement to convey land by a good and sufficient warranty deed is not performed by the mere execution of a warranty deed sufficient in form, if the title of the grantor be open to reasonable doubt,[3] or if there be an incumbrance upon the property.[3a] Upon a like principle it has been decided that a conveyance with covenants for title is not a sufficient performance of a contract of sale if the title be defective, the covenants being no such valuable consideration for the purchase money as to deprive

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[1] Gunnis v. Erhart, 1 H. Bl. 289; Ford v. Yates, 2 Mann. & G. 549; Eden v. Blake, 13 M. & W. 614; Greaves v. Ashlin, 3 Camp. 426; Powell v. Edmunds, 12 East, 6.

[2] Sugd. 15; Dart V. & P. (5th ed.) 111; Swaisland v. Dearsley, 29 Beav. 430. The same rules apply between original purchaser and sub-purchaser. Dart, Id.; Shelton v. Livius, 2 Cr. & J. 411. The rule stated in the text has been applied in America. See Averett v. Lipscombe, 76 Va. 409.

[3] Higginson v. Clowes, 15 Ves. 521; Clowes v. Higginson, 1 Ves. & B. 524; Fife v. Clayton, 1 C. P. C. N. R. 352; but see Swaisland v. Dearsley, *supra*.

[4] Sugd. Vend. 15.

[5] Dart V. & P. (5th ed.) 111.

[6] Sugd. Vend. 15; Dart V. & P. (5th ed.) 112; 15 Ves. 523; 1 Ves. & B. 524.

[7] Dart V. & P. (5th ed.) 120.

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[1] Brown v. Covilland, 6 Cal. 566. In this case it was said that if the contract had called for a good and sufficient *warranty* deed, instead of a good and sufficient deed merely, the vendors would have been compelled to convey a clear title, and not merely such title as they had, whatever it might be, to the purchaser; citing Tinny v. Ashley, *infra.* See, also, Green v. Covilland, 10 Cal. 322; 70 Am. Dec. 725. Haynes v. White, 55 Cal. 38, seems to be at variance with these cases. Tinney v. Ashley, 15 Pick. (Mass.) 552; 26 Am. Dec. 620. Gazley v. Price, 16 Johns. (N. Y.) 267; Parker v. Parmele, 20 Johns. (N. Y.) 132; 11 Am. Dec. 253. Barrow v. Bispham, 6 Halst. (N. J.) 110. Gregory v. Keenan, 256 Fed. 949. A provision that the vendor shall convey "by a good and sufficient warranty deed in the usual form" does not require that the vendor's title shall be deducible of record. Mesa Market Co. v. Crosby, 174 Fed. 96, 18 C. C. A. 70. In Hill v. Hobart, 16 Me. 164, a distinction is drawn between an agreement to make a deed, or a deed described, and an agreement "to make a good and sufficient deed to convey the title" to the premises. In the first case it is said that the contract is performed by giving such a deed or conveyance as the contract describes, however defective the title may be. See, also, Tobin v. Bell, 61 Ala. 125. STRAHAN, J., in Thompson v. Hawley, 14 Oreg. 199: "It seems to me that the more reasonable rule is that where the terms of the contract are such as to bind the grantor to convey by good and sufficient deed, or to make a good and sufficient conveyance, he can only perform his agreement by making a deed that will pass a good title. But if it clearly appears from the contract itself, or from the circumstances accompanying it, that the parties had in view merely such conveyance as will pass the title which the vendor had, whether defective or not, that is all the vendee can claim or insist upon." Citing Porter v. Noyes, 2 Greenl. (Me.) 22; 11 Am. Dec. 30; and cases cited there. It is hardly to be supposed, however, that if the vendor meant to obligate himself only to convey such title as he had, he would describe it by such an ambiguous expression as "good and sufficient deed." See extract from Tindall v. Conover, 1 Spencer (N. J. L.) 214; 11 Am. Dec. 220, *infra.* In Aiken v. Sanford, 5 Mass. 494, it was said that a contract to convey "by a good and sufficient warranty deed" was satisfied by a conveyance in proper form and regularly executed, if the grantor was seized so that the land passed by it. The reporter adds: "But the court observed that they did not mean to determine that in no case these words should be considered as applying to the title. If the money was to be paid on receiving the deed, it might be a reasonable construction that a good and sufficient title should be conveyed; otherwise the purchaser might part with his money, not merely for the land, but for a law suit also. In the present case, however, the money was to be first paid, and the plaintiff might as well sue on the covenants in his deed as on his bond. There was, therefore, no reason for giving a construction to the words not naturally implied by them." These observations were approved in Swan v. Drury, 22 Pick. (Mass.) 488.

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[1] Tindall v. Conover, 1 Spencer (N. J. L.), 214; 11 Am. Dec. 220, NORRIS, J., saying: "Now I undertake to say that in a written contract for the sale and purchase of lands the phrase "a good and sufficient warranty deed" will be understood by more than nine-tenths of mankind, not excepting the legal profession, to mean a good and sufficient title. That if a person intended to sell and another to buy, a doubtful or uncertain title, or anything less than a good and sufficient legal title, in reducing their contract to writing, they would not use this phrase, but would define the interest bargained for." Curtis Land Co. v. Land Co., 137 Wisc. 341, 118 N. W. 853, 129 Am. St. Rep. 1068.

[2] In our rural districts and among laymen the term "lawful deed carries no other idea than an unrestricted conveyance in fee, clear of incumbrances." Eby v. Eby, 5 Pa. St. 466. In the same way the term "title" is sometimes vulgarly used for "deed." Thus in Gilchrist v. Buie, 1 Dev. & B. Eq. (N. C.) 357, where the contract was "to make a sufficient title as far as this claim extends" the court said: "The term *title* is evidently used for *deed*. * * * *To make* a title, therefore, did not mean to make out one, but to make a deed and to pass the title." In this case it appeared that the vendors contracted to sell and the purchaser expected to get only such title as the vendors had.

[3] Whitehurst v. Boyd, 8 Ala. 375; Hunter v. O'Neill, 12 Ala. 39. Here the agreement was merely "to make a deed." Tarwater v. Davis, 7 Ark. 153; 44 Am. Dec. 534; Pate v. Mitchell, 23 Ark. 590; 79 Am. Dec. 114. Thayer v. White, 3 Cal. 229; Haynes v. White, 55 Cal. 38. (But see Brown v. Covilland, 6 Cal. 566.) Abendroth v. Greenwood, 29 Conn. 356; Dodd v. Seymour, 21 Conn. 480; Shouse v. Doane, 39 Fla. 95; 21 So. 807. Frazier v. Boggs, 37 Fla. 307; 20 So. Rep. 245; Horne v. Rodgers, 113 Ga. 224; Tyler v. Young, 2 Scam. (Ill.) 444; 35 Am. Dec. 116; Brown v. Canon, 5 Gilm. (Ill.) 174; Morgan v. Smith, 11 Ill. 199; Conway v. Case, 22 Ill. 127; Lull v. Stone,

[3a] Ethington v. Rigg, 173 Ky. 355, 191 S. W. 98.

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37 Ill. 224; Thompson v. Shoemaker, 68 Ill. 256. Clark v. Redman, 1 Bl. (Ind.) 379; Warner v. Hatfield, 4 Bl. (Ind.) 392; Parker v. McAllister, 14 Ind. 12. Price v. Immel, 48 Colo. 163, 109 Pac. 941; Powell v. Huey, 241 Ill. 132, 89 N. E. 299; Hall v. McKee, 147 Ky. 841, 145 S. W. 1129; Curtis Land Co. v. Land Co. 137 Wisc. 341, 129 Am. St. Rep. 1068. Fitch v. Casey, 2 Green (Io.), 300; Schreck v. Pierce, 3 Cl. (Io.) 360. In this case the court pertinently observed: "The legal effect of contracts to make title, or to deliver a deed to land under a contract of purchase, is generally that the vendor shall make a *good title*. As a general rule it makes but little difference what the precise terms of the contract are — whether the vendor agrees to make title, or a good title — or to make a deed, or a warranty deed — if it appears that he is negotiating to sell at a sound price, to be paid or part paid at the conveyance. In such cases, usually the vendor, without a nice examination of words, is understood to agree for a *good title*, and the vendee cannot be put off with merely a good deed. This rule, however, does not preclude those cases where the vendee appears to be purchasing the vendor's title, such as it may be." Bodley v. McChord, 4 J. J. Marsh. (Ky.) 475; Williams v. Potts, 1 J. J. Marsh. (Ky.) 596; Brown v. Starke, 3 Dana (Ky.), 318. Porter v. Noyes, 2 Gr. (Me.) 22; 11 Am. Dec. 30; Brown v. Gammen, 14 Me. 276; Sibley v. Spring, 12 Me. 460; 28 Am. Dec. 191, the court saying that an agreement to sell and convey is not performed by tender of a sufficient deed in form if there is an incumbrance on the land. Swan v. Drury, 22 Pick, (Mass.) 488; Mead v. Fox, 6 Cush. (Mass.) 202; Roberts v. Bassett, 105 Mass. 409; Linton v. Allen, (Mass.) 17 N. E. Rep. 523. Dwight v. Cutler, 3 Mich. 575; 64 Am. Dec. 105. Cogan v. Cook, 22 Minn. 137; Murphin v. Scoville, 41 Minn. 262. Wiggins v. McGimpsey, 13 Sm. & M. (Miss.) 532; Feemster v. May, 13 Sm. & M. (Miss.) 275; 53 Am. Dec. 83; Mobley v. Keys, 13 Sm. & M. (Miss.) 677; Greenwood v. Ligon, 10 Sm. & M. (Miss.) 615; 48 Am. Dec. 775. Luckett v. Williamson, 31 Mo. 54 and 37 Mo. 395. Beech v. Steele, 12 N. H. 88, *dictum;* Little v. Paddleford, 13 N. H. 167; Critchett v. Cooper, (N. H.) 18 Atl. Rep. 778. Tindall v. Conover, 1 Zab. (N. J. L.) 654. In Tindall v. Conover, 1 Spencer (N. J. L.), 214; 11 Am. Dec. 220, it was said that the question what was meant by an agreement to deliver a good and sufficient deed with covenants of warranty was to be determined by the terms of the contract and by all the surrounding circumstances. Johnson v. Smock, 1 N. J. L. 106; Young v. Paul, 10 N. J. Eq. 401; 64 Am. Dec. 456; Lounsbery v. Locander, 25 N. J. Eq. 557. Gilchrist v. Buie, 1 Dev. & B. Eq. (N. C.) 347, *dictum;* Lee v. Foard, 1 Jones Eq. (N. C.) 127, *semble.* Pugh v. Chasseldine, 11 Ohio, 109; 37 Am. Dec. 414. Thompson v. Hawley, 14 Oreg. 199; Collins v. Delashmutt, 6 Oreg. 51; Sanford v. Wheeler, 12 Oreg. 301. Dearth v. Williamson, 2 S. & R. (Pa.) 498; 7 Am. Dec. 652, the court saying: "A *lawful deed of conveyance* may be fairly understood a deed conveying a *lawful* or *good title.* Romig v. Romig, 2 Rawle (Pa.), 249; Colwell v. Hamilton, 10 Watts (Pa.), 413; Eby v. Eby, 5 Pa. St. 466; Wilson v. Getty, 57 Pa. St. 270. Cunningham v. Sharp, 11 Humph. (Tenn.) 120. Clute v. Robinson, 2 Johns. (N. Y.)

the purchaser of the right to detain the purchase money in case of eviction by an adverse claimant.[1] An agreement to make a "clear deed," when the purchaser knows that the vendor has only

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595, a leading case; Jones v. Gardner, 10 Johns. (N. Y.) 266; Judson v. Wass, 11 Johns. (N. Y.) 528; 6 Am. Dec. 392; Tucker v. Woods, 12 Johns. (N. Y.) 190; 7 Am. Dec. 305; Van Epps v. Schenectady, 12 Johns. (N. Y.) 442; 7 Am. Dec. 330; Gastry v. Perrin, 16 Johns. (N. Y.) 267; Robb v. Montgomery, 20 Johns. (N. Y.) 15; Carpenter v. Bailey, 17 Wend. (N. Y.) 244; Traver v. Halstead, 23 Wend. (N. Y.) 66, the court saying: "It was the title to the premises which the purchaser stipulated for, not a piece of parchment, good in form but waste paper in effect for the purpose of transferring title." Lawrence v. Taylor, 5 Hill (N. Y.), 107; Everson v. Kirtland, 4 Paige Ch. (N. Y.) 638; 27 Am. Dec. 91; McCool v. Jacobus, 7 Rob. (N. Y.) 115; Pomeroy v. Drury, 14 Barb. (N. Y.) 424; Hill v. Ressegien, 17 Barb. (N. Y.) 164; Atkins v. Bahrett, 19 Barb. (N. Y.) 639; Morange v. Morris, 34 Barb. (N. Y.) 211; Penfield v. Clark, 62 Barb. (N. Y.) 584; Fletcher v. Button, 4 Comst. (N. Y.) 400; Story v. Conger, 36 N. Y. 673; 93 Am. Dec. 546; Burwell v. Jackson, 9 N. Y. 536; Fossume v. Requa, 218 N. Y. 339, 113 N. E. 330. Patterson v. Goodrich, 3 Tex. 331; Vardeman v. Lawson, 17 Tex. 16; Phillips v. Herndon, 78 Tex. 378; Jones v. Phillips, 59 Tex. 610; Jones v. Huff, 36 Tex. 678. Stow v. Stevens, 7 Vt. 27; 29 Am. Dec. 139, the court saying that it would be trifling with the good sense of the law to hold that a good and sufficient deed means only a deed to convey what title the grantor had. Lawrence v. Dole, 11 Vt. 549. In Joslyn v. Taylor, 33 Vt. 470, and Preston v. Whitcomb, 11 Vt. 47, it was held, however, that an agreement "to give a good and sufficient warrantee deed" referred only to the kind of deed to be executed, and not to the quality of the title. In most of the States no distinction seems to have been made between an agreement for a "good and sufficient deed" and a "good and sufficient warranty deed." Goddin v. Vaughn, 14 Grat. (Va.) 117; Christian v. Cabell, 22 Grat. (Va.) 82. Newberry v. French, 98 Va. 471; 36 S. E. 519. Young v. Wright, 14 Wis. 144; 65 Am. Dec. 303; Falkner v. Guild, 10 Wis. 506; Bateman v. Johnson, 10 Wis. 1; Davidson v. Van Pelt, 15 Wis. 341; Taft v. Kessel, 16 Wis. 273; Davis v. Henderson, 17 Wis. 106; Ginther v. Townsend, 114 Md. 122, 78 Atl. 908. Moody v. Spokane, etc., R. Co. 5 Wash. 699. If the rule established by the foregoing cases were not the correct one the vendor, after the execution of the contract, might convey away the land to another, and yet, by delivering to the purchaser a deed good and sufficient in form, escape the consequences of a breach of the contract. Lull v. Stone, 37 Ill. 224. A contract to make a "lawful deed of conveyance" means a deed conveying a lawful or good title. Wilson v. Getty, 57 Pa. St. 266. A deed conveying "all the right, title and interest" of the vendor is not a compliance with a contract to execute to the purchaser "a good and sufficient deed of bargain and sale, free and clear of all incumbrances," if the property is incumbered. Rogers v. Borchard, 82 Cal. 347. If the purchaser contract for "a deed conveying a clear title" he may reject a warranty deed if there is an incumbrance on the premises. Roberts v. Bassett, 105 Mass. 409.

[1] Knapp v. Lee, 3 Pick. (Mass.) 459, disapproving Lloyd v. Jewell, 1 Greenl. (Me.) 352; 10 Am. Dec. 73.

a life estate, is fully performed by delivery of a deed conveying such an estate as the vendor has.[1]

§ 11. **Agreements to convey by "quit claim."** It sometimes happens that the purchaser proposes to buy, and the vendor proposes to sell, only such title as the vendor actually has, without regard to the goodness or the sufficiency of that title. In other words, the purchaser makes a chancing bargain, and presumably is compensated for the risk he takes in a diminished valuation of the premises. Therefore, it is very generally held that if the vendor contract only to convey or "quit claim" such interest as he may have in the premises, the purchaser is without relief against him at law or in equity.[2] But while the rule that the parties may stipulate for the acceptance of the title, such as it is, is elementary, an agreement to that effect will not be inferred from ambiguous expressions, or from the purchaser's knowledge of the existence of objections to the title. Every agreement by which the purchaser consents to take a defective title without recourse upon the vendor should be expressed in clear and unambiguous terms.[3] It seems that the purchaser's consent to take a defective title does not necessarily deprive him of the right to require a conveyance with covenants for title, since it may be that the protection to be afforded him by those covenants is the sole inducement to the consent, but it has been said by the most eminent authority that if in fact the purchaser consents to take a defective title, relying for his security on the vendor's covenants, the agreement of the parties should be particularly mentioned.[1]

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[1] Rohr v. Kindt, 3 Watts & S. (Pa.) 563; 39 Am. Dec. 53.

[2] Holland v. Rogers, 33 Ark. 251. Fitch v. Willord, 73 Ill. 92. Vail v. Nelson, 4 Rand. (Va.) 124; Sutton v. Sutton, 7 Grat. (Va.) 204; 56 Am. Dec. 109; Bailey v. James, 11 Grat. (Va.) 468; 62 Am. Dec. 659. Boyles v. Bee, 18 W. Va. 520. McManus v. Blackmar, 47 Minn. 331. Thompson v. Hawley, 14 Oreg. 199, 12 Pac. 276; Morgan v. Eaton, 59 Fla. 562, 52 So. 305. Waldron v. Zollikoffer, 3 Iowa, 108, where it is said that the failure to give a full price for property is ordinarily a strong circumstance, but not a conclusive one, to show that the parties contracted in view of defects, or for the actual value of the thing sold. In Louisiana, by statute, an express exclusion of warranty does not destroy the purchaser's right to require security against eviction, unless he bought with knowledge of the danger of eviction. Dufief v. Boykin, 9 La. Ann. 295; Gautreaux v. Boote, 10 La. Ann. 137. A purchaser who buys at a public sale under an announcement that only an interest is to be sold, and that if there is no title the purchaser will get none, is without remedy if the title fails. Such an announcement dampens the sale, and the purchaser gets the property at a reduced price with a view to speculation, and must be held to his bargain. Ellis v. Anderton, 88 N. Car. 472. An agreement to convey "by a good and sufficient quitclaim deed," and reciting that the vendor acquired title at a foreclosure sale, requires the vendor to convey the entire estate in the land sold. Arentsen v. Moreland, 122 Wisc. 167, 99 N. W. 790, 65 L. R. A. 973, 106 Am. St. Rep. 951; Brink v. Mitchell, 135 Wisc. 416, 116 N. W. 16.

[3] 1 Sugd. Vend. (8th Am. ed.) 510, 511 (337); Rawle Cov. (5th ed.) § 32. By agreeing to accept a quitclaim deed the purchaser does not part with his right to require a marketable title, free from incumbrances and defects. Wallach v. Riverside Bank, 104 N. Y. Supp. 661, 119 App. Div. 238.

As an agreement to make a "good and sufficient deed" relates not merely to the form of the deed, but to the sufficiency of the title,[2] so neither is an agreement to convey "by quit-claim deed," a stipulation merely as to the form of the deed; it is a condition which requires the purchaser to take just such title as the vendor has.[3]

§ 12. **Agreement to sell right, title and interest.** An agreement to sell all of the vendor's right, title and interest in the premises, is a sale of such interest only as the vendor may have, and the contract is fully performed on his part by a conveyance of such interest without regard to the goodness or sufficiency of the title.[4]

It has been held, however, that a vendor so contracting must have some title or some right, even though it consist of no more than a naked possession; otherwise the contract would be *nudum pactum*, and the purchaser might rescind.[5] Whether he might affirm the agreement and have damages for a breach of the contract is another question.

It has been held that an agreement to convey all the vendor's "right, title and interest, with full covenant of warranty," is not satisfied, except by the conveyance of an indefeasible estate.[6]

§ 13. **Express agreement to purchase subject to liens or defects.** If the purchaser expressly agrees to assume the payment of an incumbrance on the purchased premises, he not only cannot thereafter object to the title because of the incumbrance,[6a] but as between himself and the vendor, he makes the debt his own, and assumes to protect the vendor.[1] It has been held, however, that a mere agreement to take "subject to" an incumbrance, does not bind the purchaser to discharge the incumbrance.[2]

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[1] 1 Sugd. Vend. (8th Am. ed.) 230 (573).

[2] Ante, p. 36.

[3] McManus v. Blackmar, 47 Minn. 331.

[4] Tweed v. Mills, L. R., 1 C. P. 39; Johnston v. Mendenhall, 9 W. Va. 112; Babcock v. Wilson, 17 Me. 372; 35 Am. Dec. 263; Herrod v. Blackburn, 56 Pa. St. 103; 94 Am. Dec. 49.

[5] Johnson v. Tool, 1 Dana (Ky.), 479; 25 Am. Dec. 162.

[6] Lull v. Stone, 37 Ill. 155.

[6a] Gillidett v. Hayden, 102 Kan. 616, 171 Pac. 617.

It has also been held that if the purchaser merely agreed to take the property subject to a mortgage, he might reject a conveyance containing a provision that he should assume the payment of the mortgage, the effect of such provision being to render him personally liable for any deficiency, in case the land should be insufficient to satisfy the mortgage; a state of affairs often found to exist after a rapid decline of speculative values.[3]

It has been held that if the vendor contract in express terms to convey a "perfect title" to the purchaser, he will not be absolved from his obligation by a further provision of the contract that if the purchaser was compelled to pay any lien on the property the amount so paid should be deducted from the purchase money. It was considered that the provision in question was solely for the benefit of the purchaser, and that if there was an incumbrance on the property, he might abandon the contract notwithstanding his power to apply the purchase money to the incumbrance.[4] The general rule, however, is that the purchaser must apply the unpaid purchase money to the satisfaction of valid incumbrances.[5]

When the purchaser binds himself to pay rent if the title fails, he cannot, on failure of the title, recover damages from the vendor.[6]

The purchaser may contract to take a defective title, and if he does so he cannot afterwards complain that the title is defective.[7]

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[1] See upon this subject Sheld. Subrogation (2d ed.) § 85; Taylor v. Preston, 79 Pa. St. 436; Burke v. Gummey, 13 Wright (Pa.), 518; Campbell v. Shrum, 3 Watts (Pa.), 60; Woodward's Appeal, 2 Wright (Pa.), 322; Moore's Appeal, 88 Pa. St. 450; 32 Am. Rep. 469; Taintor v. Hemmingway, 18 Hun (N. Y.), 458; Kruger v. Adams, 13 Neb. 100.

[2] Lewis v. Day, 53 Iowa, 575, and cases cited.

[3] Kohner v. Higgins, 42 N. Y. Super. Ct. 4; Mellon v. Webster, 5 Mo. App. 449.

[4] Lewis v. White, 16 Ohio St. 444. This was an action by the vendor against the purchaser for breach of the contract. The case seems to be in conflict with Devling v. Little, 26 Pa. St. 502.

[5] See post, § 245.

[6] Cross v. Freeman, 22 Tex. Civ. App. 299; 54 S. W. 246.

[7] Strauss v. Yeager, 48 Ind. App. 448, 93 N. E. 877.

CHAPTER IV.

OF THE SUFFICIENCY OF THE CONVEYANCE TENDERED BY THE VENDOR.

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ESSENTIAL REQUISITES OF THE CONVEYANCE. § 15.
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  Date. § 17.
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    (*s*) *Amendment of certificate.* § 41.
  Reservations, restrictions and conditions. § 42.
  Waiver of objections to the conveyance. § 43.

§ 14. **GENERAL OBSERVATIONS.** When the vendor prepares his conveyance and tenders it to the purchaser, the latter may reject it and insist that there has been a breach of the contract, either (1) Because the conveyance and its covenants are not such as he is entitled to demand; or, (2) Because the title is not such as the vendor has contracted to convey. A defective conveyance, prepared and tendered by the vendor, would not constitute, strictly speaking, a defect in the vendor's title. But inasmuch as the *purchaser's* title would be incomplete without the execution of a sufficient conveyance, it has been deemed proper to include that subject in the scope of this work.

In England the purchaser is required to prepare and tender to the vendor a conveyance to be executed by him, and the same rule exists in some of the American States; but the general rule in those States is that the vendor shall prepare and deliver to the purchaser a proper conveyance of the premises.[1]

The conveyance must, of course, be sufficient in form to pass the interest to which the purchaser is entitled under the contract.[2] We have already seen that a conveyance sufficient in form as a mere medium for transferring title cannot be held a performance of a contract to make a "good and sufficient deed," if the vendor has not such title as the purchaser may require.[3]

An agreement "to sell" lands obliges the vendor to make a proper conveyance.[4] The conveyance must be witnessed or acknowledged by all the parties, and have the necessary certificates attached, so that it may be admitted to record at once.[5]

The conveyance must also contain all the covenants to which the purchaser is entitled.[6] Too much importance cannot be attached to this requisite, since upon these depends his right to relief in case he loses the estate after the conveyance has been accepted.[7] It has been held that the purchaser has no right to inspect the deed prepared by the vendor before paying the purchase money unless the contract so provides.[8]

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[1] Post, § 88.

[2] But a conveyance sufficient to pass all of the vendor's interest need not follow the language of the contract and purport to convey "all the right, title and interest" of the vendor. Brown v. Bellows, 4 Pick. (Mass.) 178.

[3] Ante, § 10. Lindeman v. Penson, 54 Mont. 466, 171 Pac. 271.

[4] Hoffman v. Fett, 39 Cal. 109; Smith v. Haynes, 9 Greenl. (Me.) 128; Dart V. & P. (5th ed.) 130. And, *e converso*, an agreement to "execute and deliver a deed" is an agreement to sell the land. Martin v. Colby, 42 Hun (N. Y.), 1.

[5] Tapp v. Beverley, 1 Leigh (Va.), 80; Botto v. Berges, 47 La. Ann. 959; 17 So. Rep. 428.

[6] Post, §§ 67, 68.

[7] Rawle Cov. for Title (5th ed.), § 320; post, chap. 27.

[8] Papin v. Goodrich, 103 Ill. 86.

§ 15. **ESSENTIAL REQUISITES OF THE CONVEYANCE.** The principal points to which the attention of the purchaser is to be directed in determining the sufficiency of the conveyance tendered to him by the vendor are: That it be written or printed upon paper, parchment or other equally convenient or substantial material; that there be one or more correctly designated grantors and grantees; that the grantors are competent to convey, and, when they act in an official capacity, have employed all necessary formalities in the execution of the deed; that proper and necessary words of conveyance have been employed; that the granted premises have been accurately and properly described, and, in some of the States, that the conveyance be under seal, attested by subscribing witnesses and acknowledged before some officer competent to take and certify acknowledgments. The foregoing essential requisites of a conveyance, as between vendor and purchaser, are further considered in the following pages. It should be observed here, however, that a deed may be sufficient to support a title in ejectment, and yet not such a conveyance as the purchaser may require. For example, in those States in which the common law prevails, a deed without a signature, as has been already observed, is valid. But it is apprehended that no purchaser could be compelled to accept such an instrument as a sufficient deed; for if he should offer to resell the premises, the want of a signature to the deed under which he holds would, beyond question, be made the ground of objection to his title. And while the objection might, after litigation, be adjudged untenable, he should not be required to accept a conveyance so irregular in form as to render his title unsatisfactory to a purchaser. So, also, where the description is so vague and uncertain as to make necessary a resort to parol evidence to identify the premises. And, generally, it may be said that the purchaser may reject the conveyance whenever its sufficiency is in any degree a matter of legal doubt, upon the same principle which permits him to reject a title concerning which there is a reasonable doubt.[1] No hardship can result to the vendor from these requirements, since he may always remove the objection at a trifling expense.

The vendor has a right to prepare and tender, and the purchaser is bound to accept, a conveyance correcting errors or misdescriptions contained in a former conveyance. If the vendor be dead, his heirs, or a commissioner of the court, should make and tender the amended conveyance.[1] By consent of parties, a deed defectively executed may be corrected by interlineations, reacknowledged and recorded anew, and may be presumed to be redelivered as of the new date, so as to take effect therefrom.[2] In some of the States a deed of bargain and sale must be supported by a valuable consideration, pecuniary or otherwise.[3] Wherever this rule exists, the purchaser should see that the consideration is expressed in the deed which is tendered to him by the vendor. It is true that the existence of the consideration, if not recited in the deed, may be shown by evidence *aliunde*;[4] but the conveyance which the purchaser is to receive should, if possible, afford no occasion for a query as to its sufficiency, if he should desire to resell the estate.

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[1] Post, chap. 31.

§ 16. **Material, printing, erasures, etc.** Deeds have always been written or printed upon paper or parchment, and the extreme improbability of a departure from this custom makes the question of the validity of a deed written or engraved upon other materials practically unimportant. If, however, a deed should be written or printed upon some material similar to and forming a convenient substitute for paper or parchment, it is apprehended that a purchaser could not decline to receive it. A deed engraved, written or printed upon stone, metal, wood or other bulky and inconvenient material might perhaps be received as evidence of title in ejectment.[5] But there can be no doubt that a purchaser would be justified in rejecting such an instrument if tendered by the vendor. Deeds are usually written with ink, but they are not liable to objection because wholly or partly in print. Even the signature of a deed may, it is apprehended, be in print, all danger of fraud being removed by the acknowledgment of the deed before attesting witnesses or a certifying officer.[6] For the same reason it is apprehended that a deed written with a lead pencil would be held valid.[1] But it may be doubted whether a purchaser might not lawfully refuse to accept a deed so written, and insist upon one prepared in the usual manner.

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[1] Leslie v. Slusher, 15 Ind. 166; Rush v. Truby, 11 Ind. 462.

[2] Fitzpatrick v. Fitzpatrick, 6 R. I. 64; 75 Am. Dec. 681.

[3] 3 Washb. Real Prop. 368 (613).

[4] Id.

[5] In 2 Bouvier's Inst. 389, it is said that an instrument written or printed on "wood, linen, bark, stone, or the like," would be invalid as a deed.

[6] Such a signature has been held a sufficient compliance with the Statute of Frauds. Browne Stat. Frauds, § 356 (4th ed.), p. 441; Devlin on Deeds, § 135,

A contract to convey by good and sufficient deed obliges the vendor to tender a deed so drawn and executed as to leave no reasonable doubt of its legal sufficiency to convey the land. It must be free from all such interlineations and erasures as are reasonably calculated to throw doubt upon the paper as a valid conveyance.[2]

§ 17. **Date.** Regularly, a deed should be dated, but the fact that it has no date, or has an impossible date, will not render it void. The true date may be shown.[3] A deed being an executed contract, it is immaterial that it bears date on a Sunday; the parties being *in pari delicto,* the courts will not interfere to declare the instrument void, as it sometimes does where the contract is executory.[4] The date may be inserted either at the beginning of the deed, or at the close, in the *testimonium* clause; that in the *testimonium* clause is to be treated as the true date, if it be later than the one expressed at the beginning of the deed.[5] Inasmuch as it is usual and customary to insert a date in conveyances of real estate, and the want of it may be easily supplied, the purchaser should require that the instrument tendered shall be complete in this particular.

§ 18. **Parties to the conveyance.** It seems unnecessary to say that every deed must contain the names or description of parties grantor and grantee.[6] Yet instances exist in which instruments, from which the name of the grantee, through carelessness or inatten-

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and cases there cited. But where a statute required the memorandum to be "subscribed" by the party to be bound, it was held that a printed signature was insufficient. Vielle v. Osgood, 8 Barb. (N. Y.) 130; Davis v. Shields, 26 Wend. (N. Y.) 351.

[1] Contracts for the sale of land written in lead pencil are valid. Clason v. Bailey, 14 Johns. (N. Y.) 484. So also, a will or codicil to a will. Raymes v. Clarkson, 1 Phillim. 22.

[2] Shouse v. Doane, 39 Fla. 95; 21 So. 807.

[3] Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230. The date is no part of the substance of a deed, and not necessary to be inserted. The real date of a deed is the time of its delivery. Thompson v. Thompson, 9 Ind. 323; 68 Am. Dec. 638. It is no objection to a deed that it bears date prior to the vendor's acquisition of title. Bledsoe v. Doe, 4 How. (Miss.) 13.

[4] See cases cited 24 Am. & Eng. Encyc. of L. 555.

[5] Kurtz v. Hollingshed, 4 Cranch C. C. (U. S.) 180.

[6] Chase v. Palmer, 29 Ill. 306; Whittaker v. Miller, 83 Ill. 381. In both these cases the deed had been executed in blank, and the name of a grantee afterwards inserted by a third person. Garnett v. Garnett, 7 T. B. Mon. (Ky.) 545.

tion, has been omitted, have been tendered to and accepted by the purchaser. The parties should be correctly described by their Christian names as well as surnames. And while an incorrect or imperfect description of the grantee does not destroy the validity of a deed as a muniment of title, there can scarcely be any doubt that a purchaser would not be required to accept such a conveyance.[1] There must not only be a grantee in every deed, but such grantee must be a person or corporation who can take and hold the premises. Deeds have sometimes been held void because of uncertainty or vagueness in the description of the grantee.[2] Thus, a grant to the people of a county is void for uncertainty.[3] But it is not necessary that a grant to a person shall describe him by name, if he be otherwise so described that he may be identified.[4] Hence, a grant to the "children of A." is valid.[5] So, also, a deed "to the heirs at law of a deceased person."[6] But a deed to "A. and his heirs," A. being dead at the time of the grant, is void. In such a case, the words "his heirs" are words of limitation and not words of purchase.[7] The grantee, unless such by way of remainder, must, of course, be in existence at the time of the grant.[8] It has been held that a conveyance to a fictitious person is void.[9] It is not absolutely indispensable that the name of the grantee shall be set forth in the granting clause of the deed; if his name appear in the *habendum*, it will suffice.[10] Nor will a deed be avoided by the fact that the grantor's name does not appear in the granting clause, if it can be supplied from the rest of the instrument.[1] The full names of the parties should be correctly set forth in the conveyance. But the omission of a middle name will not invalidate the deed.[2] Nor will a difference in the spelling of the name of the grantor, as recited in the deed and as signed thereto, be material, if it can be shown that they are one and the same person,[3] and it has been held that a conveyance to a person by a wrong baptismal or Christian name is not for that reason void.[4] But, of course, a purchaser should reject a deed containing such an irregularity. The burden of removing or explaining apparent or seeming defects should not be imposed upon him.

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[1] Thus, in Peabody v. Brown, 10 Gray (Mass.), 45, a deed to "Hiram Gowing" was held valid as a conveyance to "Hiram G. Gowing," though there was such a person as "Hiram Gowing," he being the son of the person intended as grantee. And many cases may be found in which incorrect, uncertain and doubful descriptions of the grantee have been aided by parol evidence, and the description held sufficient, according to the maxim *id certum est quod reddi potest.* But obviously this doctrine has no application to a case in which the purchaser stands insisting that the vendor shall tender a deed free from misdescription.

[2] Jackson v. Cory, 8 Johns. (N. Y.) 385. So, also, a deed to the "estate" of a certain person deceased. McInerny v. Beck, 10 Wash. 515; 39 Pac. Rep. 130.

[3] Jackson v. Cory, 8 Johns. (N. Y.) 385; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73.

[4] 1 Devlin on Deeds, § 184.

[5] Hogg v. Odom, Dudley, (Ga.) 185.

[6] Shaw v. Loud, 12 Mass. 447.

[7] Hunter v. Watson, 12 Cal. 363; 73 Am. Dec. 543.

[8] Newsom v. Thompson, 2 Ired. (N. C.) L. 277; Lillard v. Ruckers, 6 Yerg. (Tenn.) 64.

[9] Muskingum Val. Turnpike v. Ward, 13 Ohio, 120. But see Thomas v. Wyatt, 31 Mo. 188; 77 Am. Dec. 640.

[10] Berry v. Billings, 44 Me. 416; 69 Am. Dec. 107.

Where the purchaser is a partnership, the conveyance must be made to the individual partners jointly as tenants in common, and the partnership may reject a deed in which the grantee is the firm itself, *e. g.*, a deed to A. B. & Co.[5] A conveyance to A. B. & Co. passes the legal title to A. B. alone.[6] A deed made by "A. B., Executor," without specifying the estate of the testator, and signed by the executor in the same way, is sufficient as a deed executed by him in a representative and not in his individual capacity.[7]

The purchaser is also entitled to require a conveyance from the person appearing of record to be the owner, though he be in fact the mere nominal owner.[8] A contract by several to convey with warranty is not performed by tendering a conveyance signed only by one of the vendors, and the purchaser may reject such a conveyance. He has a right to have the warranties of all those with whom he contracted.[1] It has been held that a contract to make a good and sufficient deed, entered into by a vendor having no title, would be satisfied by a tender of a conveyance from the real owner.[2] It would seem, however, that if the contract entitled the purchaser to covenants of warranty, the vendor should be required to join in the conveyance so tendered.

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[1] Mards v. Meyers, (Tex.) 28 S. W. Rep. 693.

[2] McDonald v. Morgan, 27 Tex. 503; James v. Stiles, 14 Pet. (U. S.) 322. A variance in the middle initial letter of the name of the grantor, as written in the signature and in the body of the deed, will not avoid the deed. Erskine v. Davis, 25 Ill. 251.

[3] Lyon v. Karn, 36 Ill. 362; Tustin v. Faught, 23 Cal. 237; Middleton v. Findla, 25 Cal. 76.

[4] Stark v. Sigelow, 12 Wis. 234.

[5] 1 Washb. Real Prop. (3d ed.) 573; McMurray v. Fletcher, 24 Kans. 574.

[6] Arthur v. Weston, 22 Mo. 378; Beauman v. Whitney, 20 Me. 413.

[7] Babcock v. Collins, (Minn.) 61 N. W. Rep. 1020.

[8] Walter v. De Graaf, 19 Abb. N. C. (N. Y.) 406. In this case the apparent owner contracted to give a warranty deed with full covenants. The conveyance under which the apparent owner held was absolute in form, but in fact a mortgage. He reconveyed to the mortgagor, and a warranty deed from the latter was tendered to the purchaser. It was held that the purchaser was entitled to the benefit of the covenants of the apparent owner, and that the deed tendered was insufficient.

In every case in which the purchaser is entitled to demand a conveyance with covenants for title by the vendor, the duty devolves on the vendor to make and deliver his own deed, and the purchaser may reject the deed of a third person. He is entitled to the covenants of his vendor.[3]

But a deed from a third party is a substantial compliance with a covenant to convey, unless the purchaser is entitled to covenants of warranty from the vendor.[4] Such a deed, however, not being within the terms of the contract of sale, the burden devolves on the vendor to show that the purchaser accepted the same in full performance of the agreement.[1]

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[1] Lawrence v. Parker, 1 Mass, 191; 2 Am. Dec. 10; Clark v. Redman, 1 Blackf. (Ind.) 379.

[2] Bateman v. Johnson, 10 Wis. 1.

[3] Steiner v. Zwickey, 41 Minn. 448; 43 N. W. Rep. 376; Crabtree v. Levings, 53 Ill. 526; Yeates v. Prior, 11 Ark. 76; Taylor v. Porter, 1 Dana (Ky.) 422; 25 Am. Dec. 165; Royal v. Dennison, (Cal.) 38 Pac. Rep. 39; George v. Conhaim, 38 Minn. 338; 37 N. W. Rep. 391; McNamara v. Pengilly, 64 Minn. 543; 59 N. W. 1055; Meyers v. Markham, 90 Minn. 230; 96 N. W. 787; Miner v. Hilton, 44 N. Y. Supp. 155; 15 App. Div. 55. Rudd v. Savelli, 44 Ark. 145; Buswell v. Kerr. Co., 112 Minn. 388, 128 N. W. 459; Wolford v. Jackson, 123 Va. 280, 96 S. E. 237; Gottschalk v. Meissenheimer, 62 Wash. 299, 113 Pac. 765; Armstrong v. Palmer (Tex. Civ. App.) 218 S. W. 627; McVeety v. Merc. Co., 24 N. D. 245, 139 N. W. 586, Ann. Cas. 1915 B, 1028; Geo. H. Paul Co. v. Shaw, 86 Kan. 136, 37 L. R. A. (N. S.) 1123; Chicago Title Co. v. MacDonald, 192 Ill. App. 132. Compare Thos. J. Baird Co. v. Harris, 209 Fed. 291, 126 C. C. A. 217. The purchaser cannot be required to accept a deed from his vendor's vendor, with his (the purchaser's) name filled in as grantee by his vendor. Brugman v. Charleson, (N. D.) 171 N. W. 882. The rule that the purchaser is entitled to the covenants of his vendor is satisfied by a conveyance from the vendor to a stranger with warranty, followed by a conveyance from the stranger to the purchaser with warranty. Big Bend Land Co. v. Hutchings, 71 Wash. 345, 128 Pac. 652.

[4] Bigler v. Morgan, 77 N. Y. 312; Robb v. Montgomery, 20 Johns. (N. Y.) 15. Kister v. Pollak, 109 N. Y. Supp. 204; 125 App. Div. 226. The vendee cannot be required to accept a deed from a third person to whom the vendor conveyed, without proof that no dower interest, nor tax, nor assessment lien had attached since such conveyance. Bensinger v. Erhardt, 77 N. Y. Supp. 577; 74 App. Div. 169.

There would seem to be no reason why the purchaser should not be required to accept the conveyance, if those who would be entitled to the estate, in case of the failure of the title of the vendor, join with the vendor in the conveyance.[2]

The purchaser should not only see that the parties to the conveyance are properly named, designated or described, but he should insist upon the execution of the conveyance by all parties whose concurrence in the deed is necessary to perfect the title. If the deed be that of the husband, he should see that the wife joins, and *vice versa.* If the conveyance be by one who has an equitable estate only, as frequently happens, he should insist that the party having the legal title shall join as a party grantor. Regularly, the names of all parties executing the deed should be set out therein, but it sometimes happens that a deed poll is executed by a person not mentioned as one of the grantors. Whether the deed will be operative as to such person, it is unnecessary to consider here; it suffices to say that the purchaser should reject such an irregular instrument, and require the name to be inserted in the proper place. If the conveyance is made in an official or representative capacity, that fact should appear in the description of the grantor; it is insufficient that the deed be signed by the party in the capacity in which he acts.[3]

It is a general rule that the purchaser cannot be compelled to accept a conveyance executed by an attorney in pursuance of a power, unless an actual necessity for the execution of the conveyance in that form appears.[4] There has been some conflict of opinion as to the validity of a deed purporting on its face to be the act of a principal, but executed and signed by an attorney in fact in his individual capacity, that is, without the name of the principal or the addition of words after the signature of the attorney to show that the deed is not his individual act, but the act of the principal. It is deemed unnecessary to discuss this question here, or to refer to the decisions either way upon the points.[1] It suffices to say that the purchaser should insist that the recitals in the body of the deed shall show that it is the act of the principal, and that the deed shall be signed as well with the name of the principal as with that of the attorney, thus, "John Smith by his attorney in fact, William Brown."

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[1] Slocum v. Bray, 55 Minn. 249; 56 N. W. Rep. 826.

[2] Elkins v. Thompson, 155 Ky. 91, 159 S. W. 617.

[3] Bobb v. Barnum, 59 Mo. 394.

[4] 2 Sugd. Vend. (8th Am. ed.) 214 (563).

The purchaser should also be careful to see that the deed is executed by a person having power and authority to convey. If the grantor be an executor, administrator, trustee, attorney in fact, public official, officer of a court, officer of a corporation, or, indeed, any person acting *en auter droit,* the nature and extent of his powers should be examined, and the observance of all required formalities exacted.[2] Particular attention should be paid to conveyances of corporate property, and all statutory or charter provisions as to the authority of the officers to convey, and as to the mode of conveyance, should be literally and rigidly followed. A conveyance of firm property should be signed by all the partners. One partner has no right to execute a deed in the name of the partnership unless the other partners are standing by and give their consent or confer power upon him by an instrument under seal.[3]

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[1] The cases will be found collected in 1 Devlin on Deeds, § 377, *et seq.*

[2] A power of attorney to convey land must be under seal. Plummer v. Russell, 2 Bibb (Ky.), 174. A misrecital of a valid power of attorney in a deed, executed in pursuance thereof, is no objection to the validity of the deed. Jones v. Tarver, 19 Ga. 279. A deed executed by an attorney in fact, with provisions in excess of his authority, will be void as to such provisions, but valid in other respects. Gimell v. Adams, 11 Humph. (Tenn.) 283. A deed with blanks filled by an agent in the absence of the grantor, but with verbal authority from him, is void. Ingram v. Little, 14 Ga. 173; 58 Am. Dec. 549. If the deed is made in pursuance of a judicial sale, the purchaser should see that the sale has been confirmed. Fraser v. Prather, 1 McArth. (D. C.) 206; 2 Dan. Ch. Pr. 1454. A commissioner acting under a decree of court can convey no more than he is authorized by the decree to convey. Neel v. Hughes, 10 Gill & J. (Md.) 7. A conveyance by a corporation must be executed in the corporate name and under the corporate seal. Hatch v. Barr, 1 Ohio, 390. It is not necessary that the deed of a corporation shall recite the vote authorizing the execution of the deed. McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274.

[3] Story on Partnership, § 120.

If the purchaser be entitled, under the contract, to call for a conveyance of a clear and unincumbered title, he may reject a conveyance which does not contain a relinquishment of any contingent right of dower existing in the premises.[1]

Where several vendors join in the contract of sale, by which they are required to convey with warranty, the purchaser is entitled to have their joint conveyance with warranty, and separate conveyances tendered by each are insufficient.[2]

§ 19. **Words of conveyance.** The granting clause of a deed requires the careful attention of the purchaser. Of course the use of a form prescribed by statute will be sufficient, but the purchaser should see that the deed contains the operative words of conveyance found in the form or their equivalents. Such forms are usually brief, being intended to furnish a simple and convenient mode of conveyance, but it is generally provided that they shall not invalidate a deed in the "common law" or lengthy form. Where, however, by statute or common law, certain technical words are made necessary in a conveyance, equivalents will not answer.[3] Thus, in some of the States, the words "grant, bargain and sell" are by statute made to imply certain covenants for title, and in others the common-law rule that the word "heirs" is necessary in the creation of an estate of inheritance still exists. Wherever this is the case, the purchaser should see that these precise words are employed and should reject a deed which does not contain them. Where the statutory form of conveyance is not employed, attention should be given to the operative words of conveyance in the deed. A paper containing no words of conveyance can ever operate as a deed,[4] and yet instruments amounting to nothing more than executory contracts for the sale of lands have been tendered and accepted as conveyances by persons acting without competent advice. An instrument in which the only words of grant are "sell" or "sign over,"[1] cannot take effect as a deed. No estate can pass by deed unless it is plainly embraced within the words of grant.[2] But a deed without sufficient words of conveyance in the granting clause will pass a fee if words sufficient for that purpose appear in other parts of the deed.[3]

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[1] Polk v. Sumter, 2 Strobh. L. (S. Car.) 81; Jones v. Gardner, 10 Johns. (N. Y.) 266.

[2] Lane v. Ziemar, (Ind. App.) 98 N. E. 741; Ragel v. Dedman, 50 Ind. App. 359, 98 N. E. 367.

[3] 1 Wash. Real Prop. m. p. 56 (3d ed.) 671.

[4] Brown v. Manter, 21 N. H. 528; 53 Am. Dec. 223. An instrument under seal acknowledging receipt of the consideration for the sale of real estate, but containing no words of conveyance, passes no title. Pierson v. Doe, 2 Ind. 123.

§ 20. **Description of the premises.** A vast number of cases in which deeds have been held inoperative for want of a sufficient description of the premises may be found in the reports. The general rule is that a description from which it is possible to ascertain and identify the land intended to be conveyed is sufficient.[4] We need not inquire here whether parol evidence will be received in aid of an unintelligible description. The purchaser may avoid trouble of that kind by insisting upon a full and accurate description of the premises. It is simply a matter to which his attention should be particularly drawn. The deed should set out the names of the State and county in which the land lies, and also the range, township, section and quarter section of which it forms a part,[5] where those subdvisions are in use, the name of the nearest town, village or other public place in the county, and the direction therefrom in which the land lies; then follow metes and bounds, courses and distances, references to known monuments and natural objects, lands of adjacent proprietors, public highways, water courses and the like, and an estimate of the quantity of land conveyed. It is better that a deed should contain all of these items of description, but of course they are not all indispensable, if from a part of them the land can be located and identified. A description as the "S. ½ of the N. E. ¼ of S. E. ½" of a section was held fatally bad, there being no such thing as the "*south-east half*" of a section, though of course there might be a south-east quarter.[1] A description of the land conveyed as "ten acres, more or less," of a certain other piece of land, without showing how the ten acres are to be cut off, makes the deed void for uncertainty.[2] Land described in a deed must be susceptible of location, that is, the survey must be made to close as to the whole tract, or some definite portion thereof, otherwise the deed will be void and inoperative.[3] It is a general rule, however, that if the description of the premises given in a deed furnishes a sufficient means of locating and identifying the land to be conveyed, the conveyance will be sustained, though some of the particulars of description may be erroneous or inconsistent.[4] But if the description of the estate include several particulars, all of which are necessary to ascertain the estate intended, no estate will pass except such as answers to every particular.[5] If a deed contain conflicting descriptions of equal authority, that which is most favorable to the grantee will be taken.[6] If there be any doubt about what property a deed conveys, it must be construed most strongly against the grantor.[7] A deed which contains no other description of the premises than a reference to another deed containing a full description is sufficient.[8] And an uncertain description may be cured by a reference in the deed to other conveyances.[1] A general description in a deed will govern where the particular description by metes and bounds as given is uncertain or impossible.[2] If the actual boundaries of land, as marked by a surveyor, can be shown, the grantor, in a conveyance of the land, will hold accordingly, though the description by courses and distances be incorrect.[3] And it has been held that a conveyance by metes and bounds, accompanied by transfer of possession and marking the boundaries by natural objects, will pass the title, though no particular locality be set forth in the deed.[4]

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[1] McKenney v. Settles, 31 Mo. 541. But see Hutchins v. Carleton, 19 N. H. 487, where the words "assign and make over" were held to pass a fee, and Fash v. Blake, 38 Ill. 363, where a similar decision was rendered. The words "to go to" are sufficient as words of grant (Folk v. Varn, 9 Rich. [S. C.] Eq. 303), so, also, the word "convey" (Patterson v. Carneal, 3 A. K. Marsh. [Ky.] 618; 13 Am. Dec. 208), and the word "give" in a deed of gift. Pierson v. Armstrong, 1 Iowa, 282; 63 Am. Dec. 440.

[2] Ryan v. Wilson, 9 Mich. 262.

[3] Bridge v. Wellington, 1 Mass. 219.

[4] Devlin on Deeds § 1012. Where a purchaser takes possession of a rectangular piece of ground under a deed which gives the boundaries of three sides only of the rectangle, the court will supply the fourth side; and it is no defense to an action for the purchase money that the error in the description leaves an outstanding interest in the grantor or his heirs. Ray v. Pease, (Ga.) 22 S. E. Rep. 190.

[5] In the description of lands in ejectment or in a conveyance, it suffices to give the number of the section, township and range according to the public surveys. Bledsoe v. Little, 4 How. (Miss.) 13.

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[1] Pry v. Pry, 109 Ill. 466.

[2] Wilkinson v. Roper, 74 Ala. 140.

[3] Wilson v. Inloes, 6 Gill (Md.), 121.

[4] Vose v. Bradstreet, 27 Me. 156; Bell v. Woodward, 46 N. H. 315.

[5] Worthington v. Hylyer, 4 Mass. 196, per PARSONS, C. J.

[6] Vance v. Fore, 24 Cal. 435.

[7] Black v. Grant, 50 Me. 364.

[8] Glover v. Shields, 32 Barb. (N. Y.) 374; Phelps v. Phelps, 17 Md. 120; Johnston v. Scott, 11 Mich. 232.

The purchaser cannot be required to accept a deed which will require judicial construction to identify the premises conveyed.[5]

But while a defective or ambiguous description may be, in many instances, cured by parol evidence, a purchaser should never be required to accept a conveyance open to that objection, for two reasons: First, because the want of an adequate and precise description of the premises tends to render his title unmarketable and objectionable to future purchasers; and, secondly, because a conveyance, though admitted to record, is not notice to subsequent purchasers, unless the granted premises be therein so plainly and clearly described that a person reading the deed may locate and identify the property therefrom.[6]

If it be intended by the deed to convey lands, they must be referred to or described in the deed. Thus it has been held that a conveyance of the "assets" of a bank would not pass real property belonging to the bank but not specifically described in the conveyance.[7]

§ 21. **Description of estate or interest.** The purchaser should also see that the instrument tendered conveys the quantity of estate to which, by the contract, he is entitled. If, by the contract, he is entitled to demand a conveyance of an absolute and indefeasible estate of a particular description in fee simple, he should promptly reject an instrument which conveys only the "right, title or interest" of the grantor in the premises, for such a paper, as a general rule, amounts to no more than a quit claim or release, and would not estop the grantor from setting up an after-acquired title to the estate.[1] If, however, there be an express conveyance of an estate of a particular description, the addition of the words "and all the estate, right, title, interest and demand whatever" of the grantor, would not convert the deed into a mere release.[2] The general rule is that a deed shall be construed to pass the largest estate which the grantor may have in the premises, unless an intention to convey a lesser estate appears from the instrument.[3] It follows, then, that the purchaser cannot reject a conveyance, when tendered to him, on the ground that the quantity of estate or interest which he is to receive is not therein specially described. He is only interested to see that the instrument does not convey a lesser estate than that to which he is entitled. A grant of "all the property I possess" will pass an estate in remainder. And a conveyance "of all right, title, interest or claim to any land descended to one from A." passes any equitable, as well as legal, estate so descended.[4] The purchaser, of course, cannot object to the deed tendered him, on the ground that it conveys a greater right or interest than the grantor may lawfully pass or assume, assuming that the purchase was of the lesser estate. The conveyance will operate as an alienation of just such interest in the premises as the grantor actually had.[5] Thus, a deed by a joint tenant, or tenant in common, purporting to convey the whole estate, is not, for that reason, void, but passes the individual interest of the grantor.[1] The quantity of estate or interest intended to be conveyed was expressed usually in that part of the common-law deed or feoffment known as the *habendum;* thus, "to have and to hold to him the said A. and his heirs forever," etc., "to have and to hold for and during the term of his natural life," etc. This clause is still sometimes found in modern deeds, but in most of the States has fallen into disuse.[2] When employed it may be looked to for the purpose of determining the true construction of the deed, with this limitation, however, that if it be inconsistent with or repugnant to the granting clause of the deed, the latter shall prevail.[3]

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[1] Bowman v. Wettig, 39 Ill. 416.

[2] Sawyer v. Kendall, 10 Cush. (Mass.) 241.

[3] McIver v. Walker, 9 Cranch (U. S.), 173; Strickland v. Draughan, 88 N. C. 315.

[4] Banks v. Ammon, 27 Pa. St. 172.

[5] Wadick v. Mace, 103 N. Y. Supp. 889; 118 App. Div. 777.

[6] Banks v. Ammon, 27 Pa. St. 172.

[7] Wilson v. Johnson, (Ind.) 38 N. E. Rep. 38.

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[1] Post, "Estoppel," § 218. But a conveyance of a "right, title and interest" will not be construed to be a mere quit claim, if an intent to convey an estate of a particular description appear. United States v. Cal. & Oreg. Land Co., 49 Fed. Rep. 496; 1 C. C. A. 330.

[2] Dennison v. Ely, 1 Barb. (N. Y.) 610.

[3] 1 Shep. Touch. 85; ante, § 5; Stockett v. Goodman, 47 Md. 54.

[4] Brantley v. Kee, 5 Jones Eq. (N. C.) 332; Barton v. Morris, 15 Ohio, 408.

[5] 3 Bl. Com. 171; Wisely v. Findlay, 3 Rand. (Va.) 361.

§ 22. **Signing and sealing.** We have already seen that a deed without a signature might be valid at common law, the authenticity of the instrument being established by the seal of the grantor.[4] But now by statute, in most of the American States, the signature of the grantor is an indispensable part of a deed. And even in those States in which there has been no statutory change of the common law, it is apprehended that no purchaser would be compelled to accept a conveyance not signed by the grantor, so strongly has use and custom impressed upon the masses the necessity of that act. The purchaser is entitled to a conveyance authenticated in such a manner as not to excite distrust and doubt in the minds of those to whom he desires to sell. In some of the States sealing remains, as at common law, an indispensable formality in the execution of a deed. Originally a seal consisted of an impression upon wax or some similar material, adhering to the surface of the paper or parchment, or an impression upon a waxen disc attached to the paper by ribbons or strings. But now, in perhaps every State of the Union, a direct impression upon the paper itself, or a simple scroll, is by statute made sufficient as a seal.[5] And the public have become so accustomed to their use that the ancient mode of sealing, if resorted to in any case, would probably be unsatisfactory to the purchaser. It is to be remembered that in certain of the States a scroll, to be sufficient as a seal, must be recognized as such in the body of the instrument. This is usually the office of the *testimonium* clause: "In testimony whereof, I have hereunto set my hand and seal," or, "Witness the following signatures and seal," or other similar phrase immediately preceding the signature. If not so recognized, the scroll will be disregarded and the paper held to be unsealed and inoperative as a deed.[1] But an exception to this rule exists in those cases in which the instrument acknowledged is such as is by statute required to be under seal, *e. g.*, a deed. In such a case the acknowledgment of the instrument as a deed supplies the failure of the grantor to recognize the seal in the body of the instrument.[2] The purchaser should see that there are as many scrolls or seals as there are signatures to the instrument. It has been held that several grantors or signers may adopt the seal of one of their number as the seal of all,[3] but to remove any doubt or difficulty upon that point, it is better that a scroll be attached to each of the signatures.

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[1] White v. Sayre, 2 Ohio, 110.

[2] 3 Washb. Real Prop. 466 (642).

[3] Flagg v. Eames, 40 Vt. 23; 94 Am. Dec. 363; Mayor v. Bulkley, 51 Mo. 227; 4 Kent Com. 468.

[4] Shep. Touchstone (Preston's ed.), 56; 3 Washb. Real Prop. 270; Jeffery v. Underwood, 1 Ark. 108.

[5] See, generally, upon the subject of seals, 3 Washb. Real. Prop. 271; 1 Devlin on Deeds, § 242.

§ 23. **Attestation or acknowledgment.** If by the law of the place where the granted premises lie deeds are required to be executed or acknowledged before subscribing witnesses, either as a mere authentication for registry or as a necessary part of the execution of the instrument, the purchaser should see that the requirement has been precisely fulfilled. He should also see that the witness is competent, being neither the husband or wife of a party in interest,[4] nor a party in interest himself, nor otherwise disqualified to testify.

The ordinary mode in which deeds are authenticated for record is by acknowledgment before certain designated officers, who attach a certificate of acknowledgment to the deed. In a few of the States this acknowledgment is an essential element in the execution of the deed, but in most of the States the only object of the acknowledgment is to furnish the recording officer with proof that the deed is genuine, while as between the parties, except where one of the grantors is a married woman, the deed is valid without the acknowledgment. The laws of nearly every State in the Union provide that the deed of a married woman shall not be valid unless she acknowledges it, and, after the deed has been explained to her privily and apart from her husband, declares that she had willingly executed it and wished not to retract it. But while, as a general rule, deeds are valid as between the parties without acknowledgment, that formality is of vital importance to the purchaser. For unless the acknowledgment be duly taken and all the requirements of the law in respect to the certificate be complied with, the deed, though admitted to record, will not be notice to subsequent purchasers and creditors of the grantor, who might, in consequence, deprive the purchaser of the estate. Besides, a defective certificate of acknowledgment is regarded as a defect in the purchaser's title, and should he afterwards sell the estate, would justify the vendee in refusing to accept the title. For this latter reason alone it is important that the purchaser should exact a literal compliance with every provision of law relating to acknowledgment and to the certificate. There has been no more prolific source of objections to title than irregular or informal certificates of acknowledgment. The eye of the martinet instantly detects a slight departure from statutory forms, and large transactions in real property are sometimes suspended, or even abandoned, on account of real or supposed difficulties thus suggested. It, therefore, behooves the purchaser to subject the deed which he receives to the closest scrutiny, in order that the certificate of acknowledgment shall afford no ground for captious objections to his title in the future. He should insist upon a rigid and literal adherence to the prescribed forms, no matter how trivial and unimportant the departures may seem. It is proposed now to invite attention to the essential parts of a certificate of acknowledgment, and for that purpose a form such as in general use is added here. Like the Statute of Frauds, every clause and every important word in it has been the subject of repeated adjudications.

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[1] Clegg v. Lemessurier, 15 Grat. (Va.) 108; Jenkins v. Hunt, 2 Rand. (Va.) 446.

[2] Cosner v. McCrum, (W. Va.) 21 S. E. Rep. 739; Ashwell v. Ayres, 4 Grat. (Va.) 283.

[3] Townsend v. Hubbard, 4 Hill (N. Y.), 351; Burnett v. McCluey, 78 Mo. 676; Lambden v. Sharp, 9 Humph. (Tenn.) 224.

[4] Corbett v. Norcross, 35 N. H. 99.

STATE OF ———, } *to-wit*(*a*):
County of ———. }

I, William Smith, a notary public in and for the county and State aforesaid(*b*), do certify that ——— A. B.(*c*) ——— whose name is signed to the foregoing writing(*d*), bearing date on the — day of ———, ———, personally appeared before me in the county aforesaid(*e*), the said A. B. being well known to me to be the person who executed the said writing(*f*), and acknowledged the same to be his act(*g*). And I further certify that C. B., wife of the said A. B., whose names are signed to said writing bearing date as aforesaid, the said C. B. being well known to me as one of the persons who executed said writing, and being by me examined privily and apart from her husband(*h*), and having the writing aforesaid fully explained to her(*i*), she, the said C. B., acknowledged the same to be her act and deed, and declared that she had willingly executed the same(*k*), and wished not to retract it(*l*). Given under my hand and seal(*m*), this — day of(*n*) ———.

WILLIAM SMITH(*o*), *N. P.*(*p*) [SEAL](*q*).

§ 24. (*a*) *Venue of certificate.* Regularly, a certificate of acknowledgment should state in the caption or margin, as in the foregoing form, the name of the State and of the city or county for which the officer was appointed, and in which the acknowledgment was taken. This is called the "venue" of the certificate, but its absence from the paper will not be fatal if it otherwise sufficiently appears from the body of the certificate or from the deed itself read in connection with the certificate where the acknowledgment was taken.[1] But if the place of acknowledgment cannot be determined from any of these sources, the certificate will be rejected.[2] The purchaser should avoid all difficulty upon this point by insisting that the paper tendered shall literally follow the prescribed form.

§ 25. (*b*) *Name, official designation, and authority of officer.* The name of the certifying officer should appear in the body of the certificate. But this, it is apprehended, is not indispensable if the certificate be duly signed by the officer. If the statute provides that the acknowledgment shall be made before two officers instead of one, the names of both should be set out in the certificate.[1] The purchaser, of course, whether as grantee in his own right or in a representative capacity,[2] should not take the acknowledgment of the grantor. The court will reject a certificate by an interested party.[3] The fact that an officer taking an acknowledgment is related to one of the parties does not bring him within this rule.[4] One who owns an interest in a tract of land is not thereby prevented from taking an acknowledgment of a deed conveying the interest of another person in the same land.[5] If, by statute, a recital in the body of the certificate showing the official character of the person taking the acknowledgment is made necessary, and there be no such recital and no addition of the official character after the signature of the officer, the certificate will be insufficient.[6] In the absence of any statutory provision upon the subject, it is not absolutely necessary to recite the official character in the certificate.[7] If the statute requires that the certificate shall show that the officer is one of those authorized by law to take acknowledgments, evidence *aliunde* will not be received to supply a defect in that particular; otherwise, if the statute does not so require.[8] A variance between the recital of official character in the body of the certificate, and that appended to the signature of the officer, is not material.[1] And a variance between the statutory description of the officer and that contained in the certificate is immaterial.[2] The purchaser should be careful to see that the certifying officer is one of the class authorized by statute to take acknowledgments. A certificate by an officer not named in the statute will be insufficient.[3] It is not necessary that an officer shall certify that he was authorized to take acknowledgments; the fact that he describes himself as a particular officer is sufficient, and his authority may be shown *aliunde*.[4] If the competency and authority of the certifying officer be unknown to the purchaser, he should insist upon evidence of those particulars, which, when supplied, usually consists of a certificate of the judge or clerk of the court in which the officer qualified, setting forth the fact of such qualification, and the vitality of the officer's commission.[5] It is customary also for the certifying officer to append to his certificate a statement of the time when his commission will expire.

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[1] Graham v. Anderson, 42 Ill. 514; 92 Am. Dec. 89; Dunlap v. Dougherty, 20 Ill. 397. Fuhrman v. London, 13 Serg. & R. (Pa.) 386; 15 Am. Dec. 608; Brooks v. Chaplin, 3 Vt. 281; 23 Am. Dec. 209.

[2] Vance v. Schuyler, 1 Gilm. (Ill.) 160; Hardin v. Kirk, 49 Ill. 153; 95 Am. Dec. 581.

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[1] Ridgely v. Howard, 3 Harr. & McH. (Md.) 321.

[2] Beaman v. Whitney, 20 Me. 413; Brown v. Moore, 38 Tex. 645, trustee; Black v. Gregg, 58 Mo. 565, trustee; Stevens v. Hampton, 46 Mo. 404; Dail v. Moore, 51 Mo. 589; Clinch River Veneer Co. v. Kurth, 90 Va. 737, a case in which the trustee in a deed took an acknowledgment thereof.

[3] Withers v. Baird, 7 Watts (Pa.), 227; 32 Am. Dec. 754; Groesbeck v. Seeley, 13 Mich. 329; Davis v. Beazley, 75 Va. 491; Clinch River Veneer Co. v. Kurth, (Va.) 19 S. E. Rep. 878; Wilson v. Traer, 20 Iowa, 231. Compare Kimball v. Johnson, 14 Wis. 674.

[4] Lynch v. Livingston, 6 N. Y. 422.

[5] Dussaume v. Burnett, 5 Iowa, 95; Long v. Crews, 113 N. C. 256; 18 S. E. Rep. 499, when the officer was a preferred creditor in the deed; so, also, in Baxter v. Howell, (Tex. Civ. App.) 26 S. W. Rep. 453. Acknowledgment of a clerk is not invalid because taken by his deputy. Piland v. Taylor, 113 N. C. 1; 18 S. E. Rep. 70.

[6] Johnston v. Haines, 2 Ohio, 55; 15 Am. Dec. 533. See, also, Van Ness v. Bank, 13 Pet. (U. S.) 17.

[7] Russ v. Wingate, 30 Miss. 440; Shultz v. Moore, 1 McLean (U. S.), 520.

[8] Van Ness v. Bank, 13 Pet. (U. S.) 17; Scott v. Gallagher, 11 Serg. & R. (Pa.) 347; 16 Am. Dec. 508.

But while a purchaser would doubtless be justified in declining to accept a deed which had been acknowledged before an officer whose commission had expired, or before one who had usurped the office, by virtue of which he acted, it seems that the certificate would in neither case be held invalid, if the person making it assumed to act in an official capacity, and had color of title to the office in question.[1] In such a case the act of a *de facto* officer cannot be questioned in a collateral proceeding.

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[1] Merchants' Bank v. Harrison, 39 Mo. 433; 93 Am. Dec. 285, *semble*.

[2] May v. McKeenon, 6 Humph. (Tenn.) 207; Welles v. Cole, 6 Grat. (Va.) 645.

[3] Dundy v. Chambers, 23 Ill. 369 (312). Here the statute authorized an acknowledgment before mayors of cities. It was held that an acknowledgment before a mayor of a *town* was invalid. Kimball v. Semple, 10 Cal. 441. See, also, Wright v. Wells, 12 N. J. L. 131; Uhler v. Hutchinson, 23 Pa. St. 110. In North Carolina it has been held that the authority of commissioners appointed by the State government to take acknowledgments to deeds is confined to deeds made by non-residents of the State. De Courcey v. Barr, 1 Busb. Eq. (N. C.) 181. A judge of the United States court, authorized to take an acknowledgment, may take it anywhere in his jurisdiction. Moore v. Vance, 1 Ohio, 14. A statute authorizing the appointment of commissioners of deeds in the cities of the State does not extend to cities incorporated after the act took effect. Parker v. Baker, 1 Clark (N. Y.), 223.

[4] Livingston v. McDonald, 9 Ohio, 168.

[5] It must appear from the certificate of the judge that the officer taking the acknowledgment was qualified to act as such at the time the acknowledgment was taken. Phillips v. People, 11 Ill. App. 340. As to doubts about the title arising from these particulars, see post, ch. 31, § 300.

Where a certifying officer has power to appoint a deputy, an acknowledgment taken and certified by such deputy will be sufficient.[2] The better practice is that the certificate shall read as if the acknowledgment had been taken before the principal himself, and be subscribed with his name, by "A. B., Deputy," etc.[3] But a certificate by the deputy in which the name of the principal nowhere appeared has been held valid.[4] The body of the certificate should show, either by express recital or by reference to the caption or the margin of the certificate, the State, county, city or other municipality in which, and as an officer of which, the person signing the certificate professes to act. If this cannot be collected from the whole instrument, read in connection with the deed, the certificate will be rejected.[5]

§ 26 (*c*) *Name of grantor.* The name of the grantor or person acknowledging the deed must be stated in the recital of acknowledgment in the certificate, and if not so stated, the certificate will be worthless,[6] unless he be so described therein that he may be identified as the person who signed the deed.[7] The purchaser should avoid any future question or doubt which may arise from this source by insisting that the name of the grantor recited in the certificate shall correspond precisely with the name signed to the deed.[8] But where a deed has been acknowledged in open court, a certificate of that fact which fails to state by whom the deed was acknowledged is, nevertheless, sufficient, it being presumed that the acknowledgment was by the grantor.[1]

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[1] Brown v. Lunt. 37 Me. 423; Prescott v. Hayes, 42 N. H. 56; Crutchfield v. Hewett, 2 App. Cas. (D. C.) 373.

[2] Muller v. Boggs, 25 Cal. 175; Rose v. Neuman, 26 Tex. 131; 80 Am. Dec. 646; Kemp v. Porter, 7 Ala. 138.

[3] Talbot v. Hooser, 12 Bush (Ky.), 408; McCraven v. McGuire, 23 Miss. 100.

[4] Beaumont v. Yeatman, 8 Humph. (Tenn.) 542.

[5] Vance v. Schuyler, 1 Gilm. (Ill.) 160.

[6] Smith v. Hunt, 13 Ohio, 260; 42 Am. Dec. 201; Hiss v. McCabe, 45 Md. 84; Hayden v. Westcott, 11 Conn. 129.

[7] Sanford v. Bulkley, 30 Conn. 344, where the person acknowledging the deed was referred to in the certificate as "Signer and sealer of the foregoing instrument." Wise v. Postlewait, 3 W. Va. 452.

[8] The danger of inattention to this feature of the certificate is illustrated by the case of Boothroyd v. Engles, 23 Mich. 19. There the deed was signed by *Harmon Sherman*, but the certificate recited an acknowledgment by *Hiram* Sherman, and this the court held insufficient as proof of execution and acknowledg-

If the deed be that of a corporation, the proper person to acknowledge it is the officer who affixed the corporate seal.[2] If the deed be signed by two or more officers of the corporation, an acknowledgment by one of them will suffice.[3] The instrument should be acknowledged to be the act and deed of the corporation, and not of the subscribing officer.[4]

It is the better practice that the official or representative capacity of a party acknowledging a deed, such as a sheriff, trustee, commissioner, etc., be stated in the certificate, but this is not essential, and a mere description of the grantor by his name will be sufficient.[5] An authority to execute a deed of trust as attorney gives the power by implication to acknowledge it for registration.[6] It seems that a grantor, executing a deed in his own proper person, may acknowledge it through an attorney in fact.[7] A certificate that "A. duly acknowledged to me that he subscribed the name of B. to said deed as principal and his own name as attorney in fact," is sufficient.[8]

§ 27. (*d*) *Annexation of deed and reference thereto.* In some of the States a certificate of acknowledgment is by statute required to be written or printed upon the same paper on which the deed is drawn. Under such a statute it has been held that a certificate

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ment of the deed by Harmon Sherman. A deed was signed "F. M. McKinzie," and the certificate stated an acknowledgment by "F. M. McKezie." Held, insufficient. McKinzie v. Stafford, (Tex.) 27 S. W. Rep. 790. But see Chandler v. Spear, 22 Vt. 388, where it was held that an incorrect recital of the grantor's name in the certificate was not fatal, if it appeared with reasonable certainty from the whole instrument that it was in fact acknowledged by him.

[1] Phillips v. Ruble, Litt. Sel. Cas. (Ky.) 221.

[2] Kelly v. Calhoun, 95 U. S. 710; Lovett v. Saw Mill Assn., 6 Paige (N. Y.), 54.

[3] Merrill v. Montgomery, 25 Mich. 73.

[4] McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274. But see Tenney v. East Warren, etc., Co., 43 N. H. 343.

[5] Dail v. Moore, 51 Mo. 589; Robinson v. Mauldin, 11 Ala. 977.

[6] Robinson v. Mauldin, 11 Ala. 977.

[7] Elliott v. Osborn, 1 Harr. & McH. (Md.) 146.

[8] Richmond v. Voorhees, 10 Wash. 316; 38 Pac. Rep. 1014.

written upon a separate piece of paper, but firmly attached to the deed, was not in compliance with the law and was insufficient,[1] a decision that savors somewhat of excessive refinement. Ordinarily, it suffices to attach the certificate to the deed with mucilage or other adhesive substances. And, in the absence of any statutory provision bearing upon the point, it is apprehended that the certificate would not be open to objection even if it were detachable from the deed. The fact that the certificate of acknowledgment refers to the deed to which it is attached as the "foregoing mortgage," the same not being a mortgage, is immaterial.[2]

§ 28. (*e*) *Jurisdiction of officer.* The rule that an officer has no power to take an acknowledgment without the limits of the county, city or other municipality in and for which he was appointed, prevails, it is believed, in most of the States.[3] It has been held, however, that if the certificate does not show that the acknowledgment was taken within the jurisdiction of the officer, that fact will be presumed,[4] the legal presumption being in favor of the validity of the acts of public officers, where nothing to the contrary appears. But inasmuch as the form of certificate generally prescribed recites the county for which the officer was appointed, and that the grantor personally appeared before the officer in that county, and acknowledged the deed, the purchaser, it is apprehended, may well reject a certificate which does not contain those recitals. Of course, the officer may always take an acknowledgment within his jurisdiction, regardless of the location of the premises conveyed.[5]

§ 29. (*f*) *Personal acquaintance with grantor.* The recital in the certificate that the party acknowledging the deed was well known to the officer, or that his identity was proved to the officer by the oaths of credible witnesses, is indispensable.[1] Equivocal phrases, such as that the officer is satisfied as to the identity of the party, will not suffice.[2] But where the statute provided that the officer should certify that he was "personally acquainted with" the grantor, a certificate that the grantor was "personally known" to the officer was held sufficient.[3] The omission of the word "known" in the clause "personally known to me" will be fatal.[4] But it has been held that the omission of the word "personally" from the same clause is immaterial.[5]

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[1] Winkler v. Higgins, 9 Ohio St. 599.

[2] Ives v. Kimball, 1 Mich. 308.

[3] Long v. Crews, 113 N. C. 256; 18 S. E. Rep. 499; Dixon v. Robbins, 114 N. C. 102; Ferebee v. Hinton, 102 N. C. 99; 8 S. E. Rep. 922. The jurisdiction of the officer depends upon the statute which confers his authority. Thus, when it was provided that an acknowledgment might be taken by "any justice in this State," it was held that a justice might take an acknowledgment anywhere in the State. Learned v. Riley, 14 Allen (Mass.), 109.

[4] Sidwell v. Birney, 69 Mo. 144; Thurman v. Cameron, 24 Wend. (N. Y.) 87. In both these cases the venue of the certificate showed the State and county in which it was made. Of course, it does not necessarily follow that the *acknowledgment* was taken in such county. Trulock v. Peeples, 1 Ga. 3.

[5] Johnson v. McGhee, 1 Ala. 168; Colton v. Seavey, 22 Cal. 496.

§ 30. (*g*) *Fact of acknowledgment.* The recital that the grantor appeared before the certifying officer and acknowledged the deed is the gist of the whole certificate. The word "acknowledged" is not indispensable,[6] but unless the fact of acknowledgment be made to appear by the use of that word or its equivalents, the certificate will be fatally defective.[7] A recital that the grantor made oath that he signed, sealed and delivered the deed has been held equivalent to a statement that he acknowledged the deed.[8] But a recital that the grantor "stated" that he had executed the deed was held insufficient.[1] It seems that an inadvertent or clerical omission of the word "acknowledged" from the certificate will render it invalid.[2] And where a statute provides that the grantor shall acknowledge the instrument to be his "voluntary" act and deed, the omission of the word "voluntary," or its equivalent, makes the certificate worthless.[3]

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[1] Fogarty v. Finlay, 10 Cal. 239; 70 Am. Dec. 714; Wolf v. Fogarty, 6 Cal. 224; 65 Am. Dec. 509; Gove v. Cather, 23 Ill. 634 (585); 76 Am. Dec. 711; Fryer v. Rockefelier, 63 N. Y. 268. This was a case which arose between vendor and purchaser. The purchaser rejected the title because a certificate of acknowledgment in the chain of title did not show personal acquaintance with the grantor.

[2] Kimball v. Simple, 25 Cal. 440; Shepherd v. Carriel, 19 Ill. 313; Short v. Conlee, 28 Ill. 219.

[3] Kelly v. Calhoun, 95 U. S. 710. See, also, Sheldon v. Stryker, 42 Barb. (N. Y.) 284; Thurman v. Cameron, 24 Wend. (N. Y.) 87.

[4] Tully v. Davis, 30 Ill. 103; 83 Am. Dec. 179. Even though the omission be apparently inadvertent. Wolf v. Fogarty, 6 Cal. 224; 65 Am. Dec. 509; Gould v. Woodward, 4 Green (Iowa), 82. But see Rosenthal v. Griffin, 23 Iowa, 263.

[5] Hopkins v. Delaney, 8 Cal. 85; Welch v. Sullivan, 8 Cal. 511; Alexander v. Merry, 9 Mo. 514.

[6] Chouteau v. Allen, 70 Mo. 290. Here the certificate recited that the grantor, being duly sworn, "deposes and says," etc.

[7] Cabell v. Grubbs, 48 Mo. 353; Short v. Conlee, 28 Ill. 219. In Bryan v. Ramirez, 8 Cal. 461; 68 Am. Dec. 340, the certificate recited that the grantor was known to the officer to be such, but did not show an acknowledgment.

[8] Ingraham v. Grigg, 13 Sm. & M. (Miss.) 22. An acknowledgment that he "signed sealed and delivered" the deed is also equivalent to an acknowl-

§ 31. (*h*) *Privy examination of wife.* A certificate of acknowledgment of a deed executed by a married woman requires the closest scrutiny of the purchaser. The formalities prescribed by statute in this behalf are intended to supersede the ancient common-law mode of conveying the lands of a married woman by fine and recovery. They are, therefore, necessary, not only as an authentication of the deed for record, but as a part of the execution of the deed itself, without which it would be invalid between the parties, as well as to subsequent purchasers without notice.[4] For this reason, and because of the jealous care with which the courts guard the rights of those who act principally under the direction or persuasion of others, the most rigid compliance with all the requirements of the law relating to the acknowledgments of married women has been exacted. It is, therefore, indispensable that the certificate shall show that the woman was examined by the officer privily and apart from her husband. But it is not necessary that these precise words shall be employed in the certificate if others of the same import are used. Thus, a certificate that the officer took "the private examination" of the wife, and that she acknowledged that "she executed the deed without any compulsion from her husband," was held sufficient.[5] So, where the language was "after a private examination, separate and apart from her said husband."[6] And where the statute required that the woman should be examined "out of the presence" of the husband, a certificate that she was "pri-

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edgment that he executed the deed. Jacoway v. Gault, 20 Ark. 190; 73 Am. Dec. 494.

[1] Dewey v. Campau, 4 Mich. 565. This was a great refinement.

[2] Stanton v. Button, 2 Conn. 527.

[3] Newman v. Samuels, 17 Iowa, 528; Spitznagle v. Van Hessch, Neb. 338. But see Henderson v. Grewell, 8 Cal. 581.

[4] Barnett v. Shackleford, 6 J. J. Marsh. (Ky.) 532; 22 Am. Dec. 100.

[5] Skinner v. Fletcher, 1 Ired. L. (N. C.) 313.

[6] Kennedy v. Price, 57 Miss. 771.

vately examined, apart from and out of the hearing of her husband," was accepted.[1] But where the statute required that the officer should examine the wife "separately and apart" from her husband, a certificate that she had been examined "apart" from him was held insufficient.[2]

§ 32. (i) *Explanation of contents of deed.* The recital that the officer explained to the woman the contents of the deed is also absolutely indispensable.[3] The intent of the law is to protect her from deception, as well as coercion, in the execution of the instrument. Where a statute provided that the officer should make known and explain the contents of the deed to the woman, a certificate which set forth that she was made acquainted with the contents of the deed, but did not state that they were explained to her, was deemed sufficient.[4] So, also, where the certificate recited that the woman "acknowledged and declared that she was well acquainted with the contents of the deed,"[5] a decision open to grave doubt, since she may have been falsely advised as to the said contents. But a certificate that the woman "declared that she fully understood the contents of said deed," without stating that the contents were explained to her, is invalid.[6]

We have already seen that a recital of acknowledgment in the certificate, or what amounts to such a recital, is necessary, and cannot be supplied by intendment.[7] Also, that, as a general rule, the deed of a married woman, whether a mere relinquishment of her contingent right of dower, or a conveyance of her separate estate, is void as between the parties, unless acknowledged and certified in strict conformity with the requirements of the law.[1]

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[1] Deery v. Cray, 5 Wall. (U. S.) 795. So, also, where the statute provided that the officer "shall examine her privately, out of the hearing of her husband," and the certificate was "being by us privately examined," omitting the words "out of the hearing of her husband." Webster v. Hall, 2 Harr. & McH. (Md.) 19; 1 Am. Dec. 370.

[2] Dewey v. Campau, 4 Mich. 565. But see the remarks of MILLER, J., in Deery v. Cray, 5 Wall. (U. S.) 795, to the effect that "separate" and "apart," as used in the form, are synonymous terms.

[3] Houston v. Randolph, 12 Leigh (Va.), 445; Bolling v. Teel, 76 Va. 498.

[4] Chauvin v. Wagner, 18 Mo. 541, a doubtful decision.

[5] Thomas v. Meier, 18 Mo. 573.

[6] Langton v. Marshall, 59 Tex. 296; Runge v. Sabin, (Tex.) 30 S. W. Rep. 568.

[7] Ante, § 30.

§ 33. (*k*) *Voluntary act of wife.* Another indispensable requisite of the certificate is that it shall contain a recital, either in terms or in substance, that the woman declared that she had signed, sealed and delivered the deed willingly. An officer should never undertake to draw the certificate unless he has the statutory form before him. If he relies upon his memory he is apt to use expressions deemed by him the equivalent of those contained in the statute, or to omit words which appear to him immaterial. A vast number of cases are to be found in the reports in which the courts have been called upon to decide the correctness of his judgment in these particulars. Expressions which the courts in one State have deemed sufficient substitutes for the language of the statute above quoted, have been rejected in others.[2] A certificate of acknowledgment by a married woman which departs from the statutory form, may always be relied upon to create such a reasonable doubt concerning the title as would justify a purchaser from the grantee in refusing to complete the contract, for there is no rule by which the sufficiency of the certificate can be tested, and while one judge might deem it a substantial compliance with the law, he could have no assurance that another judge, if the title should be afterwards attacked, in ejectment or otherwise, would not entertain a contrary opinion. And if a purchaser from the grantee might reject the title as unmarketable upon this ground, *a fortiori* might the grantee himself reject the conveyance until a certificate free from doubt should be tendered. All possibility of doubt or question as to the validity of the certificate should be removed by insisting upon a strict and literal conformity with the language of the statutory form or requirement.[3]

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[1] Mason v. Brock, 12 Ill. 273; 52 Am. Dec. 490; Martin v. Dwelly, 6 Wend. (N. Y.) 9; 21 Am. Dec. 245.

[2] Clinch River Veneer Co. v. Kurth, 90 Va. 737, and cases cited below.

[3] *Cases in which the certificate was held insufficient.* Where the statute provided that the certificate should show that the woman acknowledged that she had not been induced to execute the deed through "ill-usage," and the certificate was that she acknowledged that she executed the deed "of her own free will, and not through any threats of her said husband, or fear of his displeasure." Hawkins v. Burress, 1 Harr. & J. (Md.) 513. Language of statute, "signed, sealed and delivered the deed as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband;" language of certificate, "signed, sealed and delivered

§ 34. (*l*) *Wish not to retract.* If the statute provides that the wife, in addition to acknowledging the deed, shall state that she does not wish to retract it, a certificate will be fatally defective if it does not recite that fact.[1] It is not absolutely necessary that the certificate shall follow the precise language of the statute,[2] and the employment of a wrong word, but one obviously intended for that used in the statute, will not vitiate the instrument.[3] But inasmuch

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the above instrument of her own free will and accord, and without any force, persuasion or threats from her said husband." Boykin v. Rain, 28 Ala. 332; 65 Am. Dec. 349. See, also, Alabama Life Ins. & Tr. Co. v. Boykin, 38 Ala. 510. Language of statute, "freely, voluntarily, without compulsion, constraint or coercion by her husband;" language of certificate, "had willingly signed, sealed and delivered the same, and that she wished not to retract it." Henderson v. Rice, 1 Coldw. (Tenn.) 223. Language of statute, "had willingly executed the same, and does not wish to retract it;" the certificate omitted the words "had willingly executed the same." Leftwich v. Neal, 7 W. Va. 569. Language of statute, "voluntary act and deed;" language of certificate, "of her own free will." Freeman v. Preston, (Tex.) 20 S. W. Rep. 495.

Cases in which the certificate was held sufficient. Where the statute provided that the certificate should show that the woman acknowledged the deed "without undue influence," and the certificate was that she acknowledged "that she executed the same freely and voluntarily * * * without fear or compulsion." Goode v. Smith, 13 Cal. 81. Language of statute, "of her own free will * * * without undue influence or compulsion of her husband;" language of certificate, "without undue influence or compulsion of her husband." Tubbs v. Gatewood, 26 Ark. 128. Language of statute, "voluntarily and of her own free will and accord, without any fear or coercion of her husband;" language of certificate, "acknowledged the above indenture to be (her) voluntary act and deed." Ruffner v. McLenan, 16 Ohio, 639. Language of statute, "signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her husband;" language of certificate, "that she signed, sealed and delivered the same, freely and voluntarily, and without any threats or compulsion from her said husband." Den v. Geiger, 9 N. J. L. 225. Language of statute, "as her voluntary act and deed;" language of certificate, "freely and of her own accord." Dundas v. Hitchcock, 12 How. (U. S.) 256. Language of statute, "that she had freely and voluntarily executed the same;" language of certificate, "without any fear, threats or compulsion." Allen v. Denoir, 53 Miss. 321. Language of statute, "that she had of her own free will executed the deed, without compulsion or undue influence of her husband;" language of certificate, "freely and of her own consent, but not by the persuasion or compulsion of her said husband." Little v. Dodge, 32 Ark. 453.

[1] Grove v. Zumbro, 14 Grat. (Va.) 501; Churchill v. Moore, 1 R. I. 209.

[2] Bateman's Petition, 11 R. I. 585, 588.

[3] Belcher v. Weaver, 46 Tex. 293; 26 Am. Rep. 267.

as variances and departures from the statutory form excite doubt and distrust in the minds of timid buyers, the purchaser should insist that the precise language of the statute be used.

§ 35 (*m*) *Reference to seal.* The laws of some of the States require that the certificate of acknowledgment shall be authenticated by the seal as well as the signature of the certifying officer. There seems to be some conflict of opinion in these States as to whether it is necessary that the officer shall acknowledge or recognize the seal, either in the body of the instrument or in the attestation clause.[1] Without pausing to consider the cases either way, it suffices to say that wherever by the *lex rei sitæ* a seal is required, the safer course is for the purchaser to see that there is a recognition of the seal by the officer, in the usual form, "Given under my hand and seal," etc.

§ 36. (*n*) *Date of certificate.* It is customary, and the better practice, for the officer to insert the date of the certificate in the attestation clause. But a date is not indispensable to the validity of the certificate, unless made so by statute.[2] And the fact that the certificate bears date before the deed itself is immaterial.[3] Inasmuch, however, as the custom of dating the certificate universally prevails, and the absence of a date might raise a doubt in the mind of a timid purchaser respecting the title,[4] the grantee would probably be justified in rejecting a certificate which was deficient in that particular.

§ 37. (*o*) *Signature of officer.* It is absolutely essential that the certificate shall be signed by the officer by whom it is made. The recital of the name of the officer in the body of the certificate will not suffice.[5] The certificate is often printed or prepared by a third person, and presented to the officer complete, with the exception of his signature, consequently the subscription of his name is an important step in the authentication of the paper. But even though the name were inserted in the form by the officer himself, or the paper were wholly in his handwriting, the omission of the signature would be fatal, the actual *subscription* of his name being required as a promulgation of the instrument.[1] If the certificate be by a deputy, the name of the principal should be subscribed "by A. B., deputy," etc.[2]

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[1] The cases may be seen in Mr. Devlin's work on Deeds, § 491.

[2] Webb v. Huff, 61 Tex. 677; Irving v. Brownell, 11 Ill. 402.

[3] Gest v. Flock, 2 N. J. Eq. 108.

[4] It will be seen hereafter that in some cases it has been held that a purchaser may reject a title if "unsatisfactory" to him, though his objections to the title are really captious and untenable. Post, § 288.

[5] Carlisle v. Carlisle, 78 Ala. 542.

§ 38. (*p*) *Abbreviation "J. P.," etc.* It is not absolutely necessary that the officer shall add to his signature his official designation, if the capacity in which he acts elsewhere appears in the certificate.[3] We have already seen that, as a general rule, his official capacity must somewhere appear, either from the body of the certificate or from the attestation clause, as the instrument, must, on its face, appear to be the act of a competent person. As it is customary to follow the signature of the officer with his official title, the purchaser should see that this is done in order that his title papers may present no appearance of irregularity. An abbreviation of the official title in common use, such as "J. P." or "N. P.," will suffice.[4]

§ 39 (*q*) *Seal of officer.* Where by statute it is provided that the certificate shall be under the signature and seal of the certifying officer, the omission of the seal will be fatal.[5] This formality, however is not required in all the States, and where not required the absence of the seal is immaterial.[6] It has been held that if by the law of a State in which an acknowledgment is taken a seal by the certifying officer is unnecessary, the want of such a seal will be no objection to the title in another State in which the land lies. In other words, that the validity of the certificate in this respect is to be governed by the law of the place where the acknowledgment was taken.[1] Where by statute the officer is required to have a seal, it must be an instrument capable of making a durable impression upon paper or some tenacious material attached to the paper.[2] If the officer be one who is not required by statute to have a seal, it is apprehended that a scroll or scrawl, recognized by him in the instrument as a seal, will suffice. If the form of the officer's seal be prescribed by statute, it must of course conform to the requirement. If there be no provision upon the subject, any device that he chooses to adopt will suffice. It is better, of course, that the seal should state the name and office of the officer, but the better opinion seems to be that these particulars are not indispensable.[3] The fact that the seal precedes instead of follows the signature of the officer is immaterial.[4]

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[1] Marston v. Bradshaw, 18 Mich. 81; 100 Am. Dec. 152.

[2] McCraven v. McGuire, 23 Miss. 100.

[3] Brown v. Farrar, 3 Ohio, 140. The omission of the letters "N. P." after the signature of a notary public does not affect the validity of the certificate. Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514; 40 N. E. Rep. 1014.

[4] Final v. Backus, 18 Mich. 218; Russ v. Wingate, 30 Miss. 440; Rawley v. Beman, 12 Ill. 198.

[5] Mason v. Brock, 12 Ill. 273; 52 Am. Dec. 490; Hastings v. Vaughn, 5 Cal. 315; Booth v. Cook, 20 Ill. 129. The notary's seal must appear, when his certificate declares that he has affixed it; otherwise the certificate is invalid. Bullard v. Perry, 28 Tex. 347. An abstract of title contained a memorandum of a certificate of acknowledgment as follows: "Certif. of acknt. by notary public for said county is signed 'B. R. Randall, L. S., Notary Public.'" Held, that the abstract sufficiently showed a certificate under official seal. Bucklen v. Hasterlik, 155 Ill. 423; 40 N. E. Rep. 561.

[6] Farnum v. Buffum, 4 Cush. (Mass.) 260; Baze v. Arper, 6 Minn. 220. None is required in Virginia; the court takes judicial notice of the acts of domestic notaries public. See, also, Powers v. Bryant, 7 Port. (Ala.) 9.

§ 40. (*r*) *Surplusage, clerical mistakes.* If a certificate of acknowledgment is in all other respects sufficient, the fact that it contains statements or recitals not required by law is immaterial. Mere surplusage or redundancy leaves the certificate unimpaired.[5] If the instrument contains all that the law requires, the fact that it is in the form of a jurat is of no consequence.[6] Nor will an obviously clerical mistake, such as the substitution of a word which does not make sense for the one used in the statute,[7] nor the omission of an immaterial word, especially where the omission is a plain oversight or inadvertence, such as the failure to insert a pronoun in a blank left for the purpose,[8] make the certificate worthless. But with respect to clerical mistakes and omissions there has been much question and doubt as to what of them are and what are not material. The omission of the word "acknowledged,"[1] though obviously inadvertent, has been held fatal to the certificate, and, on the other hand, the absence of the word "known" from the clause "fully made known to her,"[2] has been held a mere clerical omission. And in other cases omissions which one court has treated as immaterial have been by other courts regarded as of vital importance. Under these circumstances there can be no doubt that a purchaser would be justified in refusing to accept the conveyance if the certificate of acknowledgment attached thereto contained either clerical errors or inadvertent omissions. The vendor cannot force upon him a deed which, though it may be finally adjudged sufficient, is executed or acknowledged in such a manner as to cast a doubt upon the title. Generally the statutes of the different States prescribe the several elements of the acknowledgment and the duties of the certifying officer, and give a form in which the certificate may be made by the officer. Where this is done, and the form given omits some phrase or expression used in the statute, the form governs, and a certificate which literally follows the latter will be sufficient.[3] The body of the deed may sometimes be referred to for the purpose of supplying omissions from the certificate.[4] Thus, where the statute required that the certificate should show that the grantor acknowledged that he signed, sealed and delivered the deed "on the day therein mentioned, and the certificate contained no such recital, it was held that the omission was cured by reference to the deed, which bore the same date as the certificate.[5]

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[1] Bucklen v. Hasterlik, 155 Ill. 423; 41 N. W. Rep. 561.

[2] Mason v. Brock, 12 Ill. 273; 52 Am. Dec. 490.

[3] Mason v. Brock, 12 Ill. 273; 52 Am. Dec. 490. But see In re Nebe, 11 Nat. Bankruptcy Reg. 289.

[4] Gilchrist v. Dilday, 152 Ill. 207; 38 N. E. Rep. 572.

[5] Chester v. Rumsey, 26 Ill. 97; Stuart v. Dutton, 39 Ill. 91; Whitney v. Arnold, 10 Cal. 531.

[6] Ingraham v. Grigg, 13 Sm. & M. (Miss.) 22.

[7] Calumet & Chicago Canal Co. v. Russell, 68 Ill. 426.

[8] Dickerson v. Davis, 12 Iowa, 353. In Spitznagle v. Van Hessch, 13 Neb. 338, the omission of the words "and deed" from the clause "voluntary act and deed" was held immaterial. So, also, where the word "deed" was inserted and the word "act" omitted. Stuart v. Dutton, 39 Ill. 91. The omission of the

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words "for the consideration and purposes therein set forth" is fatal. Jacoway v. Gault, 20 Ark. 190; 83 Am. Dec. 494. A certificate that the grantors acknowledged a paper "to be their act and deed" instead of following the statutory form, that they "signed, sealed and delivered," etc., is sufficient. Den v. Hamilton, 12 N. J. L. 109.

[1] Stanton v. Button, 2 Conn. 527.

[2] Hornbeck v. Building Assn., 88 Pa. St. 64.

[3] Belcher v. Weaver, 46 Tex. 293; 26 Am. Rep. 267. Here the statute provided that the wife should acknowledge that she did "freely and willingly sign," etc., while the form was that "she had willingly signed," etc., omitting the word "freely." The court held that the word fully might be omitted in the certificate, because it was omitted in the form.

[4] Bradford v. Dawson, 2 Ala. 203.

[5] Bradford v. Dawson, 2 Ala. 203; Carter v. Chandron, 21 Ala. 72.

§ 41. (*s*) *Amendment of the certificate.* It will doubtless occur to the reader that in most cases objections to the sufficiency of a certificate of acknowledgment are capable of easy removal by the tender of a new certificate. It may be, also, that before the deed has been delivered by the grantor the officer may legally amend his certificate,[1] though it has been held in some cases that after the paper has been signed and delivered by the latter his powers over it have ceased, and that he cannot fill up blanks, add to, nor change the instrument so as to make it conform to the law.[2] That he may not do this scarcely admits of doubt in a case in which the deed has been admitted to record.[3] But it is not easy to perceive any grounds upon which an amendment of the certificate made by the officer at the request of the grantor before the deed was delivered and accepted could be deemed insufficient or invalid, since the rights of no third person would be thereby affected, and such a request would be itself substantially a reacknowledgment of the deed. However this may be, the better course for the purchaser is to insist upon a reacknowledgment of the deed.[4] This, in most cases, would be as feasible as an amendment of the certificate, and would leave no pretext for an objection to the title on the part of future purchasers. It is hardly necessary to say that the acknowledgment of a deed must be a matter of record and cannot be proved by parol testimony.[5] Nor can a certificate which is defective in a material particular be cured by evidence *aliunde*.[6] Neither is parol evidence admissible to contradict a certificate of acknowledgment in a collateral proceeding.[7] But of course the certificate may be attacked in a direct proceeding on the ground that the acknowledgment was procured by duress or fraud.[8] The certificate must set out in terms or in substance all that the statute requires. An acknowledgment certified to have been made "according to the act of the assembly in that case made and provided" is insufficient.[1]

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[1] There is a *dictum* to this effect in Elliot v. Piersol, 1 Pet. (U. S.) 328.

[2] Wedel v. Herman, 59 Cal. 507; Merritt v. Yates, 71 Ill. 639; 23 Am. Rep. 128.

[3] Elliot v. Piersol, 1 Pet. (U. S.) 328; Bours v. Zachariah, 11 Cal. 281; 70 Am. Dec. 779, *dictum*, the deed in that case having been recorded before the amendment was made.

[4] In Merritt v. Yates, 71 Ill. 636; 23 Am. Rep. 128, it is said that the only way in which the defective certificate can be remedied is by reacknowledgment.

[5] Pendleton v. Button, 3 Conn. 406; Hayden v. Westcott, 11 Conn. 129.

[6] O'Ferrall v. Simplot, 4 Iowa, 381.

[7] This principle is recognized by statute in Kentucky. Keith v. Silberberg, (Ky.) 29 S. W. Rep. 316.

[8] Grider v. Land Mortgage Co., 99 Ala. 281; 12 So. Rep. 775.

§ 42. **Unauthorized reservations or restrictions.** The purchaser may reject a conveyance which contains reservations, restrictions or conditions, not authorized by the contract under which the conveyance was drawn.[2] Thus, under an agreement by which he is to receive a "good and sufficient warranty deed," the purchaser may reject a deed which reserves an easement in the land to a third person, though he knew of the existence of the easement at the time the contract was made.[3] So, also, where the deed contained an unauthorized reservation of a one-acre graveyard on the premises.[3a]

The conveyance may be rejected if it does not include any easement or servitude to which the purchaser may be entitled under the contract in other lands of the vendor.[4]

The purchaser is not bound to accept a deed containing erasures,[5] nor one containing a blank, left for the consideration money.[6]

A purchaser entitled to the covenants implied from the use of the words "grant and convey," cannot be required to accept a deed in which the grantor limits the effect of those covenants by a clause that he warrants the title "against the lawful claims of all persons claiming by, through, or under him, but no other."[7]

A purchaser who buys with the understanding that he is to receive a title free from incumbrances may insist upon a conveyance free from restrictive covenants.[7a]

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[1] Flannagan v. Young, 2 Harr. & McH. (Md.) 38.

[2] Millinger v. Daly, 56 Pa. St. 245. See 3 Washb. Real Prop. 431 (639). Goldstein v. Hensley, 4 Cal. App. 444, 88 P. 507; Gregg v. Carey, 4 Cal. App. 554, 88 P. 282.

Aliter, if the restrictions be authorized by the contract of sale. Millikan v. Hunter, 180 Ind. 149, 100 N. E. 1041.

[3] Morgan v. Smith, 11 Ill. 194.

[3a] Bluegrass Realty Co. v. Shelton, 148 Ky. 666, 147 S. W. 33, 41 L. R. A. (N. S.) 384.

[4] Wilson v. McNeal, 10 Watts (Pa.), 422.

[5] Markley v. Swartzlander, 8 W. & S. (Pa.) 172.

[6] Moore v. Beckham, 4 Binn. (Pa.) 1.

[7] Union Mut. Life Ins. Co. v. Crowl, (Tex Civ. App.) 67 S. W. 901.

[7a] Krah v. Wassmer, 75 N. J. Eq. 109, 71 Atl. 404.

In a case in which the vendor leased the premises to a stranger after the sale, and the purchaser, by the terms of the contract, was entitled to a warranty deed, it was held that he might reject a deed purporting to be made subject to the lease, or describing the property as "being the same now occupied by" the lessee, since those clauses might possibly be construed as excepting the lease from the operation of the warranty.[1]

§ 43. **Waiver of objections.** The purchaser should make his objections to the deed, either in respect to form or substance, when tendered. If he fail in this respect it has been held that he thereby waives all objections.[2] And when the duty devolves upon the purchaser to tender a deed it has been held that the grantor must make his objection to the deed, if any, within a reasonable time. He cannot set up an objection to the deed for the first time when sued for a breach of contract or for specific performance.[2] If the purchaser takes possession and accepts a conveyance as satisfactory he cannot afterwards object that it is insufficient.[4] And if a deed be valid, but objectionable to the purchaser in form, he must, if he have an opportunity for inspection, make his objection at the time of the tender, or it will be waived.[5] In a case in which the purchaser took possession under a deed to which he made no objection, and afterwards refused to return the deed, it was held that he could not thereafter abandon the contract and recover back his deposit.[6] If the purchaser makes no objection to the deed when tendered, but merely says that he is unable to pay the purchase price, he will be held to have waived all objection to the deed, even though not drawn in conformity to the contract.[7] In such a case he will also be deemed to have waived any objection to specific performance, based upon the existence of an incumbrance on the property at the time the deed was tendered.[1] If he retains the deed without objection to its sufficiency he cannot afterwards defend a suit for the purchase money, on the ground that the deed was not properly acknowledged.[2]

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[1] Bruner v. Diamond, 65 Ill. App. 476.

[2] Moak v. Bryant, 51 Miss. 560; Dresel v. Jordan, 104 Mass. 407; Kenniston v. Blakie, 121 Mass. 552; Bigler v. Morgan, 77 N. Y. 312; Royal v. Dennison, 109 Cal. 558; 42 Pac. 39; Ellis v. Lockett, 100 Ga. 719; 28 S. E. 452. Groden v. Jacobson, 114 N. Y. Supp. 183, 129 App. Div. 508.

[3] Morgan v. Stearns, 40 Cal. 434.

[4] Griswold v. Brock, 43 Ill. App. 203.

[5] Stryker v. Vanderbilt, 25 N. J. L. 68.

[6] Kenniston v. Blakie, 121 Mass. 552.

[7] Moak v. Bryant, 51 Miss. 560.

The purchaser objecting to the form and contents of the deed tendered by the vendor, must allow a reasonable time in which the objections may be removed.[3]

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[1] Ashbaugh v. Murphy, 90 Ill. 182.

[2] Morrison v. Faulkner, (Tex.) 21 S. W. Rep. 984. If a deed is defective for want of a seal or other necessary formality it will be reformed, even as against a purchaser for valuable consideration, if he had notice of the plaintiff's rights. Mastin v. Halley, 61 Mo. 196; Wadsworth v. Wendell, 5 Johns. Ch. (N. Y.) 224.

[3] Geo. H. Paul Co. v. Shaw, 86 Kan. 136, 119 Pac. 546.

CHAPTER V.

CAVEAT EMPTOR.

- **GENERAL OBSERVATIONS.** § 44.
- **APPLICATION OF THE MAXIM TO JUDICIAL SALES.**
  - **Inherent defects of title.** § 45.
    - *Effect of confirmation of the sale.* § 46.
    - *Exceptions to the rule.* § 47.
  - **Fraud as it affects rights of purchasers at judicial sales.** § 48.
  - **Errors and irregularities in the proceedings. Collateral attack.** § 49.
  - **Want of jurisdiction.** § 50.
  - **Matters occurring after jurisdiction has attached.** § 51.
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- **SALES BY EXECUTORS AND ADMINISTRATORS.**
  - **Sales in pursuance of testamentary powers.** § 53.
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  - **Want of jurisdiction. Errors and irregularities.** § 56.
- **SHERIFF'S SALES.**
  - **Want of title in execution defendant.**
    - *General rules.* § 57.
    - *Exceptions.* § 58.
    - *Fraudulent representations.* § 59.
    - *Rights of purchaser from purchaser under execution.* § 60.
  - **Title under void judgment.** § 61.
  - **Title under void sale.** § 62.
- **TAX SALES.** § 63.
- **SALES BY TRUSTEES, ASSIGNEES, ETC.** § 64.
- **SUBROGATION OF PURCHASER AT JUDICIAL AND MINISTERIAL SALES.**
  - **Where the sale is void.** § 65.
  - **Where the sale is valid.** § 66.

§ 44. **GENERAL OBSERVATIONS.** The maxim *caveat emptor* (let the buyer beware), as it respects titles to land, is peculiar to the common law. It is unknown to the civil law.[1] The principal applications of the maxim are: (1) In the denial of relief to a purchaser of lands who has accepted a conveyance of a defective title without covenants of indemnity from the grantor;[2] (2) In charging a purchaser with *laches* or negligence in failing to avail himself of means for ascertaining the validity of the title;[1] (3) To designate a class of cases in which it is conclusively presumed that the purchaser agreed to take just such title as the vendor had, and in which he is required to pay the purchase money, though the title which he is to receive will be utterly worthless, and though the contract still remains executory. As a consequence of this doctrine, in the latter class of cases no contract on the part of the vendor that his title is good and indefeasible will be implied from the mere relations of the parties, contrary, as we have seen, to the general rule when the vendor contracts in his own right. It is to this class of cases that our attention will be directed. Of the two first-mentioned class of cases there is nothing to be observed here, the obligation of the purchaser to protect himself by covenants for title, or by searches for defects, being elsewhere considered in this work.

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[1] Co. Litt. 102a; Brown Leg. Max. 768.

[2] Phillips v. Walsh, 66 N. C. 233.

The cases to which the rule *caveat emptor* applies, in the sense that the purchaser will be deemed to have entered into the contract with the understanding that he is to take the title, such as it is, without an express contract to that effect, are those in which the purchase was made at (1) judicial sales; or (2) ministerial or fiduciary sales; that is, sales by executors, administrators or other personal representatives under judicial license; sales by executors and administrators under powers conferred by the will; sales by trustees and mortgagees; sales by tax collectors, and generally any sale in which the vendor acts not in his own right, but in a fiduciary or ministerial character, and from whom the purchaser has no right to require general covenants for title.

§ 45. APPLICATION OF THE MAXIM TO JUDICIAL SALES.—Inherent defects in the title. A judicial sale may be described to be a sale made by an officer of a court of justice in pursuance of an order or decree of such court, and which remains incomplete until ratified or confirmed by the court.[2] The commissioner or other officer making the sale is the mere agent of the court to receive and report the purchaser's bid.[3] Objections to the title by a purchaser at a judicial sale are either such as are founded upon want of jurisdiction, or errors and irregularities in the proceedings resulting in the decree under which the purchase is made, or such as are founded upon inherent defects in the title independent of such proceedings, for example, the existence of a better title in a stranger than that which the court undertakes to sell. In either case objections to the title must be made before the sale is confirmed.

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[1] Phillips v. Walsh, 66 N. C. 233.

[2] Dresbach v. Stein, 41 Ohio St. 70.

[3] Bolgiano v. Cook, 19 Md. 375.

§ 46. *Effect of confirmation of the sale.* It has been said that the doctrine *caveat emptor* applies in all its force to judicial sales, that is, that it will be conclusively presumed that the purchaser contracts to take the title, such as it may be.[1] This presumption, however, does not apply until the sale has been confirmed. The purchaser may always resist the confirmation of the sale on the ground that the title is bad,[2] and he may have a reference to a master to determine whether a good title can be made.[1] But if he permits the sale to be confirmed without objection, he cannot afterwards refuse to pay the purchase money because of imperfections in the title,[2] or irregularities in the proceedings under which he pur-

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[1] Rorer Jud. Sales (2d ed.), §§ 150, 174, 476, 528, 602, 694, 923.

Corwin v. Benham, 2 Ohio St. 36.

Hously v. Lindsay, 10 Heisk. (Tenn.) 651.

Brown v. Wallace, 4 Gill & J. (Md.) 479.

Cashon v. Faina, 47 Mo. 133; Stephens v. Ells, 65 Mo. 456.

The reasons for this rule are set forth in the following extract from the opinion of the court in Bishop v. O'Conner, 69 Ill. 431: "In all judicial sales the presumption is that as the rule *caveat emptor* applies, the purchaser will examine the title with the same care that a person does who receives a conveyance of land by a simple quit-claim deed. When he knows there are no covenants to resort to in case he acquires no title, the most careless, saying nothing of the prudent, would look to the title and see that it was good before becoming a purchaser at such sale. Or if not, he must expect to procure it on such terms as he might sell the claim for a profit. As well might a person purchasing by quit-claim deed file a bill to be reimbursed on the failure of title as where the purchase is made at a sale by an administrator. Both kinds of purchase depend upon the same rule. It is the policy of the law only to invest a sheriff, master in chancery, or administrator in making sales of real estate with a mere naked power to sell such title as the debtor or deceased had, without warranty, or any terms except those imposed by law. They are the mere instruments of the law to pass such, and only such, title as was held by the debtor or intestate. Then, if the purchaser in this case observed but ordinary prudence, he had the title, and, as a part of it, the proceedings under which he purchased, examined, and whether so or not, we must presume that he determined to take the risk of the title upon himself. We have no hesitation in saying that the rule of *caveat emptor* applies in this case in full force."

[2] Sugd. Vend. (8th Am. ed.) 152; Freeman Void Jud. Sales, § 48; Rorer Jud. Sales (2d ed.), § 165; Fryer v. Rockefeller, 63 N. Y. 268; Trapier v. Waldo, 16 So. Car. 276; Toole v. Toole, 112 N. Y. 333; Bird v. Smith, 101 Ky. 205; 40 S. W. 571.

This proposition appears to have been limited, in Pennsylvania, to cases in which the purchaser has been deceived or misled. De Haven's Appeal, 106 Pa.

St. 612, citing Schug's Appeal, 14 W. N. C. (Pa.) 49; Binford's Appeal, 164 Pa. St. 435; 30 Atl. Rep. 298.

At a judicial sale the purchaser buys at his peril, as in ordinary sales under execution, the only difference being that in sales by the chancellor through his commissioner the purchaser may have relief for defective title before the sale is confirmed, but not after. Humphrey v. Wade, 84 Ky. 391; 1 S. W. Rep. 648.

A purchaser at a judicial sale cannot, in case of the existence of judgment creditors not before the court, be required to complete his purchase without their concurrence. Governor of Hospital v. West. Imp. Commrs., 1 De G. & J. 531. He must see that all judgment creditors have come in under the decree, for those who have not done so may subject the land in his hands to the payment of their judgment. 2 Sugd. Vend. (8th. Am. ed.) 156 (521).

Rule *caveat emptor* does not apply at judicial sale as at execution sale, until after confirmation. Charleston v. Blohme, 15 So. Car. 124; 40 Am. Rep. 690.

[1] 2 Jones Mortgages, § 1648; Rorer on Jud. Sales (2d ed.), § 150; Gordon v. Sims, 2 McCord Ch. (S. C.) 151. In England the title is directed to be investigated before a sale in chancery is made. 1 Sugd. Vend. (8th Am. ed.) 13. The court confirms judicial sales, and in so doing exercises large powers in correcting errors. Reasonable time is always given for the examination of title, and, if necessary, a reference will be ordered. Mitchell v. Pinckney, 13 So. Car. 203, 212.

The right of the purchaser to have a reference of the title is denied in Anderson v. Foulke, 2 Harr. & G. (Md.) 346, 358. In re Browning, 2 Paige Ch. (N. Y.) 64, a reference of title was directed on the application of the purchaser *after* confirmation of the sale.

[2] 2 Jones on Mortgages, § 1647; Freeman Void Jud. Sales, § 48; Wood v. Mason, 3 Sumn. (U. S.) 318.

Threlkeld v. Campbell, 2 Grat. (Va.) 198; 44 Am. Dec. 384; Thomas v. Davidson, 76 Va. 338, Hickson v. Rucker, 77 Va. 135; Long v. Weller, 29 Grat. (Va.) 347; Watson v. Hoy, 28 Grat. (Va.) 698; Young v. McClung, 9 Grat. (Va.) 336; Daniel v. Leitch, 13 Grat. (Va.) 195.

Jennings v. Jenkins, 9 Ala. 285; Perkins v. White, 7 Ala. 855.

Williams v. Glenn, 87 Ky. 87; 7 S. W. Rep. 610; Fox v. McGoodwin, 21 Ky. L. R. 1776; 56 S. W. 515.

Hedrick v. Yount, 22 Kans. 344.

Barron v. Mullin, 21 Minn. 374.

Dresbach v. Stein, 41 Ohio St. 70.

Capehart v. Dowery, 10 W. Va. 130.

Williamson v. Field, 2 Sandf. Ch. (N. Y.) 583; Hammond v. Chamberlain, 58 Neb. 445; 78 N. W. 718.

In Rorer on Judicial Sales (2d ed. § 150) it is said that "although the rule *caveat emptor* applies after the (judicial) sale is closed by payment of the purchase money and delivery of the deed, if there be no fraud; yet the buyer, if he chased.[1] In this respect his failure to make seasonable objection to the title has the same effect as would his acceptance of a conveyance without covenants for title. It has also been held that if the purchaser bid with notice of defects in the title, he cannot set up those defects as a ground for resisting a confirmation of the sale.[2] We shall see that the same rule prevails in cases of private sale.[3] It seems to be the better opinion that confirmation of the sale is conclusive upon the purchaser, whether he had or had not notice of the defective title. It is certainly so where he had notice of the defect,[4] or wherever, by reasonable diligence, he might have obtained notice,

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discover the defect beforehand, will not be compelled to complete the sale," citing Ormsby v. Terry, 6 Bush (Ky.), 553, a case which seems to decide no more than that the court will not confirm the sale and compel the purchaser to execute his bonds for the deferred payments of the purchase money if the title be bad and the purchaser object. It is not probable that more than this last proposition is intended by the author referred to, since the rule is almost universal, as has been seen, that the maxim *caveat emptor* applies in its fullest extent after the confirmation of a judicial sale, whether the purchase money has or has not been paid. except in certain cases where the decree or judgment under which the sale was made was void on the ground of fraud or want of jurisdiction, or where the sale itself was tainted with fraud; and except, perhaps, in some of the States, where the purchaser has been evicted and the fraud arising from the sale remains undisturbed in the hands of the court, or in the hands of the purchaser.

After confirmation of a judicial sale it cannot be avoided in a collateral proceeding by showing defects in the notice of sale (Wyant v. Tuthill, 17 Neb. 495; 23 N. W. Rep. 342), or that security for the payment of the purchase money was not required (Wilkerson v. Allen, 67 Mo. 502); or that the officer who made the sale had no authority for that purpose (Core v. Stricker, 24 W. Va. 689); or that he departed from the prescribed order of sale (McGavock v. Bell, 3 Coldw. [Tenn.] 512); or that the appointment of the selling officer was invalid. Mech. Sav. & B. L. Assn. v. O'Conner, 29 Ohio St. 651.

It cannot be denied that the rule stated in the text may produce hardship in some cases, especially where by statute a confirmation of the sale is permitted to be made by a judge at chambers or during vacation of the court, on motion of a party, and notice to those interested, in which case the interval between the sale and the confirmation is usually short. Of course, however, if the motion be made by the purchaser, and the title should turn out to be defective, he has no one but himself to blame, as common prudence would dictate that he satisfy himself about the title before moving to confirm the sale.

[1] Jennings v. Jennings, 9 Ala. 285; Wilson v. Raben, 24 Neb. 368; 38 N. W. Rep. 844.

[2] Riggs v. Pursell, 66 N. Y. 193; 74 N. Y. 371. In Carneal v. Lynch, 91 Va. 114; 20 S. E. 959, the purchaser objected to confirmation of the sale on the ground that the property encroached 2½ inches on a street. But as a map was exhibited before the sale showing the encroachment, which map he saw but did not examine closely, he was required to take the property.

[3] Post, "Waiver of Objections," § 85.

[4] Jennings v. Jenkins, 9 Ala. 285, 291.

as where the defect appears from records or documents accessible to him.[1] A purchaser at a judicial sale is presumed to have notice of a want of jurisdiction appearing from the record of the proceedings under which he purchased.[2] It is to be observed that the maxim *caveat emptor* applies as well in equity as at law. Failure of title under judicial or ministerial sales, apart from any question of fraud, mistake or surprise in the procuration or rendition of the judgment under which the sale was made, or fraud or mistake in the sale itself, affords, after confirmation of the sale, no ground for relief in equity against the obligation of the contract.[3] A purchaser at a judicial sale may, before confirmation, raise the objection that the title is unmarketable; he is not bound to show that it is absolutely bad.[4] He cannot be required to take a title which he must support by bill of injunction against a third person.[5] Generally, a purchaser by private contract cannot be compelled to take an equitable title,[6] but the rule is otherwise, at least in England, in case of purchases under decree in chancery.[7] A purchaser at a judicial sale cannot, of course, object, after confirmation of the sale, that the title is unmarketable or doubtful.[8]

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[1] Smith v. Winn, 38 S. Car. 188; 17 S. E. Rep. 717.

[2] Campbell v. McCahan, 41 Ill. 445. It is the business of a purchaser at a judicial sale to see that all the persons who are necessary to convey the title are before the court, and that the sale is made according to the decree. 2 Dan. Ch. Pr. 1456; Daniel v. Leitch, 13 Grat. (Va.) 195.

[3] Long v. Waring, 25 Ala. 625; McCartney v. King, 25 Ala. 681; Holmes v. Shaver, 78 Ill. 578; Hand v. Grant, 10 Sm. & M. (Miss.) 514; 43 Am. Dec. 528. A purchaser at a judicial sale cannot enjoin the collection of the purchase money on the ground that the title has failed. McManus v. Keith, 49 Ill. 388; Threlkeld v. Campbell, 2 Grat. (Va.) 198; 44 Am. Dec. 384.

[4] See post, chapter 31, where, also, is considered what matters render a title doubtful. Handy v. Waxter, (Md.) 23 Atl. Rep. 1035; McCaffery v. Little, 20 App. D. C. 116; Trust Co. v. Muse, 4 App. D. C. 12.

[5] 1 Sugd. Vend. (8th Am. ed.) 593; Shaw v. Wright, 3 Ves. 22.

[6] Post, ch. 30.

[7] 1 Sugd. Vend. (8th Am. ed.) 152. The rule that a purchaser will not be compelled to take an equitable title does not extend to estates sold under the decree of a court of equity, where the legal title is vested in an infant. 1 Sugd. Vend. 592, at p. 594, it is said that this "anomaly" is removed by statute, enabling the court to make a good title. In Bryan v. Read, 1 Dev. & Bat. Eq. (N. C.) 78, 86, it was held that a purchaser at a judicial sale under decree against an infant could not be compelled to complete the contract, because the infant might show cause against the decree when of age.

[8] Boorum v. Tucker, (N. J. Eq.) 26 Atl. Rep. 456.

The rule *caveat emptor* applies as well to incumbrances as to defects of title proper. After confirmation of the sale the existence of an incumbrance upon the premises is no ground for detaining the purchase money, nor for recovering it back from the plaintiff in the suit in which the sale was made,[1] though, as will hereafter be seen, the purchaser will in some cases be subrogated to the rights of such plaintiff against the property purchased, or to the benefit of the lien, claim, or incumbrance that he has been compelled to pay to perfect his title, or to the satisfaction of which the purchase money paid by him has been applied.[2] While the purchaser may resist the confirmation of the sale on the ground that the title is defective, he will not be relieved from his bid if the title can be perfected within a reasonable time.[3] The rule that the vendor may perfect the title where time is not of the essence of the contract especially applies in cases of judicial sale.[4] He may also be required to take the title, with compensation or abatement of the purchase money, in case of failure of title to a small portion of the property not material to the enjoyment of the rest.[5]

The objection that there are liens on the property cannot be made where the lienholders are parties to the suit in which the property was sold, with a right to have the proceeds applied to the satisfaction of their liens.[6]

§ 47. *Exceptions to the rule caveat emptor.* It is true, as a general rule, that a purchaser at a judicial sale cannot detain or have restitution of the purchase money on the ground that the title is defective, after the sale has been confirmed. But exceptions have been made to this rule in cases of mistaken or fraudulent representations as to the title by the officer making the sale, and where the fund arising from the sale remains under the control of the court. Thus, where an officer of the court, selling under a decree, advertised the title to be indisputable, and the purchaser afterwards discovered that there was in fact no title, it was held that the court must, even after confirmation of the sale, the purchase money not having been distributed, vacate the sale on petition of the purchaser, and direct that the purchase money be refunded to him.[7] And it has even been held, irrespective of the question of fraud or mistake, that if, while the fund is yet in court, the purchaser should be disturbed in his possession, or exposed to disturbance by one having a clear paramount title to the estate, which was unknown to the purchaser at the time of the sale, the sale should be rescinded, and the purchase money restored to the purchaser.[2] The same case decides that if the purchase money has been distributed by the court, the purchaser can have no relief.

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[1] Farmers' Bank v. Martin, 7 Md. 342; Farmers' Bank v. Peter, 13 Bush (Ky.), 594; Williams v. Glenn, 87 Ky. 87; 7 S. W. Rep. 610; Worthington v. McRoberts, 9 Ala. 297.

[2] Post, this chapter, "Subrogation," §§ 65, 66.

[3] Ormsby v. Terry, 6 Bush (Ky.), 553.

[4] Thomas v. Davison, 76 Va. 342. In Lamkin v. Reese, 7 Ala. 170, it was held that though the court had no jurisdiction to order a sale of the land, yet, if the purchaser went into possession he could not, after the lapse of two years, rescind the contract if the heirs were then able and willing to make him a title.

[5] Riggs v. Pursell, 66 N. Y. 193; Merges v. Ringler, 54 N. Y. Supp. 280; 34 App. Div. 415.

[6] Blanton v. Ky. Distilleries, etc., Co., 120 Fed. 318.

It has been held that the rule *caveat emptor* does not apply to cases in which the court had no jurisdiction to direct the sale at which the purchaser bid, and that in such a case the purchaser

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[1] Preston v. Fryer, 38 Md. 221. In this case it appeared that a married woman had conveyed her separate estate to her husband, and afterward died before her husband. On the death of the husband suit was brought for sale of the land and distribution of the proceeds among his heirs. The deed to the husband was a nullity, but the officer of the court advertised the title to be good, and the purchaser bought under that impression. But for the fact that the proceeds of sale remained undistributed in the cause when restitution was made, and but for the unnecessary declaration by the officer that the title was good, it would be difficult to reconcile this case with the rule *caveat emptor*, as applied to judicial sales in other jurisdictions. While there is no warranty at a judicial sale, yet, if the purchaser when sued for the purchase money can show that at the sale there were misrepresentations as to the thing sold, whether wilful or not, he may set up such misrepresentations as a defense to the action. Charleston v. Blohme, 15 So. Car. 124; 40 Am. Rep. 690, citing State v. Gaillard, 2 Bay (S. C.), 11; 1 Am. Dec. 628; Means v. Brickell, 2 Hill (S. C.), 657; Adams v. Kibler, 7 So. Car. 58; Mitchell v. Pinckney, 13 S. Car. 203.

[2] Glenn v. Clapp, 11 Gill & J. (Md.) 1. This holding is largely *obiter dictum*, as the purchase money in the case had not been paid, and the case itself was an appeal from an order confirming the sale as against the purchaser's objections to the title. The rule announced seems eminently just and equitable, but it cannot be easily reconciled with the general rule that a purchaser at a judicial sale cannot be relieved from his bargain after confirmation of the sale, on the ground that the title has failed.

might have restitution of the purchase money even after confirmation of the sale.[1] And, generally, it has been held that a purchaser at a judicial sale which is void for want of jurisdiction in the court to order the sale, or for other cause, may resist the payment of the purchase money, even after the purchaser's bid had been accepted by the court.[2] There can be no confirmation of that which is void. We have elsewhere attempted to show that this eminently just and equitable doctrine is inconsistent with the rule *caveat emptor,* as the purchaser may inform himself of the want of jurisdiction by examining the proceedings in the cause.[3] Nor does the rule apply where there was no such land in existence as the officers of the court undertook to sell.[4] Nor where the premises were in the possession of one claiming adversely at the time of the sale, the purchaser and the parties being ignorant of such person's claim, or that he intended to retain possession.[5] The purchaser will not be deprived of his right to reject a defective title, and enjoin the collection of the purchase money, where he has been led by the conduct of the parties to postpone a motion to set aside an order confirming the sale, until after the close of the term at which the order was made.[1]

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[1] Boggs v. Hargrave, 16 Cal. 559; 76 Am. Dec. 561, citing Darvin v. Hillfield, 4 Sandf. Sup. Ct. (N. Y.) 468; Kolher v. Kolher, 2 Edw. Ch. (N. Y.) 69; Post v. Leet 8 Paige (N. Y.), 337; Seaman v. Hicks, 8 Paige (N. Y.), 655; Brown v. Frost, 10 Paige (N. Y.), 243; Shively v. Jones, 6 B. Mon. (Ky.) 275. This is doubtless true in any case in which the court was without jurisdiction of the person of the defendant, or in which the suit was of a kind of which the court could not take cognizance. But in the principal case the objection to the jurisdiction was that the defendant had no title to the property; that the title was outstanding in one who had not been made a party, and the objection was sustained, and the purchaser permitted to recover back the purchase money. Such a principle goes far towards destroying altogether the application of the maxim *caveat emptor* to judicial sales that have been confirmed, since in most instances the purchaser seeks relief on the ground that the title is outstanding in a stranger.

[2] Freeman Void Jud. Sales, § 48; Todd v. Dowd, 1 Metc. (Ky.) 281; Carpenter v. Strother, 16 B. Mon. (Ky.) 289; Barrett v. Churchill, 18 B. Mon. (Ky.) 387.

[3] Post, this chapter, § 61.

[4] Strodes v. Patton, 1 Brock. (U. S.) 228, per MARSHALL, C. J. A decree directed the sale of the lands whereof H. died "seized and possessed." The officers of the court at the time of the sale exhibited certain conveyances to H., but disclaimed any responsibility for quantity or title, and declared that the purchaser must buy at his risk. It appeared that H. had never been seised of one of the tracts so conveyed, and was not entitled to anything by virtue of the conveyance thereof. The sale was treated as having been made without authority, or by mistake, and the purchasers were relieved, even after confirmation.

[5] McGown v. Wilkins, 1 Paige Ch. (N. Y.) 120, the court saying: "This is not like the case of a sale by the sheriff on execution. There the court never gives possession to the purchaser, even as against the party to the suit."

The rule that a purchaser at a judicial sale cannot, after the sale has been confirmed, refuse to pay the purchase money on the ground that the title is defective, is salutary where the objection is merely that the title is unmarketable,[2] or where there is no probability that the purchaser will ever be disturbed in his possession, and the alleged imperfections have been ferreted out as an excuse for the detention of the purchase money. But where there is a clear and palpable failure of the title, as where the purchaser has been evicted by an adverse claimant, or where the rights of the holder of the paramount title are being asserted, or will inevitably be asserted, by hostile proceedings, it would seem that neither the ends of justice nor of legal policy or convenience can be subserved by compelling the purchaser to pay his money into court, when the court can give him nothing in return. Accordingly, in several such cases, not only has the purchaser been permitted to detain the unpaid purchase money, but restitution thereof has been made to him where the fund accruing from the sale remained undistributed in the hands of the court.[3] In other cases, a distinction has been made between sales in partition, or other voluntary sales, and those in which the sale is to compel the payment of a debt, holding in the former case that the purchaser may detain the purchase money, and in the latter that he must pay it though evicted by title paramount.[4] The proposition that a purchaser at a judicial sale, who, after confirmation of the sale, has been evicted by title paramount, will not be compelled to pay the unpaid purchase money when the facts avoiding the title were not such as he could have discovered by the exercise of reasonable prudence, care and diligence, commends itself to the mind as equitable and just. It is believed that no serious inconvenience could result from such a rule, while a benefit consequent thereon is obvious. Judicial sales are usually made upon an extended credit, and if purchasers could be assured that they would not be compelled to pay the unpaid purchase money if they should be evicted by some one having a better title, it is fair to assume that better prices for property thus would be realized.

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[1] Morrow v. Wessell, (Ky.) 1 S. W. Rep. 439.

[2] Worthington v. McRoberts, 9 Ala. 297. In Mahoney v. Allen, 42 N. Y. Supp. 11, the purchaser was permitted to make objections of that kind after the sale was confirmed.

[3] Preston v. Fryer, 38 Md. 221. Boggs v. Hargrave, 16 Cal. 559; 76 Am. Dec. 561. Weems v. Love Mfg. Co., 74 Miss. 831; 21 So. 915. See, also, Charleston v. Blohme, 15 So. Car. 124; 40 Am. Rep. 690. The case of Glenn v. Clapp, 11 Gill & J. (Md.) 1, has been cited to this point, but an examination of that case shows that the purchaser's objections to the title were made before confirmation of the sale. See Rorer on Jud. Sales (2d ed.), 78.

[4] Latimer v. Wharton, (So. Car.) 19 S. E. Rep. 855. Here the purchaser in a suit for the administration of the assets of a deceased debtor's estate, sought

But the generally prevalent rule and the weight of authority, undoubtedly is that a purchaser at a judicial sale proper will not be permitted to have restitution of the purchase money after it has passed beyond the control of the court, without regard to the nature or extent of the defect of title,[1] except, perhaps, where the judgment or decree under which the purchase was made was void for

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to enjoin a judgment for the purchase money on the ground that he had been evicted by an adverse claimant, and it was held that the sale of the land having been compulsory, he must pay the purchase money; the court observing: "It is well known that the reason of the rule of *caveat emptor* at sheriff's sales is because such sales are forced and are made under compulsory process. There is not the same reason for holding that the rule should prevail where the officer selling the property is regarded as the agent of the parties, such as sales for partition and those made by executors and administrators." This case contains an interesting review of the South Carolina authorities upon the right of the purchaser at a judicial sale to detain the purchase money on failure of the title. As to such right in this State in case of a private sale, see post, § 190. In Smith v. Brittain, 3 Ired. Eq. (N. C.) 347, 351; 42 Am. Dec. 175, which was a suit for partition, it was said by RUFFIN, C. J.: "A sale by the master in a case of this kind, is but a mode of sale by the parties themselves. It is not merely a sale by the law, *in invitum*, of such interest as the party has or may have, in which the rule is *caveat emptor*, but professes to be a *sale of a particular estate*, stated in the pleadings to be vested in the parties, and to be disposed of for the purpose of partition only. Thereupon, if there be *no such title*, the purchaser has the same equity against being compelled to go on with his purchase as if the contract had been made without the intervention of the court, for, in truth, the title has never been passed on between persons contesting it."

[1] Smith v. Winn, 38 So. Car. 188; 17 S. E. Rep. 717.

want of jurisdiction;[1] nor, after the sale has been confirmed, to detain the purchase money upon mere suggestions of doubts and difficulties as to title, nor even where the title has absolutely and palpably failed, if the pleadings in the case in which he purchased show the true state of the title.[2] And in no case, apart from questions of fraud or deceit, can a purchaser at a sale made by one in a ministerial or fiduciary capacity, maintain an action against the seller to recover damages for inability to convey a clear title. Inasmuch as there is no contract in such a case that the purchaser shall receive a good title, there can be no cause of action against the vendor if the title fails.[3] We have seen, however, that if the person making the sale choose to execute a conveyance with general warranty to the purchaser, he will be personally liable on the covenant.[4]

It has been held, with respect to the maxim *caveat emptor*, as applicable to judicial sales, that a distinction is to be observed between cases in which the decree directs a sale of the "land" itself, and those in which only an "estate" or interest in the land is directed to be sold, and that in the former case, if the purchaser acquires no title, he may, even after confirmation of the sale, have the contract rescinded and the purchase money returned, but that in the latter case he must take the title at his risk.[5] This distinction does not appear to have been generally observed.

§ 48. Fraud as it affects rights of purchaser at judicial sale.

Fraud, as it respects the rights of a purchaser at a judicial sale or of one claiming under such purchaser, is either: (1) **Fraud** antecedent to the sale, such as fraud in the procuration or rendition of the judgment or decree in pursuance of which the sale is made; (2) Fraud in the sale itself, such as collusion between the officer selling and the purchaser, by which the property is sacrificed; and (3) Fraud on the part of the officer selling or parties in interest in falsely stating the condition of the title, with intent to deceive. In the first two instances the sale is open to collateral attack by the party injured and by the purchaser himself; fraud in these respects is considered in a subsequent section of this work.[1] In the last instance there are cases which hold that if the purchaser at a judicial sale has been induced to bid by the fraudulent representations or concealment of facts respecting the title on the part of the officer or of others interested in making the sale, he will be relieved in equity from his bid, after confirmation of the sale.[2] But even in a case of misrepresentation as to the title, the purchaser cannot avoid the sale unless he can show that he could not have discovered the fraud with reasonable diligence.[3] Thus, where the pleadings in a suit to foreclose a junior mortgage showed the existence of the prior mortgage, and the purchaser at foreclosure sale in the suit was induced to bid by the representations of the officer making the sale and by the clerk of the court, that there was no prior lien on the property, it was held that he could not be relieved from the contract, as he might easily have informed himself of the true state of the title by examining the pleadings.[4]

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[1] See Boggs v. Hargrave, 16 Cal. 559; 76 Am. Dec. 561.

[2] Eccles v. Timmons, 95 N. Car. 540. Even though the purchaser was fraudulently induced to bid. Norton v. Neb. Loan & Tr. Co., 35 Neb. 466; 53 N. W. Rep. 481; 58 N. W. Rep. 953.

[3] A rigorous application of the doctrine *caveat emptor* to judicial sales is found in Evans v. Dendy, 2 Spear (S. Car.), 9, 43 Am. Dec. 356, where it was held that a purchaser under a decree in partition between heirs who has been evicted by title paramount, cannot recover back the purchase money, though it remains undistributed in the hands of the officer making the sale. RICHARDSON, J., dissented upon the ground that the officer making the sale is the mere agent of the heirs, and that such a sale does not stand upon the same footing as a sale under execution. See, also, Rogers v. Horn, 6 Rich. L. (S. C.) 361. It is to be observed that in Evans v. Dendy, supra, a conveyance without covenants for title had been made to the purchaser.

[4] Post, § 69.

[5] Shields v. Allen, 77 N. Car. 375, criticised but not overruled in Ellis v. Anderton, 88 N. Car. 476. This case holds that when a court decrees the sale of land it

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is the duty of the officer selling to offer a good title to the land. In Miller v. Feezor, 82 N. C. 192, citing Shields v. Allen, supra, it was said that the maxim *caveat emptor* did not apply to judicial sales in North Carolina.

[1] Post, this chapter, § 52.

[2] Rorer on Jud. Sales (2d ed.), § 175; Preston v. Fryer, 38 Md. 221; Mervine v. Vaulier, 3 Halst. Ch. (N. J.) 34, *semble;* Bishop v. O'Connor 69 Ill. 431, *dictum.* While there is no warranty at a judicial sale, the purchaser when sued for the purchase money may set up misrepresentations as to the title as a defense. Charleston v. Blohme, 15 So. Car. 124; 40 Am. Rep. 690; Mitchell v. Pinckney, 13 So. Car. 203. Statements in a bill for partition that complainants are the owners of the property, are no such fraudulent representations as to the title by those interested in a sale of the property as will entitle the purchaser to relief. McManus v. Keith, 49 Ill. 388.

[3] Williams v. Glenn, 87 Ky. 87; 7 S. W. Rep. 610.

[4] Norton v. Neb. Loan & Tr. Co., 35 Neb. 466; 53 N. W. Rep. 481; 58 id. 953.

Nor will the purchaser be relieved if with knowledge of the fraud he permits the sale to be confirmed without objection.[1] There are cases also which hold that the officer making the sale has no right to make representations concerning the title, and that, therefore, the purchaser has no right to rely on them, and will not be entitled to relief if he should.[2]

The purchaser may of course resist confirmation of the sale on the ground that he was induced to bid by fraudulent or mistaken representations as to the state of the title.[3]

§ 49. Errors and irregularities in the proceedings. Collateral attack. Errors and irregularities in judicial proceedings are either such as render the judgment or decree therein pronounced absolutely null and void, or such as render them voidable only. A judgment rendered against one who has not been brought before the court by due process of law is absolutely void.[4] A judgment founded upon a misconception of the law of the case, the court having acquired jurisdiction of the parties, is voidable only.[5] A void judgment is open to collateral attack. A voidable judgment can be vacated or annulled only upon appeal or writ of error, or in some direct proceeding between the parties.[6] It seems to be settled everywhere, either by statute or judicial declaration, that the reversal of a judgment or decree on error or appeal cannot disturb the title of a purchaser at a judicial sale under such judgment or decree,[1] except in a case in which the land sold was not the property of the defendant in the cause, and the alleged debt for which the land was sold was found not to exist.[2] And, except, also, in some of the States, that if the plaintiff in the reversed judgment be himself the purchaser of the land, the defendant may recover it back.[3] There may be a restitution of the proceeds of the sale to

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[1] Fore v. McKenzie, 58 Ala. 115.

[2] Vandever v. Baker, 13 Pa. St. 126; Slowthower v. Gordon, 23 Md. 1, where it was said that there is no relation of trust and confidence between the officer making a judicial sale and the purchaser.

[3] Veeder v. Fonda, 3 Paige (N. Y.), 94; Seaman v. Hicks, 8 Paige (N. Y.), 656; McGown v. Wilkins, 1 Paige (N. Y.), 120; Morris v. Mowatt, 2 Paige (N. Y.), 586; 22 Am. Dec. 661; Kauffman v. Walker, 9 Md. 229. In Tooley v. Kane, 1 Sm. & M. Ch. (Miss.) 518, it was said that the court would set aside a sale in case of fraud, even after confirmation.

[4] Black on Judgments (1st ed.), 245, et seq.

[5] Freeman on Judgments (4th ed.), § 117, et seq.; Cox v. Davis, 17 Ala. 714; 52 Am. Dec. 199.

[6] Freeman Void Jud. Sales, § 20; Black on Judgments, § 261, et seq.; Rorer on Jud. Sales (2d ed.), § 171. Swiggart v. Harber, 4 Scam. (Ill.) 364; 39 Am. Dec. 418. The opinion of the court in the leading case of Voorhees v. Bank of the U. S. 10 Pet. (U. S.) 449, 475, contains a clear exposition of this doctrine: "The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case it is a record importing absolute

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verity; in the other mere waste paper. There can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit, and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. It would be a well-merited reproach to our jurisprudence if an innocent purchaser, no party to the suit, who had paid his money on the faith of an order of a court, should not have the same protection under an erroneous proceeding as the party who derived the benefit accruing from it. A purchaser under judicial process pays the plaintiff his demand on the property sold; to the extent of the purchase money he discharges the defendant from his adjudged obligation. Time has given an inviolable sanctity to every act of the court preceding the sale, which precludes the defendant from controverting the absolute right of the plaintiff to the full benefit of his judgment, and it shall not be permitted that the purchaser shall be answerable for defects in the record, from the consequence of which the plaintiff is absolved. Such flagrant injustice is imputable neither to the common nor statute law of the land." In Lancaster v. Wilson, 27 Grat. (Va.) 624, 629, the court, deciding that the title of a purchaser under an invalid and irregular attachment sale could not be collaterally drawn in question, observed: "If, after the rendition of a judgment by a court of competent jurisdiction, and after the period elapses when it becomes irreversible for error, another court may, in another suit, inquire into the irregularities or errors in such judgments, there would be no end to litigation, and no fixed established rights. A judgment, though unreversed and irreversible, would no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up. Acts of limitation would become useless and nugatory. Purchasers on the faith of judicial powers would find no protection. Every right established by a judgment would be insecure and uncertain, and a cloud would rest upon every title."

[1] Rorer Jud. Sales, § 130.

[2] Baker v. Baker, 87 Ky. 461; 9 S. W. Rep. 382.

[3] Post, "Sheriff's Sales," this chapter; Gould v. Sternberg, 128 Ill. 510; 21 N. E. Rep. 628; Turk v. Skiles, 38 W. Va. 404. This exception does not appear to have been admitted in Baker v. Baker, 87 Ky. 461; 9 S. W. Rep. 382, and was denied in Yocum v. Foreman, 14 Bush (Ky.), 494.

the party injured by the error, but the purchaser's title remains intact,[1] unless, indeed, it is apprehended the judgment was reversed upon grounds that would have rendered it void had no appeal been taken. It would seem then to follow from these elementary principles that, if a purchaser at a judicial sale resists a confirmation of the sale on the ground of errors and irregularities in the proceedings, it would only be necessary to consider whether such errors and irregularities were of a kind that would render the judgment or decree under which the sale was made absolutely void, or voidable only. In the former event it is conceived that the purchaser would be excused from completing the purchase, and that in the latter event he would be required to pay the purchase money and accept a conveyance.[1] Thus, if the court decree a sale of testator's lands in pursuance of an erroneous construction of his will, all parties in interest being before the court, it is apprehended that the error would be no objection to the title wherever the rule that the reversal of a judgment does not affect the rights of a purchaser under the judgment is observed. On the other hand, if infants, having an interest under the will, have not been brought before the court in the manner provided by law, the judgment of the court is absolutely void as to them, and the land in the hands of the purchaser being subject to their demands upon their arrival at majority, it would seem clear that the purchaser would be relieved from his bid.[2] It has been frequently said that a purchaser at a judicial sale cannot question the regularity of the proceedings prior to the decree under which he purchased.[3] This, it is obvious, means only errors and irregularities prior to the sale that would make the decree voidable; that is, reversible on appeal or in some direct proceeding, and not errors or other matters, such as want of jurisdiction or fraud, that would make the decree absolutely void and open to collateral attack, for it is clear that the purchaser showing such want of jurisdiction before confirmation of the sale could not be compelled to complete the contract.

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[1] Voorhis v. Bank of U. S., 10 Pet. (U. S.) 449. Freeman on Judgments, § 484 (3d ed.); Freeman on Void Jud. Sales, p. 45 (3d ed.); Black on Judgments, p. 320; Rorer Jud. Sales (2d ed.), § 132; Burnett v. Hamill, 2 Sch. & Lef. 577. Voorhees v. Bank, 10 Pet. (U. S.) 449; McGoon v. Scales, 9 Wall. (U. S.) 23, 31. Jackson v. Edwards, 22 Wend. (N. Y.) 493, 518. Cockey v. Cole, 28 Md. 276; 92 Am. Dec. 684; Benson v. Yellott, (Md.) 24 Atl. Rep. 451. Capehart v. Dowery, 10 W. Va. 130. Frederick v. Cox, 47 W. Va. 14; 34 S. E. Rep. 958. Yocum v. Foreman, 14 Bush (Ky.), 494; Bailey v. Fanning Orphan School, (Ky.) 14 S. W. Rep. 908. Stout v. Gully, (Colo.) 22 Pac. Rep. 954; Cheever v. Minton, (Colo.) 21 Pac. Rep. 710. Gould v. Sternberg, 128 Ill. 510; 21 N. E. Rep. 628. England v. Garner, 90 N. Car. 197. If jurisdiction of a cause has been acquired by the court the title of a purchaser at a sale therein cannot be affected by the fact that the decree in pursuance of which the sale was made was founded on insufficient proof. Bolgiano v. Cook, 19 Md. 375. A purchaser under a judgment merely erroneous acquires good title; otherwise, if the judgment be void. Bowers v. Chaney, 21 Tex. 363. Mere errors and irregularities in the proceedings make no grounds for collateral attack. Wilson v. Smith, 22 Grat. (Va.) 493. The remedy of the person injured by the passing of title under a judgment that has been reversed for error is an action for damages against those at whose instance the sale was made, alleging such facts as will show that the plaintiff is entitled, by reason of the reversal, to what he has been deprived of by the erroneous judgment. Hays v. Griffith, 85 Ky. 375; 11 S. W. Rep. 306; 3 S. W. Rep. 431. The case of Sohier v. Williams, 1 Curt. (C. C.) 479, affords an illustration of this principle. The sale in that case was by a trustee under a power in a will, which authorized him to sell when a majority of the testatrix's children should advise a sale. The court was of opinion that the consent of the major part of the children *living when the power was to be exercised* was sufficient, but considered the question so doubtful that but for the fact that all parties in interest were before the court, and would be bound by a decree, the purchaser would not have been compelled to complete the contract. Had the court pronounced an erroneous decree, having all parties in interest before it, the decree would, indeed, have been subject to reversal by a higher court, but the title of the purchaser would have remained undisturbed. In Dunfee v. Childs, 45 W. Va. 155; 30 S. E. 102, it was said that the title of the purchaser falls with the reversal of a decree, 1st, where he is a party to the suit with an interest in the cause; 2nd, where the decree was reversed for want of necessary parties; and 3rd, where the decree reversed is that which confirmed the sale whether he was a party to the suit or not.

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[1] 2 Jones on Mortgages, § 1647; Freeman Void Jud. Sales, p. 45 (3d ed.): Rorer Jud. Sales, p. 65. Trapier v. Waldo, 16 S. C. 276; Bulow v. Witte, 3 S. C. 323. Wright v. Edwards, 10 Oreg. 307; McCulloch v. Estes, 20 Oreg. 349; 25 Pac. 724.

[2] In Cline v. Catron, 22 Grat. (Va.) 378, the curator of an idiot's estate and lands brought a suit for a sale of the lands and reinvestment of the proceeds, and at a sale under decree in the cause, himself purchased the lands. The sale was confirmed, in violation of a statute which provided in express terms that the plaintiff, the curator, should not be admitted as a purchaser. It was afterwards objected that title derived through such purchaser was, by reason of the premises, insufficient; but it was held that the court, having had jurisdiction to make the sale, the confirmation thereof was mere error, for which the decree might have been reversed, but could not be attacked in a collateral proceeding.

[3] Cox v. Cox, 18 D. C. 1. A more accurate expression of the rule is found in Sutton v. Schonwald, 86 N. Car. 198, 204; 41 Am. Rep. 455, where it is said that a purchaser who is no party to the proceeding is not bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. And in James v. Meyers, 41 La. Ann. 1100, it was said that while the purchaser is not, as a general rule, bound to look beyond the decree, he is still bound to see that the court had jurisdiction.

The cases illustrating the proposition that a judgment merely erroneous cannot be made the subject of collateral attack, are almost endless. A number of instances have been given in the notes below, in which the title of a purchaser, immediately or derivatively, under a judicial sale, has been called in question on the ground of errors and irregularities in the proceedings, and in which the objection has been held untenable.[1] It must suffice to say here, generally, that insufficiency of the evidence to sustain the judgment; error of the court in applying the law to the facts; want of parties, where the objection is made by one bound by the judgment; defects or irregularities in the process or service of process, other than absolute want of service; legal disability of a party, according to the preponderance of authority; judgment for an excessive amount; mistakes and clerical errors in the rendition or entry or judgment, or other like matters, cannot be availed of, in a collateral proceeding, to invalidate a title held under a judicial sale.[1]

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[1] In Perkins v. Fairfield, 11 Mass. 227, a title under a sale by administrators by virtue of a license from the court, was held good against the heirs of the intestate, although the license was granted upon a certificate from the judge of probate, not authorized by the circumstances of the case. A purchaser at a judicial sale cannot object to the title on the ground that more of an estate was sold than was necessary to satisfy the decree, "the decree being a sufficient security to him, as it cannot appear but that it was right to sell the whole." 1 Sugd. Vend. 68; Daniel v. Leitch, 13 Grat. (Va.) 195, 210. Irregular service of summons does not affect the title of a purchaser at a judicial sale. Upson v. Horn, 3 Strobh. Eq. (S. C.) 108; 49 Am. Dec. 633. Failure to revive a suit for partition in the name of the heirs of one of the complainants who died after decree for, but before date of sale of the lands, will not render the sale void, nor impair the title of a purchaser thereunder. Schley v. Baltimore, 29 Md. 34. In Derr v. Wilson, 84 Ky. 14, it was contended that a court had no power to order a sale of a homestead, subject to the life interest of the debtor, and that such a judgment was void for want of jurisdiction, but it was held that while the court erred in making the order, it had jurisdiction of the parties and subject-matter, and that, therefore, the judgment and the title of the purchaser thereunder could not be collaterally attacked. Where judgment was entered for the full amount of a penal bond instead of the damages for a breach of the bond, awarded by the jury, it was held error, but not such as could affect the title of a purchaser under the judgment. Wales v. Bogue, 31 Ill. 464. A decree in chancery against unknown heirs is not void because no affidavit was filed that they were unknown. It is voidable only on appeal. Hynes v. Oldham, 3 T. B. Mon. (Ky.) 266, Benningfield v. Reed, 9 B. Mon. (Ky.) 102. If a guardian *ad litem* be appointed for an infant and he actually answers, a decree based thereon will not be absolutely void, though there was no actual judicial notice of the suit given the infant. Bustard v. Gates, 4 Dana (Ky.), 429. Bank U. S. v. Cochran, 9 Dana (Ky.), 395, Benningfield v. Reed, 8 B. Mon. (Ky.) 100. A statute providing that before a sale is ordered in partition the court

§ 50. **Want of jurisdiction.** The only grounds, it seems, upon which a judgment of a court of record can be attacked in a collateral proceeding are want of jurisdiction in the court to render the judgment, and fraud, mistake or surprise in the procuration of the judgment.[2] Jurisdiction is either: (1) Of the person of the defend-

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shall appoint some one to represent infant parceners, is directory only, and a failure to appoint such a person does not deprive the court of jurisdiction and render its judgment void. Robinson v. Redman, 2 Duv. (Ky.) 82. The fact that a mortgagee, before proceeding to foreclose, executes a bond whose condition does not conform to the statute, will not avoid the jurisdiction of the court to confirm the foreclosure sale noi affect the title of a purchaser thereat. Cockey v. Cole, 28 Md. 276; 92 Am. Dec. 684. The fact that commissioners in partition do not make their report under seal, as required by statute, will not invalidate a title thereunder upon collateral attack; such an irregularity could be taken advantage of only, if at all, by proceedings in error. Lane v. Bommelmann, 17 Ill. 95. Failure to direct a sale in inverse order of alienation is not such error as affects the jurisdiction and avoids the sale. Jenks v. Quinn, 137 N. Y. 223; 33 N. E. Rep. 376. Where the record in a proceeding by an administrator to sell decedent's lands for the payment of his debts, affirmatively shows that the court has jurisdiction to order the sale, that the land was sold under order of, and was approved by the court, and that a deed under like order was executed to the purchaser, it was held that the action of the court, being in the nature of a proceeding *in rem*, could not, though abounding with errors and irregularities, be collaterally impeached. The failure to give the statutory notice by citation to the heirs, and the absence of proof by the record that the guardian *ad litem* of the minor heirs accepted the appointment, or that he filed an answer denying the allegation of the petition, or that the commissioner of sale gave proper notice of the time and place of sale — are mere irregularities, which might furnish good grounds of reversal on error, but which could not invalidate the sale, when collaterally attacked, if the record affirmatively showed that the court had jurisdiction. Saltonstall v. Riley, 28 Ala. 164; 65 Am. Dec. 334.

[1] See Black on Judgments, § 261 et seq.

[2] Post, § 52. The court must have jurisdiction of the subject-matter and of the parties to render its judgment valid on collateral attack. Commercial Bank v. Martin, 9 Sm. & M. (Miss.) 613. "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in a given case. To constitute this there are three essentials: *First*, the court must have cognizance of the class of cases to which the one adjudged belongs; *second*, the proper parties must be

ant;[1] (2) of the subject-matter of the suit; (3) of the *res*, or property in contest.[2] Want of jurisdiction in one or more of these respects is not necessarily fatal to the judgment of the court if it have jurisdiction upon other grounds. Thus, a proceeding against a non-resident defendant by which it is sought to attach his lands within the territorial jurisdiction of the court is essentially a proceeding *in rem*, and the fact that proceedings by publication to bring the defendant before the court are too defective for that purpose will not affect the validity of a judgment or decree for the sale of the land and the title of a purchaser thereunder.[3] The converse of the foregoing proposition, that is, that the existence of jurisdiction upon one or more grounds does not necessarily validate a judgment if jurisdiction upon another ground be wanting, is also true. Thus, in a suit for the administration of a trust, the court may have jurisdiction of the cause of action and of the persons of the defendants, but if jurisdiction of the *res* be wanting, for example, if the

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present, and, *third*, the point decided must be, in substance and effect, within the issue." Munday v. Vail, 34 N. J. Law, 422.

[1] Cooper v. Reynolds, 10 Wall. (U. S.) 308, 316. The text is grounded upon the distinctions formulated by Mr. Justice MILLER in this case, as follows: "It is as easy to give a general and comprehensive definition of the word jurisdiction as it is difficult to determine in special cases the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make. By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause."

[2] Black Judgmts. § 240.

[3] Cooper v. Reynolds, 10 Wall. (U. S.) 308; Voorhees v. Bank of U. S., 10 Pet. (U. S.) 449. These are leading cases and in them it was held that defects and irregularities in the affidavit and publication of notice in proceedings by attachments against non-residents and the fact that the record does not show compliance with all the statutory requisites in such cases, did not go to the jurisdiction of the court, and did not, therefore, render the judgment in the cause absolutely

trust subject consist of lands lying in another State and consequently beyond the jurisdiction of the court, a decree of the court directing a sale of those lands will be absolutely void.[1] And, generally, it may be laid down as a rule that if from any cause or in any respect, the court have not jurisdiction to render the judgment or decree under which a judicial sale is made, a purchaser at such sale will not acquire a title that will be safe from the attacks of parties to such judgment or of those claiming under them.[2] Collateral attack in the sense in which it is here used means, of course, attack in a collateral proceeding by some one who is bound by the judgment, either as party or privy, such as the defendant himself, his heirs and assigns. These cannot maintain ejectment against the purchaser or his assigns unless the proceedings were absolutely void for want of jurisdiction.[3] But the title of a purchaser at a judicial sale may always be

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void, though they were errors for which the judgment might be reversed. Such proceedings are essentially *in rem;* the judgment or decree binds nothing but the property levied upon, and the court acquires jurisdiction by an actual levy, notwithstanding the defective service of process on the defendant. In Ohio several cases decide that a statutory proceeding for the sale of a decedent's lands for the payment of his debts is essentially *in rem*, and that, though the heir was required to be made a party to the proceeding, the failure to serve process on him did not oust the court of its jurisdiction and invalidate the title of a purchaser. Sheldon v. Newton, 3 Ohio St. 494, 506, citing Robb v. Irwin, 15 Ohio, 689; Snevely v. Lowe, 18 Ohio, 368. An attachment against a non-resident is a proceeding *in rem,* and after the return of the officer "levied on the property of the defendant" the jurisdiction has fully attached, and it becomes a cause in court. Sutherland v. De Leon, 1 Tex. 250; 46 Am. Dec. 100. The principle established by the case of Cooper v. Reynolds, 10 Wall. (U. S.) 308, and stated in the text does not seem to have been recognized in all of the States. Thus in New York it has been held that a judgment founded on an affidavit for an order of publication against a non resident which fails to state that the defendant could not be found within the State "after due diligence" is void for want of jurisdiction, and that a purchaser thereunder acquires no title. McCracken v. Flanagan, 127 N. Y. 493; 141 N. Y. 174; 36 N. E. Rep. 10.

[1] As was held in Contee v. Lyons, 19 D. C. 207.

[2] See cases cited post, "Doubtful Title," ch. 31, § 297, notes; Stansbury v. Inglehart, 20 Dist. Col. 134; Frost v. Atwood, 51 Mich. 360; Calvert v. Ash, 47 W. Va. 480; 35 S. E. 887. A sheriff's deed under a judgment void on its face for want of jurisdiction does not even make a cloud on the title which will sustain a bill *quia timet.* Holland v. Johnson, 80 Mo. 34. A purchaser at an execution sale under a void judgment for want of service of process acquires no title. Roberts v. Stowers, 7 Bush (Ky.), 295.

[3] It is hardly necessary to say here that an independent action or proceeding by a party to a judgement, which has for its sole object the vacation of the judgment.

overthrown by one not a party or privy to such proceedings, who can show a better title in himself; that is, a title paramount to that which passed under the judgment or decree of the court. A stranger to the record, however, cannot, of course, avail himself of want of jurisdiction on the part of the court, or of any error or irregularity in the proceedings, whether they render the judgment absolutely void or voidable only.[1]

Jurisdiction of the person consists in power over the person of the defendant, obtained by the service of process or by the voluntary appearance of the defendant in the progress of the cause. If the court have not jurisdiction of the cause upon other grounds, a judgment founded upon process, insufficient of itself, or insufficiently executed, to bring the defendant into court, is absolutely void.[2]

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upon the ground of fraud, surprise or mistake, is not a "collateral attack" in the sense in which that expression is generally used. That is a *direct* attack, and is always admissible; otherwise every defendant would be at the mercy of fraudulent officers of the court colluding with the plaintiff to deprive him of his property. Thus an officer's return of service of process may be impeached in a direct proceeding after judgment. Black on Judgments, § 288, and cases there cited. The writer does not remember to have seen in any of the books a definition of the terms "direct" and "collateral" attack as used in reference to the validity of judgments, probably because they have been considered too plain to require definition. "Direct attack" would seem to consist in some proceeding, either by motion, petition, appeal or writ of error in the suit in which the judgment was rendered, or to consist in a separate suit, usually in equity, between the original parties or their privies, having for its sole object the reversal or vacation of such judgment either for error, fraud, mistake or like fatality in the rendition or procuration of the judgment. "Collateral attack" would seem to consist in an attempt to show the invalidity of the judgment in any proceeding between the parties or their privies, which does not have for its sole object the vacation of the judgment, such, for example, as an action against the purchaser for the purchase money, ejectment against the purchaser, trespass to try title and the like; or an action by the purchaser to recover the possession, or to recover back the purchase money or the like. This seems sufficiently clear. It has been held, however, that ejectment by the execution debtor against a purchaser under the execution upon the ground that the sale and proceedings thereafter are void is a direct and not a collateral attack. Gue v. Jones, 25 Neb. 634; 41 N. W. Rep. 555. If this decision be sound, the question what is and what is not "direct" or "collateral" attack will be involved in much obscurity and doubt.

[1] Swiggart v. Harber, 4 Scam. (Ill.) 364; 39 Am. Dec. 418.

[2] Mercantile Trust Co. v. So. Park Res. Co., (Ky.) 22 S. W. Rep. 314. An invalid order of publication against a non resident heir is a fatal objection to a title obtained through proceedings in which such order was made. Menifee v.

Jurisdiction of the subject-matter consists in the right to entertain the suit, having regard to the nature of the cause of action and of the relief sought. Thus, if the court should take jurisdiction of a cause in plain violation of a statute which prescribes and limits its jurisdiction, it is conceived that a judgment therein rendered would be absolutely void, and a title dependent thereon, such as a purchaser could not be required to take.[1] A court may be said to have jurisdiction of the subject-matter of a suit when it has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed.[2] If the judgment or decree be entirely aside from the issue raised in the record, it will be absolutely void and treated as a nullity in a collateral proceeding.[3] To this subdivision, namely, want of jurisdiction of the subject-matter must, for want of a more precise classification, be referred those cases in which a court has transcended its powers in any respect other than a mere misconception of the law, or misapplication of the law to the facts. Thus, where the clerk of a County Court has

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Marye, (Va.) 4 S. E. Rep. 726. If the court take jurisdiction of a party to the suit as being of age, he cannot attack the proceedings collaterally and show that he was an infant. He must assert his rights in some direct proceeding to vacate the judgment or decree that has been rendered against him. England v. Garner, 90 N. Car. 197.

[1] An example of a title under a judicial sale void for want of jurisdiction of the subject-matter is found in the case of Stansbury v. Inglehart, 20 D. C. 134. The statute law of the District of Columbia permits a Chancery Court to sell the lands of an infant held jointly or in common with another. It was held that this did not extend to a case in which the interest of the adult tenant was in possession and that of the infant in expectancy, and that, therefore, the court had no jurisdiction to decree the sale of an infant's estate in remainder, and that a purchaser thereunder acquired no title.

[2] Language of the court in Hope v. Blair, 105 Mo. 85; 16 S. W. Rep. 595.

[3] This rule is illustrated by the case of Munday v. Vail, 34 N. J. Law, 418. This was a suit in ejectment against a purchaser at a judicial sale, in a suit to set aside a voluntary conveyance. The only relief prayed in the last-named suit was that the conveyance should be declared void as to the plaintiff, but the decree went further and declared the deed to be void even as between the parties thereto. This decree was declared a nullity and judgment was entered for the plaintiff in ejectment. So, also, in Corwith v. Griffing, 21 Barb. (N. Y.) 9, where a decree confirming a report of commissioners in partition, who had in their allotment embraced lands not embraced in the pleadings, was held null and void as to such lands.

made a defective certificate of acknowledgment of a deed by a married woman, it was held that the court had no power or jurisdiction to make an order directing the clerk to execute a second certificate, properly setting forth the facts, and that a title depending upon such certificate could not be sustained.[1] Care must be taken, however, to distinguish between cases in which the court errs in assuming jurisdiction, and those in which the error consists in a misapplication of the law to the facts of the case.

Jurisdiction of the *res* consists of power over property, real or personal, sought to be disposed of by judgment or decree in the cause. If the proceeding is essentially *in rem*, jurisdiction is obtained by a seizure under process of the court, whereby the property is held to abide such order as the court may make concerning it.[2] It is also necessary that property sought to be made the subject of a decree or judgment of the court shall lie within the territorial jurisdiction of the court. A court of one State has no power to decree a sale of lands lying in another State, and the title of a purchaser derived through such a sale is bad.[3] In some cases it has been said that upon collateral attack of a judgment, if the record does not show the necessary jurisdictional facts, their existence will be presumed, *in the absence of evidence to the contrary*.[4] It may be doubted whether this is an accurate statement of the rule; the admission of extraneous evidence to show the non-existence of jurisdictional facts would in effect neutralize the rule that where the record is silent as to such facts their existence will be conclusively presumed. Evidence *dehors* the record cannot be admitted to show want of jurisdiction.

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[1] Elliott v. Piersol, 1 Pet. (U. S.) 328. The proceeding in which the court directed the amended certificate to be made appears to have been altogether *ex parte*. The order was made on the motion of the purchaser about ten years after the original certificate was made. If the proceeding had been *inter partes* and the power of the court to make the order had been disputed, it would be difficult to distinguish the case from one in which the court errs in compelling a married woman to execute a deed, or from any other case in which it errs in decreeing that a particular thing be done. To the principle stated in the text is to be referred also the case of Driggers v. Cassaday, 71 Ala. 529, where it was held that a probate court had no jurisdiction to order a sale of lands for delinquent taxes.

[2] Black on Judgments, §§ 271, 273, 276; Thompson v. Tolmie, 2 Pet. (U. S.) 157; Grignon v. Astor, 2 How. (U. S.) 319; Florentine v. Barton, 2 Wall. (U. S.) 308.

[3] Rorer Jud. Sales, § 58; Contee v. Lyons, 19 D. C. 207.

[4] Evans v. Ashby, 22 Ind. 15. The leading case of Thompson v. Tolmie, 2 Pet. (U. S.) 157, decides, as we have seen, that extraneous evidence cannot be received to show want of jurisdiction.

Objections to title founded upon want of jurisdiction in a court to enter a judgment or decree under which the title is derived are materially limited and restricted by two rules of law, which it is important to bear in mind. The first rule is, that if jurisdiction do not affirmatively appear from the record itself, evidence *dehors* the record, that is, extraneous evidence, will not be received to show that in fact the court had no jurisdiction. It will be conclusively presumed, except where the record itself shows the contrary, that there was a concurrence of all things necessary to give the court jurisdiction according to the maxim *omnia praesumuntur rite et solenniter esse acta*.[1] Especially will such a presumption be made when the record is very ancient.[1] The second rule is that the recitals of fact in the record from which the jurisdiction of the court is seen, or a recital of jurisdictional facts contained in the judgment itself, cannot be contradicted or shown to be untrue in any collateral proceeding. The record imports absolute verity.[2] Thus, to illustrate the first rule, in a case in which the law provided that the lands of a decedent should not be sold for partition until the eldest child had arrived at majority, the court refused to permit one who

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[1] Black on Judgments, §§ 271, 273, 276. Thompson v. Tolmie, 2 Pet. (U. S.) 157; Grignon v. Astor, 2 How. (U. S.) 319; Parker v. Kane, 22 How. (U. S.) 1; 4 Wis. 1; 65 Am. Dec. 483. Duncanson v. Manson, 3 App. Cas. (D. C.) 361. Menefee v. Marye, (Va.) 4 S. E. Rep. 726. Where a statute required that notice of levy of an execution on land should be served on the execution defendant five days before the term of court to which the execution must be returned, it was held that it will be conclusively presumed from rendition of the judgment that such notice had been given. Burke v. Elliot, 4 Ired. L. (N. C.) 355; 43 Am. Dec. 142. Where the record shows that process was ordered against infant defendants, and that at a following term a guardian *ad litem* was appointed, it will be presumed, on collateral attack, that such defendants were brought regularly into court, though no actual service of process on them appears. Thompson v. Doe, 8 Blackf. (Ind.) 336; Brackenridge v. Dawson, 7 Ind. 383. See, also, Horner v. State Bank, 1 Ind. 130; 48 Am. Dec. 355. A title under a decree in a suit for specific performance against infant defendants will not be declared invalid in a collateral proceeding on the ground that the record does not show notice to the infants, they having been represented by guardian *ad litem*. Horner v. State Bank, 1 Ind. 130; 48 Am. Dec. 355. If the record shows that a guardian *ad litem* was appointed for infant defendants "on motion," but does not show on whose motion, it will be presumed that the infants were present in court when the motion was made, and that they had notice of the proceeding. Thompson v. Hart, 8 Blackf. (Ind.) 336; Horner v. State Bank, 1 Ind. 130; 48 Am. Dec. 355; Waltz v. Barroway, 25 Ind. 383. The fact that the record of a *sci. fa.* against infant heirs to revive a judgment against the ancestor does not show the appointment of a guardian *ad litem* will not invalidate the title of a purchaser under the judgment. Evans v. Ashby, 22 Ind. 15. But where it affirmatively appears from the record, as by the statement con-

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tained in an agreed case, that the infants were not served with process, had no notice of the proceedings, and were not in court during their pendency, the judgment will be held void on collateral attack. Doe v. Anderson, 5 Ind. 33. In Ford v. Walsworth, 15 Wend. (N. Y.) 449, it was held that a title under a sale, in pursuance of a surrogate's order, might be collaterally attacked for want of jurisdiction if it did not appear that an account of the personal estate and of the debts of the decedent was presented to the surrogate, showing a necessity for the sale, even though the presentment of the account is recited in the order of sale. Regarding a Surrogate's Court as a court of general and unlimited jurisdiction in probate matters, it is not easy to reconcile this decision with the rule that, except where the record shows the contrary, it will be presumed that everything necessary to give the court jurisdiction had transpired at the time the order, judgment or decree was made.

[1] Shackelford v. Miller, 9 Dana (Ky.), 273; Baker v. Coe, 20 Tex. 429.

[2] Black on Judgments (2d ed.), § 276; Grignon v. Astor, 2 How. (U. S.) 319, 340, leading case. In Dorsey v. Kendall, 8 Bush (Ky.), 294, 298, it was held that a judgment, upon service by publication, could not be collaterally attacked upon the ground that the order of publication had been obtained upon a false affidavit or a false return of the sheriff. A judgment subjecting the lands of a non-resident to the payment of delinquent taxes, which, following the form prescribed by statute, recites that "notice has been given as required by law," cannot be attacked in a collateral proceeding, though the statute expressly provides that the taxpayer shall be notified by publication in a newspaper in the county where the land lies. Driggs v. Cassaday, 71 Ala. 529. It is to be borne in mind that while recitals in the record cannot be contradicted in a collateral proceeding, they are not conclusive upon the parties if founded in fraud or mistake. Thus, if the officer return process as "executed on the defendant A.," and such return be fraudulent, in that service was never made, or erroneous, in that the officer mistook another person for A., the defendant A. cannot show these facts in a collateral proceeding, such as ejectment by or against a purchaser at a sale consequent upon such return; but he can by some *direct* proceeding, either by motion, petition or other proceeding in the cause in which the sale was made, if still pending, or, if not pending, then by an independent action or suit on his part against all persons interested, vacate the judgment, orders and subsequent proceedings in the cause by which he is deprived of his rights.

was bound by a decree for sale in a suit for partition, to show that the eldest child had not reached full age when the decree was entered.[1] To illustrate the second rule, if the return indorsed by an officer on original process in a suit show service thereof on the defendant, evidence will not be received in a collateral proceeding to show that in fact the return is false and that process was never served on the defendant, nor that the process was not served at the time stated in the return, nor that the person making the return was not the proper person to serve the process.[2]

It should be remarked here that the rule as to presumption of jurisdictional facts, where the records do not disclose them, applies only to the judgments of a court of original, general jurisdiction. No such presumption arises in favor of the judgment of a court of special or limited jurisdiction; the proceedings of such a court must set forth the facts and evidence on which the judgment is rendered.[3] What is and what is not a court of general jurisdiction is a question which cannot be inquired into here. It must suffice to say that, as a general rule, the Superior Courts in each State, as distinguished from those courts in which the pleadings are oral, such as a Justice's Court, are courts of general or unlimited jurisdiction; in other words, courts in which the great mass of civil rights are enforceable in the first instance.[4]

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[1] Thompson v. Tolmie, 2 Pet. (U. S.) 157.

[2] Burke v. Elliot, 4 Ired. L. (N. C.) 355, 359; 43 Am. Dec. 142.

[3] Grignon v. Astor, 2 How. Pr. (U. S.) 319, 341, a leading case. In Young v. Lorain, 11 Ill. 624, 636; 52 Am. Dec. 463, it was held that the Circuit Court in that State, while a court of general common-law and chancery jurisdiction, was a court of special or limited jurisdiction in respect to its statutory power to order the sale of infant's lands, and that a proceeding for such sale which did not show upon its face that all the personal estate of the infant had been exhausted, that being by statute a condition precedent to the power to order the sale, was absolutely void and afforded no protection to the purchaser. And in Strouse v. Drennan, 41 Mo. 289, it was held that the statutory jurisdiction of a County Court to order the sale of an infant's lands for his education and support was special and limited, and that, where the record in such a case failed to show that the sale was made upon due appraisement, and that other statutory requisites had been complied with, an order confirming the sale was absolutely void.

[4] In this connection the following observation from Mr. Black's excellent work on Judgments will be found useful (§ 283): "In all the States there are courts having original jurisdiction of every (or nearly every) species of action or proceeding known to the common law, unlimited in respect to the amount or the

The question, "When does the fact that the court had no jurisdiction appear upon the face of the record?" naturally arises here, and presents some difficulty when considered in connection with the rule that in a case in which jurisdictional facts do not appear from the record, it will be presumed that the court was satisfied of the existence of those facts before entering a judgment or decree. Suppose a plaintiff in partition sets out A., B. and himself as owners of the property to be divided, but fails to make B. a party defendant, and process issues only against A. It is plain that a decree in the cause directing a sale of the premises would be absolutely void as to B., and a purchaser would acquire no title to his interest. Suppose, however, that B. was made a party and that process issued against him, but the record failed to show whether or not the process was ever served. Will it be presumed upon collateral attack that B. was served with process, and that such fact was made to appear to the court before judgment was entered? Does such a case stand upon the same footing as one in which the court having no jurisdiction over the subject-matter, except upon a certain contingency, such, for example, as the arrival of a party in interest at majority, a court in which the judgment is attacked will presume that such contingency had transpired and that the court of first instance was advised thereof before judgment was entered? It is conceived that no such presumption would be made in favor of the judgment or decree, and that the rule that the existence of jurisdictional facts will be presumed does not apply in cases in which it is the practice of the courts to enter judgment only upon documentary evidence, such as becomes a part of the record, that jurisdiction had been acquired;[1] nor in any case in which it is provided

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character of the controversy. And these are unquestionably 'superior' courts within the meaning of the rule. And the same is true of courts possessing general equity powers. In most of the States there are certain tribunals whose authority is wholly derived from statutes, who are authorized to take cognizance only of a particular class of actions or proceedings, or to act only in certain specified circumstances, whose course of procedure is precisely marked out, and whose minutes or memorials are not dignified with the character of a record. And these are undoubtedly 'inferior' courts within the meaning of the rule."

[1] See Given v. McCarroll, 1 Sm. & M. (Miss.) 351; Laughman v. Thompson, 6 Sm. & M. (Miss.) 259; Burke v. Elliott, 4 Ired. L. (N. C.) 355, 358; 42 Am. Dec. 142, where it was said that a judgment against one not a party is void, and that

by statute that the judgment roll shall show service on the defendant where judgment by default is rendered,[1] nor, generally, wherever it is provided that the record shall show certain jurisdictional facts.[2]

It follows from the foregoing principles that the only case, apart from fraud, mistake or surprise, in which a judgment or decree can be declared void in a collateral proceeding is one in which the fact that the court had no jurisdiction of the cause appears upon the face of the proceedings in which the judgment or decree was rendered. In other words, a judgment will be void on its face only where the record discloses the jurisdictional facts, and the facts so disclosed are plainly insufficient to have conferred jurisdiction.[3] If this rule be sound, it is plain that the cases in which objection to the title may be successfully made on the ground of defective judicial proceedings through which the title is derived, will be reduced to a very narrow compass. This result is not to be regretted. The security of titles to real estate under judgments and decrees of court is a matter of the gravest importance to the public. Besides, the

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it can appear that he is a party only when the record states an appearance, or the official service of process on the person or his property. Citing Armstrong v. Harsham, 1 Dev. (N. C.) 187; Irbey v. Wilson, 1 Dev. & Bat. Eq. (N. C.) 568, and Skinner v. Moore, 2 Dev. & Bat. (N. C.) 138. In Campbell v. McCahan, 41 Ill. 45, it was held that a decree against a non-resident, founded upon an affidavit for an order of publication which failed to show upon its face that defendant was a non-resident, was absolutely void and open to collateral attack. Where it was provided by statute that an order for the sale of an infant's lands should not be void for irregularity in the proceedings provided certain substantial facts appeared, it was held that these facts must, on collateral attack, appear from the record or be shown by extraneous proof to exist, and that the court could not presume that they had been made to appear to the court granting the order. Cooper v. Sunderland, 3 Iowa, 114; 66 Am. Dec. 52. In Bannister v. Higginson, 15 Me. 73, it was held that if an officer's return of a levy of an attachment on land do not show by whom the appraisers of the land were chosen, the proceedings would be insufficient to pass the title. In Tederall v. Bouknight, 25 So. Car. 275, it was intimated that that if the record showed that a "summons" had been issued against an infant defendant the court, on collateral attack, might presume that it had been served, though actual service did not appear from the record.

[1] Hyde v. Redding, 74 Cal. 493, 501; 16 Pac. Rep. 380.

[2] Thornton v. Mulquinne, 12 Io. 549; Babbitt v. Doe, 4 Ind. 355, *semble.*

[3] Black on Judgments, § 278.

rule destroys a great source of frivolous objections to title, and materially lessens the labors of those whose duty it is to examine and pass upon the validity of titles. The foregoing rules may be regarded as established by the preponderance of judicial decision in America. But they have not passed without dissent, and decisions in conflict with the principles upon which they have been rested may be found in several of the States. An exhaustive consideration of this subject is beyond the scope of this work. The student will find the numerous cases in point collected in a recent work upon judgments, in which the whole subject of collateral attack is philosophically and perspicuously treated.[1]

The importance of these rules cannot be overestimated. If a title derived through a judicial sale may be overturned by matters *in pais* affecting the jurisdiction of the court, concerning which the most cautious purchaser cannot inform himself, there would be no safety in purchasing under a judgment or decree, and such titles would be held in as slight estimation as those dependent upon tax sales. If the record shows affirmatively want of jurisdiction in the court to render the judgment or decree, the purchaser can, by examination of the record, advise himself of that fact. But if it should be required of the purchaser to pursue his inquiries outside of the record, and satisfy himself as to the truth and adequacy thereof by the statements of witnesses, it is plain that the examination of a title under a judicial sale would involve a great outlay of time and money, with little assurance of safety in the result, and would probably prevent the acceptance of such titles, unless the consideration should be substantially reduced.

§ 51. **Title as affected by matters and things occurring after jurisdiction has attached.** It is obvious that a title under a judicial sale may be declared insufficient upon grounds other than want of jurisdiction to render the judgment or decree under which the sale was made. There may be proceedings in a cause which are no part of the original *res judicata*, and which are never passed upon until drawn in question in some subsequent proceeding involving the title of the purchaser.[2] Such, it is conceived, would be a conveyance to the purchaser, the sale not having, as yet, been confirmed.[1] The judgment too may be voidable because the result of fraud or mistake. And the sale itself and a conveyance in pursuance thereof may confer no rights upon the purchaser because effected by fraudulent collusion with the officer of the court or in other ways tainted with fraud.[2] With respect to sales that are void for want of confirmation, it is to be observed that it is not necessary, according to the weight of authority, that the record shall show a confirmation of the sale in express terms in order to validate the title of the purchaser.[3] A decree directing the distribution of the purchase money arising from the sale or directing that a deed be made to the purchaser is in effect a confirmation of the sale.[4] Nor is a report of sale by the officer of the court indispensable to the validity of the title if it otherwise appears from the record that a sale was made and that it was confirmed by the court.[5]

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[1] 1 Black Judgments, ch. 12, p. 297.

[2] Upson v. Howe, 3 Strobh. (S. C.) 108; 49 Am. Dec. 633.

§ 52. *Fraud as ground for collateral attack.* The rights of the purchaser at a judicial sale, where fraudulent misrepresentations respecting the title were made, have been already considered in this work.[6] Fraud which exposes the title of the purchaser to collateral attack is either fraud in the procuration or rendition of the judgment or decree under which the sale is made, or fraud in the sale itself. Fraud in the procuration of a judgment always opens the judgment to collateral attack by a party to the suit. The rule that fraud vitiates everything applies to judicial records as well as to private contracts.[7] An illustration of this principle is afforded by the case of Mitchell v. Kintzer.[8] This was an action of ejectment against a married woman by one who purchased the premises in dispute at an execution sale against the husband. The premises consisted of the share of the wife in her deceased father's estate, which the administrator of that estate, fraudulently colluding with the husband, returned as having been sold to the husband, there having been in fact no sale, and no purchase money paid by the husband. There was nothing on the face of the records of the Orphans' Court, ordering and confirming the sale, to impeach the validity thereof; but, upon the principle that fraud vitiates all acts, judicial as well as others, judgment was rendered for the wife, the defendant. Generally, it may be said that if a purchaser at a judicial sale buy with knowledge of fraud in the proceedings anterior to the sale, he cannot hold the property as against the claims of a party to the suit who was injured by the fraud.[1] But, of course, a purchaser, without notice from a purchaser with notice of the fraud, would be protected.

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[1] See Freeman Void Jud. Sales, § 43.

[2] In Singletary v. Carter, 1 Bailey L. (S. C.) 467; 21 Am. Dec. 480, a levy made by a deputy sheriff under an execution, in which he himself was plaintiff, was held void, and a sale and deed in pursuance thereof inoperative to vest title in the purchaser.

[3] Freeman Void Jud. Sales, § 44; Rorer Jud. Sales, §§ 3, 16, 107, 129.

[4] Agan v. Shannon, (Mo.) 15 S. W. Rep. 757.

[5] Harrison v. Harrison, 1 Md. Ch. 331.

[6] Ante, § 48.

[7] Fermor's Case, Co. Rep. pt. 3. p. 77; Vandever v. Baker, 13 Pa. St. 121, *obiter;* Wilson v. Smith, 22 Grat. (Va.) 493; Lancaster v. Wilson, 27 Grat. (Va.) 624.

[8] 5 Pa. St. 216; 47 Am. Dec. 408. See, also, Rhoads v. Selin, 4 Wash. C. C. (U. S.) 715.

Fraud in making a judicial sale, other than fraudulent representations as to the title, exposes it to collateral attack at the suit of the party injured.[2] It sometimes happens that the officer making the sale either directly purchases the property himself, or indirectly through some one whom he has procured to bid. Such a sale is *prima facie* fraudulent and conveys no title as against those in whose behalf the sale was made. So, also, where the officer fraudulently colludes with the purchaser in conducting the sale in such a manner that the property is sold for less than its value, or the parties in interest otherwise deprived of their rights.[3] It is a fraud also if the commissioner or officer making the sale himself purchases the land; but a party to the suit, having it in his power to resist the confirmation of such a sale and failing to do so, will not, after the lapse of a considerable time, be permitted to file a bill attacking the sale.[1] It is common to except cases of fraud, mistake and surprise in laying down the rule that the title of a purchaser at a judicial sale cannot be overturned by attacking in a collateral proceeding the judgment under which the sale was made. It is clear that a judgment founded in fraud or mistake is not conclusive upon the injured party. But if land be purchased by a party to fraudulent proceedings under which the sale was had, or by a party to a judgment or decree founded upon mistake, it seems that the sale should be vacated in some direct proceeding between the parties rather than by way of collateral attack.[2] It has been so held in a case in which certain lands were embraced in a decree for sale by mistake.[3] The right of a purchaser at a void judicial sale in a proceeding to enforce a lien or incumbrance, or to subject property to the payment of a debt or charge, to be substituted or subrogated to the benefit of such debt or lien that has been satisfied from the fund arising from such sale has been frequently declared.[4]

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[1] Morris v. Gentry, 89 N. Car. 248, 252, where the point was *obiter;* citing, however, University v. Lassiter, 83 N. Car. 38; Ivey v. McKinnon, 84 N. Car. 651; Sulton v. Schonnald, 86 N. Car. 198; 41 Am. Rep. 455; Gilbert v. James, 86 N. Car. 244.

[2] Freeman Void Jud. Sales, § 40. In Sumner v. Sessions, 94 N. Car. 371, a distinction was drawn between cases in which the officer selling purchased directly at his own sale, and those in which he purchased from a purchaser at his own sale, holding that in the former case the sale is a nullity and open to collateral attack and in the latter case that the sale could only be vacated by some direct proceeding instituted for that purpose. See, also, Rutherford v. Stamper, 60 Tex. 447; Dodd v. Templeman, 76 Tex. 57; 13 S. W. Rep. 187; Fisher v. Wood, 65 Tex. 200. McLaurin v. McLaurin, 106 N. C. 331; 10 S. E. Rep. 1056.

[3] Freeman Void Jud. Sales, § 40. Patton v. Thompson, 2 Jones (N. Car.), 285; 67 Am. Dec. 222. Even though the purchaser gives a fair price. Lancaster v.

Wilson, 27 Grat. (Va.) 624. Merwin v. Smith, 1 Gr. Ch. (N. J.) 182; Hodgson v. Farrell, 2 McCart. (N. J.) 788. If a purchaser at a judicial sale participates in a fraud in making the sale that fact may, in a collateral proceeding, be shown in avoidance of the sale. Griffith v. Bogert, 18 How. (U. S.) 158.

[1] Walker v. Ruffner, 32 W. Va. 297; 9 S. E. Rep. 265; Newcomber v. Brooks, 16 W. Va. 32.

[2] England v. Garner, 90 N. Car. 197; Hare v. Holloman, 94 N. Car. 14; Sumner v. Sessions, 94 N. Car. 371; Syme v. Trice, 96 N. Car. 243; 1 S. E. Rep. 480; Tyson v. Belcher, 102 N. Car. 112; 9 S. E. Rep. 634.

[3] Jones v. Coffey, 97 N. Car. 347; 2 S. E. Rep. 165. This was an action to recover lands sold by mistake under decree in a cause to which the now plaintiffs were parties. The court said: "The plaintiffs contend that if the land they seek to recover by this action was embraced by and sold under the decree in the action mentioned, it was so by mistake and misapprehension. It appears that that action is not yet determined. If so, the plaintiffs ought to seek their remedy if they have any in it; if it is determined, then by an independent action." Loyd v. Malone, 23 Ill. 43; 74 Am. Dec. 179; Keuchenbeiser v. Beckert, 41 Ill. 172; Lloyd v. Kirkwood, 112 Ill. 329, 338; Griswold v. Hicks, (Ill.) 24 N. E. Rep. 63.

[4] Hudgin v. Hudgin, 6 Grat. (Va.) 320; 52 Am. Dec. 124; Haymond v. Camden, 22 W. Va. 180; Hull v. Hull, (W. Va.) 13 S. E. Rep. 49. In this case the court, by BRANNON, J., after declaring the rule stated in the text, continued:

§ 53. **SALES BY EXECUTORS AND ADMINISTRATORS. Sale in pursuance of power in will.** Sales by executors and administrators are of two kinds: (1) Sales under a power contained in a decedent's will, and (2) Sales under judicial authority for the payment of the decedent's debts. Sales of the first kind, that is, sales in pursuance of a power, do not require judicial sanction in the first instance, nor confirmation after they have been made; the legal title is vested in the executor or administrator by the will, and his authority to sell is complete as soon as the formalities of the law in respect to probate of the will and qualification of the personal representative have been complied with, and the contingencies provided for in the will have transpired.[1]

It has been broadly stated that the maxim *caveat emptor* applies in all of its strictness to sales by executors and administrators.[2] This is true enough in respect to the validity of legal proceedings whence the power is derived, and, perhaps, in respect to restrictions or limitations upon the power in the testator's will. But no reason is perceived why, in case the testator himself had no title to the lands, a purchaser under a power contained in the will, should, while the contract is executory, be compelled to pay the purchase money with the certainty of eviction before him. At least, it would seem, that in such a case the maxim *caveat emptor* should be confined to cases in which the defects of title were such as the purchaser might have discovered by the exercise of ordinary diligence, and that in this respect a distinction may be made between cases in which the sale is made under a power and those in which it is made under a judicial license. This view is supported by the leading case of Garnett v. Macon,[3] in which a sale of lands was made by an executor under a power in the will for the payment of debts. It was held that the executor could not compel specific performance of the contract unless he

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"Principles of justice demand this, and courts of equity have raised up this principle, a being of their creation called 'substitution,' unknown to the common-law forums, to accomplish the ends of justice, and I know of no more signal instance to exemplify the disposition as well as the power of equity to adopt means to accomplish right than this of substitution accorded purchasers under void proceedings whose money has gone to satisfy liens good against the debtor."

[1] Woerner Law of Administration, § 464; Freeman Void Jud. Sales, § 9.

[2] Woerner Law of Administration § 484.

[3] 2 Brock. (C. C.) 213. Altgelt v. Mernitz (Tex. Civ. App.), 83 S. W. 891. In re Mulholland's Estate, 224 Pa., 73 Atl. 932, 132 Am. St. Rep. 791.

was able to convey a clear title. The opinion was by Chief Justice MARSHALL, and there was no adversion to the maxim *caveat emptor*. A sale by an administrator or executor, directly or indirectly to himself, acting under a power in the will, is void.[1] But, of course, the sale must be vacated by some appropriate proceeding for that purpose. It has been seen that such a sale under judicial license is in some of the States a nullity, absolutely void, and open to collateral attack, while in others a sale by the officer indirectly to himself, though fraudulent, must be vacated in some direct proceeding and cannot be shown in a possessory action by or against the purchaser.[2] The distinction, for the purposes of this work, is comparatively unimportant, for we are here considering defects for which a purchaser may reject a title ; and, to a purchaser from an administrator who has made a fraudulent sale to himself, it is immaterial whether the title is liable to be attacked in a collateral proceeding or in a direct proceeding, since in either case, if charged with notice of the fraud, he would lose the estate.

§ 54. **Sales in pursuance of judicial license.** The maxim *caveat emptor* has been rigorously applied in most of the American States to sales by executors and administrators under judicial authority, whether in respect to inherent defects in the title or to those which result from errors and irregularities in the proceedings whence the authority to sell is derived. The sale, like a tax sale, is of the title such as it is, good or bad, and the purchaser is conclusively presumed to have purchased with that understanding.[3] This rule has been carried so far that it has even been held that the administrator is under no obligation to disclose incumbrances on the estate or defects in the title that are known to him,[1] unless it be a want of title resulting from his own act or that of the intestate.[2]

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[1] Davies v. Hughes, (Va.) 11 S. E. Rep. 488. Prentice v. Townsend, 127 N. Y. Supp. 1066; 143 App. Div. 151.

[2] Ante, § 52.

[3] Woerner Law of Adm. § 484; Rorer on Jud. Sales (2d ed.), § 476; Freeman Void Jud. Sales, § 48; Schouler on Exrs. (2d ed.) § 515. Worthington v. McRoberts, 9 Ala. 297; Corbett v. Dawkins, 54 Ala. 282; Burns v. Hamilton, 33 Ala. 210; 70 Am. Dec. 570; Bolling v. Jones, 67 Ala. 508. Probate sales, however, are subject to confirmation by the court in this State. See above cases. Colbert v. Moore, 64 Ga. 502; Jones v. Warnock, 67 Ga. 484. Bingham v. Maxey, 15 Ill. 295; Moore v. Neil, 39 Ill. 256; 89 Am. Dec. 303; McConnell v. Smith, 39 Ill. 279; Wing v. Dodge, 80 Ill. 564; Tilley v. Bridges, 105 Ill. 336. Ripley v. Kepler, 94 Ind. 308. Hale v. Marquette, 69 Iowa, 376. Short v. Porter 44 Miss. 533; Hutchins v. Brooks, 31 Miss. 430. Bashore v. Whisler, 3 Watts (Pa.), 490; Fox v. Mensch, 3 W. & S. (Pa.) 444; King v. Gunnison, 4 Pa. St. 172; Sackett v. Twining, 18 Pa. St. 199; 57 Am. Dec. 599. Lynch v. Baxter, 4 Tex. 431; 51 Am. Dec. 735; Williams v. McDonald, 13 Tex. 322; Rice v. Burnett,

In most of the States it seems that probate sales are not reported to the court for confirmation, and, therefore, cannot be regarded as judicial sales. The authority to sell is granted by the court, but thereafter the court, with respect to the sale, is *functus officii*.[3] But in other States it seems that such sales are reported to court for confirmation.[4] Where that is the case, no reason is perceived why the purchaser should not be permitted to resist confirmation on the ground that the title is defective, as he may do in the case of an ordinary judicial sale. A proceeding on behalf of an administrator to sell the lands of his intestate for distribution on the ground that it cannot be equitably divided among the heirs, is a proceeding *in rem*, and a sale made under a decree in such a case is a judicial sale to which the doctrine *caveat emptor* applies. The purchaser buys at his peril, and if there be no fraud or mistake or ignorance of any material fact he must pay the purchase money after confirmation of the sale, even though he gets no title.[5] If the purchaser from an

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39 Tex. 177. A harsh application of the rule stated in the text will be found in the case of Bolling v. Jones, 67 Ala. 508, where a widow, who purchased the lands of her deceased husband at a sale by his administrator, was compelled to pay for a part to which she was entitled as a homestead. STONE, J., dissenting. The rule applies whether the sale by the administrator be public or private. Kirkland v. Wade, 61 Ga. 478

[1] Thompson v. Munger, 15 Tex. 523; 65 Am. Dec. 176; Hawpe v. Smith, 25 Tex. Supp. 448. See, also, Loudon v. Robertson, 5 Bl. (Ind.) 276.

[2] In Walton v. Reager, 20 Tex. 103, 110, it was said that if the administrator should sell the land a second time without disclosing the prior sale it would be a fraud upon the purchaser and would vitiate the second sale. The court added that it would be equally a fraud upon a purchaser from the administrator if there had been a prior sale by the intestate, whether the same was known or unknown to the administrator, if the purchaser had no knowledge of it, thus withholding application of the maxim *caveat emptor* from these cases in which the want of title springs from the fault or wrongful act of the administrator, and distinguishing between such cases and those in which the title was originally defective. But see Ward v. Williams, 45 Tex. 617, where this *dictum* is overruled.

[3] Smith v. Arnold, 5 Mason (U. S.), 414, 420.

[4] See Rorer on Jud. Sales, § 362. 2 Woerner Am. Law of Admn. § 1059.

[5] Garrett v. Lynch, 45 Ala. 204. Burns v. Hamilton, 33 Ala. 210; 70 Am. Dec. 570.

administrator or executor has received a conveyance it is immaterial, with respect to his asserted right to detain the purchase money on failure of the title, whether the conveyance was with or without covenants for title. If the conveyance was with covenants they do not bind the estate, and consequently the breach of them affords no counterclaim to an action for the purchase money.[1] And if the conveyance was without covenants for title the purchaser would, on general principles, be without relief.

§ 55. **Fraud on the part of the representative.** Fraud in a sale by a fiduciary or ministerial officer in representing that the title is good, or that there are no incumbrances on the property, when he knows the contrary, has been distinguished from fraudulent collusion by which the sale is effected, or any other fraud, not in respect to the title, which avoids the sale. Fraudulent misrepresentations as to the title or as to incumbrances cannot, it has been held in some cases, entitle the purchaser to detain or recover back the purchase money from the estate; they merely give the purchaser a right of action against the fraudulent vendor in his individual capacity.[2] Other cases hold that the administrator's representations as to the title are immaterial and irrelevant, and that if the purchaser chooses to allow himself to be influenced by them, he has no remedy against the estate, either by way of recovery back or detention of the purchase money.[3] *A fortiori*, the purchaser cannot be relieved if the representation was made in good faith.[4] Nor is the administrator in any case, it seems, bound to disclose imperfections in the title and incumbrances upon the estate. Mere silence on the part of the administrator in these respects will not be construed to be a fraud on the purchaser.[5] An administrator has no right to agree that the sale shall be free from incumbrances,[1] and if an incumbrance exist, the purchaser must take subject thereto. Nor can he refuse to pay the purchase money on the ground that the title was advertised to be good.[2] Nor has the administrator a right to represent that the title is good. He should offer for sale merely such right, title or interest in the estate as his testator or intestate may have had.[3] If there is a cloud upon the title he cannot even apply to a court of equity to remove it.[4] But the better opinion seems to be that if the administrator fraudulently represent that the title is good for the purpose of effecting a sale, when he knows that there is no title, the contract will be rescinded and the parties placed in *statu quo*.[5]

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[1] Hale v. Marquette, 69 Iowa, 376; Mitchell v. McMullen, 59 Mo. 252.

[2] Colbert v. Moore, 64 Ga. 502; Ga. Code, § 2622. Riley v. Kepler, 94 Ind. 308. Hutchins v. Roberts, 31 Miss. 430. But see Hawpe v. Smith, 25 Tex. Supp. 448, and Walton v. Reager, 20 Tex. 103.

[3] Fox v. Mensch, 3 W. & S. (Pa.) 444. Even though the representation by the administrator was fraudulently made. Ripley v. Kepler, 94 Ind. 308.

[4] Coombs v. Lane, 17 Tex. 280.

[5] Woerner Am. Law of Admn. § 484; Wilson v. White, 2 Dev. Eq. (N. Car.) 29. It seems, however, that the purchaser in this case knew of the objection to the title, which was an outstanding right of dower. Thompson v. Munger, 15 Tex. 523; 65 Am. Dec. 176; Hawpe v. Smith, 25 Tex. Supp. 448.

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[1] Bickley v. Biddle, 33 Pa. St. 276. But see Reiner's Appeal, (Pa. St.) 12 Atl. Rep. 850, where it was held that an executor has a right, when making a sale, to declare that the purchaser shall take free of an incumbrance on the premises, and that the estate must reimburse the purchaser if he be compelled to discharge the lien.

[2] Halleck v. Guy, 9 Cal. 181; 70 Am. Dec. 643. A number of authorities will be found collected in the briefs of counsel and in the opinion of the court in this case.

[3] Schouler on Executors (2d ed.), § 212.

[4] Le Moyne v. Quimby, 70 Ill. 399.

[5] Hickson v. Linggold, 47 Ala. 449; Fore v. McKenzie, 58 Ala. 115, provided the purchaser does not, with knowledge of the fraud, permit the sale to be confirmed. Crayton v. Munger, 9 Tex. 285; Able v. Chandler, 12 Tex. 88; 62 Am. Dec. 518, where the sale was of personal property; Roehl v. Pleasants, 31 Tex. 45; 98 Am. Dec. 514; Walton v. Reager, 20 Tex. 103. Bond v. Ramsey, 89 Ill. 29. Ives v. Pierson, 1 Freem. Ch. (Miss.) 220. As to whether a prior conveyance by the administrator or the intestate entitles the purchaser to relief, see Ward v. Williams, 45 Tex. 617, criticising Walton v. Reager, 20 Tex. 103. Banks v. Ammon, 27 Pa. St. 172. Love v. Berry, 22 Tex. 371. "If the administrator makes representations which he knows to be untrue for the purpose of deceiving the purchaser, who is thereby deceived, without that degree of negligence on his part which will throw the responsibility of the description upon himself, we hold that he may show that fraud in defense to the note. (Mason v. Wait, 4 Scam. [Ill.] 135. England v. Clark, 4 Scam. [Ill.] 489; Welch v. Hoyt, 24 Ill. 118. Linton v. Porter, 31 Ill. 120.) This does not dispense with the application of the rule *caveat emptor* to such sales. I know of no case where that rule has ever been so applied as to excuse a fraud. The utmost vigilance may often be unable to guard against the practices of the fraudulent. As has been repeatedly decided by this court, in the absence of fraud the purchaser at such sale must not only look out for the title but for the quality of the article which he purchases. Nor can the administrator bind the estate by a warranty of either. If he assumes to do so he would be personally responsible upon such warranty.

The rule that the maxim *caveat emptor* applies in its strictest sense to sales by executors and administrators under judicial license is established, as we have seen, in most of the American States. But in some of the States it does not prevail in its fullest extent. Thus, in Mississippi it has been held that a purchaser from an administrator under a probate license may refuse to pay his bond for the purchase money, if the proceedings in which license culminated fail to show notice to the heirs, as required by law.[1] And in Texas, where an administrator sold land to which there was no other title than a location under a rejected and fraudulent certificate, it was held that the rule *caveat emptor* did not apply, the court saying that it was simply a question of justice, whether the estate having parted with nothing, and the purchaser having gotten nothing, he should be compelled to pay.[2] So, also, it has been held that a purchaser from an administrator whose powers have been revoked will be relieved in equity.[3] And generally it has been held that if a probate sale be void, either for want of jurisdiction in the court to order the sale, or for want of authority in the administrator to sell, the purchaser cannot be compelled to pay the purchase money.[4] This is without doubt a great relaxation of the rule *caveat emptor*, if not entirely inconsistent therewith, inasmuch as the defect would

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This is carrying the doctrine of risk to the purchaser and immunity to the estate far enough. To go further and sanction the practice of a fraud would tend to drive all men from such sales, which would prove a serious detriment to estates." CATON, J., in Ray v. Virgin, 12 Ill. 216.

[1] Gwin v. McCarroll, 1 Sm. & M. (Miss.) 351; Laughman v. Thompson, 6 Sm. & M. (Miss.) 259; Worten v. Howard, 2 Sm. & M. (Miss.) 530; 41 Am. Dec. 607. Compare Mellen v. Boarman, 13 Sm. & M. 100. *Contra*, Bishop v. O'Connor, 69 Ill. 431.

[2] Roehl v. Pleasants, 31 Tex. 45; 98 Am. Dec. 514. The same observation would apply with equal force in a case in which the purchaser is put in possession and afterwards evicted by one claiming under a paramount title; yet, as we have seen, the purchaser is denied relief in such a case. It is not easy to reconcile this decision with the declaration in Rice v. Burnett, 39 Tex. 177, that a purchaser at an administrator's sale is to be regarded as a mere speculator; to win if he gets a good title, and to lose if the title be worthless.

[3] Levy v. Riley, 4 Oreg. 392.

[4] Woerner Am. Law of Admn. § 485; Freeman Void Jud. Sales, § 48. Wyatt v. Rambo, 29 Ala. 517; 68 Am. Dec. 89; Ikelheimer v. Chapman, 32 Ala. 676; Riddle v. Hill, 51 Ala. 224. Campbell v. Brown, 6 How. (Miss.) 230. Bartee v. Tompkins, 4 Sneed (Tenn.), 623.

be, in most instances, palpable upon the face of the proceedings, and one to which the attention of the purchaser would naturally be directed in the first instance.[1] The right of a purchaser at a void probate sale to be subrogated to the rights of the creditor whose debt was paid out of the proceeds of the sale, will be considered hereafter.[2] It seems that a purchaser at a void probate sale cannot, where time is not material, rescind the contract if the heirs are willing to join in a conveyance of the land to him.[3] In the State of New York a purchaser at a probate sale may refuse to complete his purchase if the title be bad. He cannot be compelled to accept an unmarketable title.[4] Such a rule, it is believed, conduces to the interests and advantage of all parties, by increasing the confidence of bidders at probate sales, by protecting purchasers against latent defects in the title, and by preventing sacrifice and loss to the estate of the decedent. In suits against purchasers at probate sales the courts will be slow to entertain objections to title founded upon errors, defects and irregularities in the proceedings under which the administrator derived his authority to sell. Mere omissions by the administrator, or by the court, to do certain things not essential to the jurisdiction of the court cannot defeat the title of a *bona fide* purchaser from the administrator. The repose and security of such purchaser in their titles is of the greatest interest to the public, for if they could be evicted or disturbed in their possession because of such errors and omissions, probate sales would be dampened, and the estates of decedents would be sacrificed.[5] Therefore, it has been said by the most eminent judicial authority that "there are no judicial sales around which greater sanctity ought to be placed than those of the estates of decedents, made by order of those courts to which the laws of the States confide full jurisdiction over the subject.[6]

§ 56. **Want of jurisdiction, errors and irregularities in probate proceedings.** What has been already said in respect to want of jurisdiction, errors and irregularities in judicial proceedings generally, as affecting the title of a purchaser thereunder, applies to sales by executors, administrators, or other officers under probate licenses.[1] It may be useful, however, to present here several instances in which the title of a purchaser at such a sale has been declared sufficient or insufficient with respect to the validity of probate proceedings. It has been held that an order for the sale of the lands of a decedent, made by the probate court before petition filed by the administrator for that purpose, and before a return of a citation against the heirs as required by statute, is void for want of jurisdiction, and may be attacked in a collateral proceeding.[2] So, also, where the proceedings show upon their face that the administrator was not entitled to letters of administration.[3] So, where no order of publication of the application for license to sell is made, as required by statute.[4] So, also, where such application fails to set forth the names of the heirs at law, and the citation to answer is not directed to all the heirs, as required by law.[5] The jurisdiction of a probate court to order a sale of the lands of a decedent is founded upon the fact that there are debts due by him, and a decree founded upon a petition for such sale which contains no averment that the estate is indebted is not simply reversible for error, but is void and open to collateral attack.[6] Payment of the purchase money in full and occupancy of the premises will not give a purchaser at a probate sale title as against the heir, unless the sale has been confirmed and a conveyance made.[1] A sale of more than enough land to pay the debts of an estate, or a license to sell enough for that purpose only, is absolutely void.[2] If the statute law provides that the lands of a decedent shall not be sold for the payment of his debts unless the personal estate is insufficient for that purpose, the court will not have jurisdiction to direct a sale of the lands unless the petition or complaint avers the insufficiency of the personalty to pay the debts.[3] If notice of application by the administrator for license to sell be not given the heirs and other persons interested, in pursuance of the statute, the sale will be void, and open to collateral attack.[4] But want of service of a summons on the guardian *ad litem* of infant heirs makes the subsequent proceeding reversible for error and not absolutely void, and, therefore, does not affect the title of the purchaser.[5] Where the courts of law or equity, and not the probate court, have power to order a sale of devised lands as assets for the payment of the testator's debts, an order of the probate court directing such a sale is without jurisdiction and absolutely void.[6]

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[1] Ante, § 46.

[2] Post, this chapter, § 65.

[3] Lamkin v. Reese, 7 Ala. 170. See, also, Lampton v. Usher, 7 B. Mon. (Ky.) 57.

[4] See the case of Wilson v. White, 109 N. Y. 59, in which a purchaser from an executor selling under a surrogate's order was relieved from his bid on the ground that the title was defective. See, also, Headrick v. Yount, 22 Kans. 344.

[5] Poor v. Boyce, 12 Tex. 140.

[6] Grignon v. Astor, 2 How. (U. S.) 243.

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[1] Ante, p. 76. Upon the general proposition that the validity of a probate sale cannot be attacked in a collateral proceeding, except upon the ground of want of jurisdiction to order the sale, see Rorer on Judicial Sales, § 349; Freeman Void Jud. Sales, chap. 2; 2 Woerner Am. Law of Admn. § 488.

[2] Finch v. Edmondson, 9 Tex. 504; Campbell v. Brown, 6 How. (Miss.) 106, 230; Puckett v. McDonald, 6 How. (Miss.) 269; Gwin v. McCarroll, 1 Sm. & M. (Miss.) 351.

[3] Haug v. Primeau, 98 Mich. 91; 57 N. W. Rep. 25; Templeton v. Falls Land Co., 77 Tex. 55; 13 S. W. Rep. 964, and Texas cases there cited.

[4] Cunningham v. Anderson, (Mo.) 17 S. W. Rep. 972.

[5] In re John's Estate, 21 Civ. Proc. R. (N. Y.) 326; 18 N. Y. Supp. 172.

[6] Lyons v. McCurdy, 90 Ala. 493; 8 So. Rep. 52; citing Tyson v. Brown, 64 Ala. 244; Wilburn v. McCalley, 63 Ala. 436; Quarles v. Campbell, 72 Ala. 64; Robertson v. Bradford, 70 Ala. 385; Meadows v. Meadows, 73 Ala. 356; Landford v. Dunkton, 71 Ala. 594; McCorkle v. Rhea, 75 Ala. 213; Ballard v. Johns, 80 Ala. 32; Morgan v. Farned, 83 Ala. 367; 3 So. Rep. 798.

On the other hand, it has been held that the validity of an administrator's sale will not be affected by the fact that he gave no bond to conduct the sale properly,[7] nor that the record failed to show a necessity for the sale,[1] nor that an inadequate price was realized for the property sold,[2] nor that the administrator died pending the proceeding to sell.[3] Irregularities in the publication of notice to non-resident defendants in a proceeding to sell land for the payment of a decedent's debts, will not avoid the title of the purchaser.[4] A recital in the record of probate proceedings for the sale of land that notice of the sale had been posted as required by law cannot be contradicted in a collateral proceeding.[5] If the record is silent as to the existence of certain jurisdictional facts, and those facts are of a kind that are not required to appear affirmatively from the record, it will be presumed that the court was satisfied of their existence at the time of pronouncing judgment.[6] The regularity and validity of the appointment and qualification of an administrator who has been recognized by the probate court and authorized to sell, cannot be inquired into collaterally.[7] Fraudulent collusion between the administrator and the purchaser, by which the land is sacrificed, furnishes a ground upon which the heirs may avoid the sale.[8] And it may be stated as a general rule that in a case of fraud, whether in the procurement or rendition of the order under which the sale is made, or in the proceedings anterior to or at the time of the sale, whereby the heirs are deprived of their rights in the premises, makes the title liable to attack in the hands of a purchaser with notice of the fraud.[9] But the liability of the title to attack on this ground will not relieve the purchaser from the contract, if the fraud appeared upon the face of the proceedings, and might have been discovered by the exercise of due diligence.[1]

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[1] Greenough v. Small, 137 Pa. St. 132; 20 Atl. Rep. 553; Morgan's App., 110 Pa. St. 271; 4 Atl. Rep. 506; Armstrong's App., 68 Pa. St. 409; Demmy's App., 43 Pa. St. 169.

[2] Gregson v. Tuson, (Mass.) 26 N. E. Rep. 874. *Contra*, Comstock v. Crawford, 3 Wall. (U. S.) 396; Hodges v. Fabian, (So. Car.) 9 S. E. Rep. 820.

[3] Needham v. Salt Lake City, (Utah) 26 Pac. Rep. 920; citing Comstock v. Crawford, 8 Wall. (U. S.) 396, *dictum*.

[4] Mickel v. Hicks, 19 Kans. 578; 27 Am. Rep. 161; Chicago, Kan. & Neb. R. Co. v. Cook, 43 Kans. 83; 22 Pac. Rep. 988; Harrison v. Harrison, 106 N. Car. 282; 11 S. E. Rep. 356. This, however, was not a case of collateral attack. The rule in North Carolina was otherwise as to infants until by statute service of summons was required to be made on the infant. Hare v. Hollomon, 94 N. Car. 14.

[5] Coffin v. Cook, 106 N. C. 376; 11 S. E. Rep. 371.

[6] Atwood v. Frost, 51 Mich 360; 73 Mich. 67. Other instances in which judgments or orders of probate courts have been held void for want of jurisdiction and open to collateral attack will be found in Kertchem v. George, 78 Cal. 597; 21 Pac. Rep. 372; Rogers v. Clemmans, 26 Kans. 522; Coulson v. Wing, (Kans.) 22 Pac. Rep. 570; Black v. Dressell, 20 Kans. 153. In McNally v. Haynes, 59 Tex. 583, it was held that a purchaser at a probate sale was chargeable only with notice of the application for the sale, the order of sale and the sale itself, with accompanying exhibits, if any, and that beyond these he was not bound to look.

[7] Wyman v. Campbell, 6 Port. (Ala.) 219; 31 Am. Dec. 677.

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[1] Lynch v. Baxter, 4 Tex. 431; 51 Am. Dec. 535; Poor v. Boyce, 12 Tex. 449.

[2] Williams v. Johnson, (N. Car.) 17 S. E. Rep. 496.

[3] Palmerton v. Hoop, (Ind. Sup.) 30 N. E. Rep. 874; Gross Lumber Co. v. Leitner, 91 Ga. 810; 18 S. E. Rep. 62; Succession of Massey, 46 La. Ann. 126; 15 So. Rep. 6.

[4] Berrian v. Rogers, 43 Fed. 467; Mohr v. Maniere, 101 U. S. 417. *Contra*, Mohr v. Tulip, 40 Wis. 66.

[5] Richardson v. Butler, 82 Cal. 174; 23 Pac. Rep. 9.

[6] Ante, § 50. McMillan v. Reeves, 102 N. Car. 550; 9 S. E. Rep. 449, where the authority of counsel to act for those not served with process was presumed to exist, the same not having been disputed in the proceedings complained of. Mills v. Herndon, 77 Tex. 89; 13 S. W. Rep. 854; Price v. Springfield Real Estate Assn., (Mo.) 10 S. W. Rep. 57.

[7] Poor v. Boyce, 12 Tex. 440.

[8] Freeman Void Jud. Sales, § 40.

[9] In Lynch v. Baxter, 4 Tex. 431; 51 Am. Dec. 735, it was intimated that if a sale by an administrator for the payment of debts, when there was no necessity

§ 57. **SHERIFF'S SALES. Want of title in execution defendant.** *General rules.* The title which a purchaser at an execution sale will acquire may be worthless for three reasons: (1) Because of a complete want of title on the part of the execution defendant; the purchaser may be evicted by some one having a title paramount to that which the officer undertakes to sell. (2) Because the judgment or order under which the officer professes to act is void for want of jurisdiction in the court, or for some other reason, is open to collateral attack, and insufficient to bar a recovery of the estate from the purchaser by the judgment debtor or those claiming under him. (3) Because of some matter transpiring subsequent to the judgment or order under which the sale is made, avoiding the sale, for example, a levy and sale after the return day of the process under which the officer acts.

The maxim or rule *caveat emptor* applies with peculiar force to cases in which there is a complete want of title in the execution defendant.[2] In most of the States there is no report or confirmation of the sale; no time is given for examination of the title; the

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therefor, was fraudulently procured by the purchaser in collusion with the administrator, the title thereunder would be open to attack.

[1] Rice v. Burnett, 39 Tex. 177.

[2] Freeman on Executions, § 335; Herman on Executions, p. 395; Freeman Void Jud. Sales, § 48; Rorer on Jud. Sales, p. 603, Title "Sheriffs," Am. & Eng. Encyc. of L. The Monte Allegre, 9 Wh. (U. S.) 616. Here the sale was of personal property, but the case has been constantly cited in applying the same principle to sales of realty under execution. Lang v. Waring, 25 Ala. 625; 60 Am. Dec. 535. Goodbar v. Daniel, 88 Ala. 583; 7 So. Rep. 254; Thomas v. Glazener, 90 Ala. 537, 8 So. Rep. 153. Danly v. Rector, 10 Ark. 211; 1 Am. Dec. 242. Johns v. Frick, 22 Cal. 512. Methvin v. Bexley, 18 Ga. 551. England v. Clark, 4 Scam. (Ill.) 486; Walbridge v. Day, 31 Ill. 379; 83 Am. Dec. 227; Bassett v. Lockard, 60 Ill. 164; Alday v. Rock Island Co., 45 Ill. App. 62. Vest v. Weir, 4 Blackf. (Ind.) 135; Walden v. Gridley, 36 Ind. 523. Holtzinger v. Edwards, 51 Iowa, 383. Treptow v. Buse, 10 Kans. 170. Hand v. Grant, 10 Smed. & M. (Miss.) 514; 43 Am. Dec. 528. Miller v. Finn, 1 Neb. 254. Mervin v. Vanlier, 7 N. J. Eq. 34. Vattier v. Lytle, 6 Ohio, 477; Corwin v. Benham, 2 Ohio St. 36; Creps v. Baird, 3 Ohio St. 277. Weidler v. Bank, 11 Serg. & R. (Pa.) 134; Auwerter v. Mathiot, 9 Serg. & R. (Pa.) 399. Friedly v. Scheetz, 9 Serg. & R. (Pa.) 156; 11 Am. Dec. 691; Smith v. Painter, 5 Serg. & R. (Pa.) 223; 9 Am.

purchaser pays the cash, the officer executes a deed, and the transaction is ended, so that there is no room for the application of any asserted equitable right to detain the purchase money where the title fails, as in the ordinary case of vendor and vendee. Such sales stand much upon the same footing as tax sales. The purchaser regulates his bid by his knowledge that he will get merely such title as the execution defendant has, though it be utterly worthless; consequently the property is usually knocked down to him at a nominal figure. Again, the sheriff stands in the place of the execution debtor, and sells merely such title or interest as the debtor may have in the property. The sale by the sheriff can amount to no more than a sale by the debtor himself of merely such estate or title as he might have, expressly without warranty, and, as the purchaser could in such case neither detain nor recover back the purchase money from the debtor on failure of the title, neither can he in such case detain or recover it back from the sheriff or the execution creditor.[1] Therefore, stringent applications of the rule *caveat*

Dec. 344; Coyne v. Souther, 61 Pa. St. 456; Wills v. Van Dyke, 106 Pa. St. 111. Upham v. Hamill, 11 R. I. 565; 23 Am. Rep. 525. Thayer v. Sheriff, 2 Bay (S. Car.), 171; Harth v. Gibbs, 3 Rich. L. (S. Car.) 316; Wingo v. Brown, 14 Rich. (S. Car.) 103. Oberthier v. Stroud, 33 Tex. 525. Henderson v. Overton, 2 Yerg. (Tenn.) 393; 24 Am. Dec. 492, unless the sale was made under a void judgment; Bostick v. Winton, 1 Sneed (Tenn.), 541. Saunders v. Pate, 4 Rand. (Va.) 8, where, however, the sale was of personal property. In Methvin v. Bexley, 18 Ga. 551, a purchaser at a sheriff's sale, who had been evicted from the premises, filed a bill to recover from the sheriff a surplus remaining in the sheriff's hands after satisfying the execution, which surplus the sheriff claimed by virtue of other *fi. fas.* against the same defendant. It was held that the rule *caveat emptor* applied, and that the bill could not be maintained. The rule *caveat emptor*, as it applies to sheriffs' sales, is thus defended by the court in Thayer v. Sheriff, 2 Bay (S. C.), 169: "These sales are made by operation of law, in which the will and consent of the defendants are never consulted. They are forced upon them, whether they assent or dissent to or from them, and it is their right, whatever that may be, more or less, that is sold by the sheriff, who is a public officer of justice. There is no warranty in law, either express or implied, raised on any of the parties concerned in such a sale; neither on the part of the former owner, the defendant, nor the sheriff, who is the mere organ of the law for transferring the right of the defendant. *Caveat emptor*, under these circumstances, is the best possible rule that can be laid down or adopted. Every man who goes to a sheriff's sale ought to take care and examine into the title of the defendant carefully before he attempts to bid; and that is one reason, among many, why property is in general sold so much under its real value at these sales."

[1] Methvin v. Bexley, 18 Ga. 551.

emptor will be found in cases of sales by sheriffs or other ministerial officers under executions, attachments, or other legal process.[1] The rule *caveat emptor* applies with additional force if the purchaser at a sale under execution was warned that the title was in dispute.[2] The purchaser at a sale under execution not only takes merely such title as the execution debtor may have, but he takes subject to all equities which may exist against the latter,[3] whether he has notice of them or not.[4] A purchaser at an execution sale is not entitled to the privileges of a purchaser without notice. Thus, it has been held that he takes subject to the right of a third person to require a conveyance of the bare legal title from the execution debtor where such person had purchased from the debtor and paid the purchase money without taking a conveyance before the execution sale.[5] The same rule was applied in a case in which the title to the property was being litigated between the execution defendant and a stranger, the purchaser objecting that a *lis pendens* had not been docketed, as the law required.[6] So, also, where the execution plaintiff had agreed with the defendant that the lien of his judgment should be postponed and made subsequent to a junior mortgage.[7] But inasmuch as a purchaser at a sale under execution succeeds to all the rights of the execution plaintiff, the rule that he takes subject to all equities against the execution defendant must obviously be taken with the qualification, namely, that if, under the Registry Acts, the judgment under which the sale is made is a lien on the premises in the hands of a purchaser from the judgment debtor, the purchaser under the execution succeeding to the benefit of that lien will take the title discharged from the equitable rights of the purchaser from the judgment debtor.[1] So, if the judgment debtor incumbers the property after the lien of the judgment has attached, a subsequent sale under the judgment will carry a title to the purchaser discharged of the incumbrance.[2] It has been held, also, that the purchaser will not be entitled to relief upon the ground that all parties were mistaken in supposing that the execution defendant had an interest in the premises subject to execution.[3] Nor will a purchaser at an execution sale be released upon the ground that he had never attended such a sale before, and not hearing the terms of the sale, supposed himself to be buying the entire estate in question, and not merely the debtor's "right, title and interest" therein.[4] But it has been held that if the execution plaintiff himself purchase the premises under a mistake as to the application of the proceeds to his lien, the same being absorbed by other liens on the property, the sale will be set aside upon his motion.[5] In some of the States sales of realty under execution are required to be reported to court and confirmed before they become conclusive upon the parties. Wherever this practice prevails, it seems that the purchaser may resist the confirmation of the sale upon the ground that the title is bad.[6]

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[1] A sale by a sheriff, foreclosing a mortgage, is a "sheriff's sale," within the meaning of the rule *caveat emptor*. Walbridge v. Day 31 Ill. 379; 88 Am. Dec. 227.

[2] Oberthier v. Stroud, 33 Tex. 522; Boro v. Harris, 13 Lea (Tenn.), 36.

[3] Osterman v. Baldwin, 6 Wall. (U. S.) 116; Bell v. Flaherty, 45 Miss. 694. See cases cited Vol. 6, U. S. Dig. (1st series) 141, § 2202. If the execution defendant have only an equitable estate, and has not paid the entire purchase money, a purchaser under the execution acquires only his interest, and can get a title only by doing those things upon performance of which the debtor himself would have been enabled to demand a conveyance of the title. Walke v. Moody, 65 N. Car. 599. Morgan v. Bouse, 53 Mo. 219.

[4] Vannoy v. Martin, 6 Ired. Eq. (N. Car.) 169; 51 Am. Dec. 418.

[5] Georgetown v. Smith, 4 Cranch C. C. (U. S.) 91.

[6] Rollins v. Henry, 78 N. Car. 342.

[7] Frost v. Yonkers Sav. Bank, 70 N. Y. 553; 26 Am. Rep. 627.

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[1] Halley v. Oldham, 5 B. Mon. (Ky.) 233; 41 Am. Dec. 262; Riley v. Million, 4 J. J. M. (Ky.) 395; Fosdick v. Burr, 3 Ohio St. 471.

[2] Nickles v. Haskins, 15 Ala. 619; 50 Am. Dec. 154; Spoor v. Phillips, 27 Ala. 193. Million v. Riley, 1 Dana (Ky.), 359. Tinney v. Watson, 41 Ill. 215; Goff v. O'Conner, 16 Ill. 421. Campbell v. Lowe, 9 Md. 500; 66 Am. Dec. 339. Williamson v. Johnston, 12 N. J. L. 86; Den v. Young, 12 N. J. L. 300; Bloom v. Welsh, 27 N. J. L. 177.

[3] Freeman Void Jud. Sales, § 49. See post, "Mistake" ch. 35; Wingo v. Brown, 14 Rich. L. (S. C.) 103. The purchaser in this case refused to comply with the terms of sale, the land was resold, and he was held liable for the difference. Norman v. Norman 26 So. Car. 41.

[4] Upham v. Hamill, 11 R. I. 565; 23 Am. Rep. 525.

[5] Cummings' Appeal, 23 Pa. St. 509, citing Ontario Bank v. Lansing, 2 Wend. (N. Y.) 260, and Post v. Leet, 8 Paige Ch. (N. Y.) 336, which, however, was a sale by a master in chancery, and not by the sheriff. But see Davis v. Hunt, 2 Bailey (S. C.), 412, where an execution plaintiff, who purchased at his own sale under the mistaken supposition that his lien on the property was the oldest, was compelled to complete his purchase.

[6] Wood v. Levis, 14 Pa. St. 9; Am. & Eng. Encyc. of L. "Sheriffs."

In certain of the States, a purchaser under execution, who has been evicted by one having a title paramount to that of the execution debtor, has been permitted to recover the purchase money from the execution plaintiff upon the ground that, *ex æquo et bono*, the purchaser is better entitled to the money than the execution creditor is to withhold it from him.[1] This doctrine, however, is plainly inconsistent with the rule *caveat emptor*. If the purchaser cannot *detain* the unpaid purchase money, *a fortiori* he cannot recover it back; and if he cannot recover it back from the execution debtor, *a fortiori* he cannot recover it back from the execution creditor. Therefore, it has been frequently held that want of title in the debtor gives the purchaser no right of action against the creditor.[2] And these cases, it is believed, are sustainable both upon principle and authority. Of course, however, the creditor may, by his conduct, make himself liable to the purchaser, as where, knowing the title to be worthless, he induces the purchaser to bid by representing it to be good.[1]

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[1] Henderson v. Overton, 2 Yerg. (Tenn.) 393; 24 Am. Dec. 492. Chapman v. Brooklyn, 40 N. Y. 372. Citizens' Bank v. Freitag, 37 La. Ann. 71; Gaines v. Merchants' Bank, 2 La. Ann. 479; McIntosh v. Smith, 2 La. Ann. 756. It will be remembered that the rule *caveat emptor* is not strictly observed in Louisiana, the civil law prevailing there. In New York, the execution purchaser, if evicted because of irregularity in the proceedings, or error in the judgment on which the execution was issued, may recover the purchase money from "the person for whose benefit the property was sold." Code C. P. N. Y. §§ 1479, 1480; Gerrard's Titles to Real Estate (3d ed.), 797. Several cases have been cited to this proposition which decide nothing more than that money paid under a mistake of fact may be recovered back. Among others are Rheel v. Hicks, 25 N. Y. 289; Kingston Bank v. Eltinge, 40 N. Y. 391; 100 Am. Dec. 516; Kelly v. Solari, 9 M. & W. 54; Miller v. Duncan, 6 B. & C. 671. The case of Moses v. McPherlan, 2 Burr. 1012; 1 W. Bl. 219, has been relied upon in support of this doctrine, but it can hardly be considered in point, for there the defendant had agreed in writing to indemnify the plaintiff against his indorsement of certain notes, on which indorsement the defendant afterwards recovered judgment, in violation of his agreement.

[2] U. S. v. Duncan, 4 McLean (U. S.), 607. Dunn v. Frazier, 8 Blackf. (Ind.) 432. Whitmore v. Parks, 3 Humph. (Tenn.) 95; Kimbrough v. Burton, 3 Humph. (Tenn.) 110. Judice v. Kerr, 8 La. Ann. 462. England v. Clark, 4 Scam. (Ill.) 486, the court saying: "The plaintiff has received no more than he was legally entitled to, and, although it came from the purchaser and he has lost the consideration for which he paid his money, it was not the procurement or agency of the plaintiff that induced the purchase or occasioned the loss. He allowed the law to take its course without interposition or control, and by receiving from its officer the fruits of its process, he violated no legal or equitable obligation, and incurred neither the one nor the other, to refund that which he was entitled to receive."

§ 58. *Exceptions.* The rule that a purchaser of a worthless title at a sale under execution is without relief is undoubtedly sustained by the weight of authority in America.[2] But exceptions to that rule have been declared. Thus, it has been broadly laid down that a sale of land on execution will be set aside on the motion of the purchaser if it appear that the execution defendant had no interest in the land when sold;[3] especially if the execution plaintiff himself be the purchaser.[4] In some of the States the right of the purchaser to relief when there is no title is fixed by statute.[5] If the execution be levied by mistake on the lands of a stranger, the levy and sale will be set aside.[6] So, also, where an execution has been levied on personal property to which the execution defendant had no title, the purchaser, having been compelled to satisfy the true owner, has been held entitled to reimbursement from the execution debtor.[1]

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[1] Schwinger v. Hickock, 53 N. Y. 280

[2] Ante, § 57.

[3] Rocksell v. Allen, 3 McLean (U. S.), 357. Ritter v. Henshaw, 7 Iowa, 97, an early Iowa case, enforces the rule *caveat emptor* against the purchaser under circumstances of much hardship. Dean v. Morris, 4 Green (Io.), 312.

[4] Freeman Void Jud. Sales, § 49. Warner v. Helm, 1 Gil. (Ill.) 220, 234. Watson v. Reissig, 24 Ill. 281; 76 Am. Dec. 746. Lansing v. Quackenbush, 5 Cow. (N. Y.) 38. Ontario Bank v. Lansing, 2 Wend. (N. Y.) 260, *semble.* Ritter v. Henshaw, 7 Iowa, 97. In Alabama if the execution plaintiff purchase the property the execution is satisfied *pro tanto*, whether the defendant had or had not title to the property. Thomas v. Glazener, 90 Ala. 537; 8 So. Rep. 153, especially if he had notice of the want of title. McCartney v. King, 25 Ala. 681; Goodbar v. Daniel, 88 Ala. 583.

[5] Hammersmith v. Espy, 19 Iowa, 444. "When any person shall purchase at sheriff's sale any real estate on which the judgment upon which the execution issued was not a lien at the time of the levy, and which fact was unknown to the purchaser, the district court shall set aside such sale on motion," etc. Revision, § 3321. This has been construed to mean that if the judgment debtor has no interest in the land sold the purchaser may have the sale set aside. Chambers v. Cochran, 18 Iowa, 159; but see Holtzinger v. Edwards, 51 Iowa, 383, where a narrower construction is given to the statute. But the purchaser cannot under this statute have relief if he buys with notice of the want of title. Cameron v. Logan, 8 Iowa, 434; Jones v. Blumenstein, 77 Iowa, 361. In North Carolina and California there are also statutes giving a remedy to purchasers of worthless titles at execution sales. Halcombe v. Loudermilk, 3 Jones L. (N. C.) 491. Code Civil Proc. Cal. § 708.

[6] De Wolf v. Mallett, 3 Dana (Ky.), 214. In this case, however, the sale was set aside at the instance of the execution plaintiff, the purchaser consenting.

A decision of the Kentucky Court of Appeals establishes the proposition that a purchaser at an execution sale may detain the unpaid purchase money if the execution-defendant had no title, provided the sale was made at the instance of the execution-plaintiff.[2] Inasmuch as most execution sales are made at the instance of the plaintiff, there would be few cases in which the purchaser would not be permitted to detain the purchase money on failure of the title, if this decision be sound. The decision is apparently at variance with the rule *caveat emptor* as applied to execution sales. The purchaser, it is presumed, might, by examining the public records, have informed himself of the existence of the prior conveyance which defeated the title.

In Louisiana, where the civil law prevails, it seems that the purchaser at an execution sale may, if the title prove worthless, recover the purchase money either from the plaintiff or the defendant in the execution.[3]

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[1] Maguire v. Marks, 28 Mo. 193; 75 Am. Dec. 121. Richardson v. McDougall, 19 Wend. (N. Y.) 80. Sanders v. Hamilton, 3 Dana (Ky.), 550.

[2] Bartlett v. London, 7 J. J. Marsh. (Ky.) 641. The case is very brief, and its importance justifies complete reproduction here. The report consists only of an opinion by ROBERTSON, Ch. J., which was as follows: "The only question we shall consider in this case is, whether the plaintiff is entitled to a perpetuation of his injunction to an enforcement of his sale bond, in consequence of the fact that the defendant in the execution under which the land was sold (for which the bond was given), had no title to the land. It sufficiently appears that D. C., the defendant in the execution, had conveyed the land to A. C., prior to the date of the execution, and there is no proof tending to show that the conveyance was inoperative or fraudulent. The legal title must, therefore, be deemed to have been in A. C. and not in D. C. at the time of the levy and sale It also sufficiently appears that the levy and sale were made at the instance of the defendant in error, who was the plaintiff in the execution. In such cases the purchaser, acting in good faith, as the plaintiff seems to have done, has an equitable right to withhold the consideration. The defendant in error is not without his remedy against his original debtor. Wherefore it is decreed and ordered that the decree of the Circuit Court dissolving the plaintiff's injunction and dismissing his bill, be reversed and the cause remanded, with instructions to perpetuate the injunction." See, also, Brummel v. Hunt, 3 J. J. Marsh. (Ky.) 709.

[3] See Citizens' Bank v. Freitag, 37 La. Ann. 71.

§ 59. *Fraudulent representations as to title.* If a purchaser at an execution sale be induced to bid by the fraudulent representations of the sheriff, the execution creditor, or the execution debtor respecting the title, he will have his remedy, but whether by avoidance of the sale, and the detention or the recovery back of the purchase money, or by action against the wrongdoer to recover damages for the deceit, is not harmoniously determined by the authorities. There are cases which hold that if the purchaser has been purposely deceived as to the state of the title by any one interested in making the sale, he will be released from his bid and the sale vacated upon his motion.[1] Other cases hold that the sheriff is not the agent of the parties interested in the land, and that if he fraudulently misrepresent the title he is personally liable to the purchaser for the damages thence accruing, but that the sale itself must stand;[2] also,

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[3] Rocksell v. Allen, 3 McLean (U. S.), 357. Chambers v. Cochran, 18 Iowa, 159. Wingo v. Brown, 14 Rich. L. (So. Car.) 103. Moore v. Allen, 4 Bibb (Ky.), 41. Webster v. Haworth, 8 Cal. 21, 26; 68 Am. Dec. 287, which was a sale on execution, the execution creditor falsely representing that his judgment was the first lien on the property. The purchaser was relieved from the payment of the purchase money, the court saying: "It is said that the maxim *caveat emptor* applies to judicial sales, and that the defendant (purchaser) cannot avail himself of the misrepresentations of the plaintiff (execution creditor), as he had access to the records of the county, and might have informed himself upon the subject. Grant that the maxim *caveat emptor* applies to sheriffs' sales, it has never been carried to the extent that such a sale could not be impeached on the ground of fraud or misrepresentation. The maxim only applies thus far, that the purchaser is supposed to know what he is buying, and does so at his own risk. But this presumption may be overcome by actual evidence of fraud, or it may be shown that, in fact, the party did not know the condition of the thing purchased, and was induced to buy upon the faith of representations made by those who, by their peculiar relations to the subject, were supposed to be thoroughly acquainted with it. The fact that the defendant (purchaser) might have examined the public records does not alter the case. Before such an examination could have been had, the sale would have been over, and he would have lost the opportunity to purchase. If, under these circumstances, he applied to the judgment creditor for information, and, acting upon that information, was misled to his prejudice, he should be relieved, and the actual party in interest estopped from claiming an advantage resulting from his own misrepresentation of facts, whether wilfully or ignorantly made."

[4] Hensley v. Baker, 10 Mo. 157, 159, *obiter.* See Mellen v. Boarman, 13 Sm. & M. (Miss.) 100. Stoney v. Shultz, 1 Hill Eq. (So. Car.) 464; 27 Am. Dec. 429. Weidler v. Bank, 11 Serg. & Rawle (Pa.), 134. It is the duty of the sheriff to announce defects of title of which he is informed, and if he conceals them he and

that if the parties in interest are guilty of fraud, the remedy is by action of deceit.[1]

In Pennsylvania it has been intimated that if the purchaser be induced by the sheriff to suppose that he will get a complete legal title, and on that presumption he bids the full value of the clear legal estate, he will be entitled to relief, notwithstanding the rule *caveat emptor*.[2]

§ 60. *Rights of purchaser from purchaser under execution.* A purchaser at an execution sale cannot then, with the exceptions already noted, refuse to pay the purchase money on the ground that the title has turned out to be worthless, his bid being presumed to have been made with that contingency in view.[3] But one who purchases from a purchaser under execution has, of course, a right to demand a conveyance of an indefeasible estate in the absence of any agreement, express or implied, to the contrary. The circumstance that a vendor holds under a sheriff's deed, if known to the purchaser, may, however, be entitled to some weight in settling a dispute between the parties as to the kind of title the purchaser was to receive.

§ 61. **Title under a void judgment.** The title of a purchaser at a sale under execution may be worthless because the judgment on which the execution issued was void for want of jurisdiction, or for some other reason was open to collateral attack. The validity of titles under execution comes in question in the ordinary case of

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the sureties on his official bond will be liable to the purchaser. Comm'th v. Dickinson, 5 B. Mon. (Ky.) 506; 43 Am. Dec. 139; McGhee v. Ellis, 4 Litt. (Ky.) 244; 14 Am. Dec. 124; Wolford v. Phelps, 2 J. J. Marsh. (Ky.) 31. In Dwight's Case, 15 Abb. Pr. (N. Y.) 259 (O. S.), a purchaser at an execution sale had been induced to bid by the representations of the plaintiff's attorney that the title was good, the fact being that the defendant had conveyed away the premises before the judgment, under which the sale was made, had been docketed. The purchaser was relieved. If the sheriff sell personal property, knowing that the title is bad, and fails to disclose that fact to the purchaser, he will be liable in damages. Harrison v. Shanks, 13 Bush (Ky.), 620.

[1] Davis v. Murray, 2 Const. Rep. (So. Car.) 143; 12 Am. Dec. 661; Kilgore v. Peden, 1 Strobh. L. 18, 21, citing Winter v. Dent, MSS. and Towles v. Turner, 3 Hill (So. Car.), 178; Tucker v. Gordon, 4 Desaus. Eq. (S. C.) 53.

[2] Auwerter v. Mathiot, 9 Serg. & R. (Pa.) 397, 403; Cumming's Appeal, 23 Pa. St. 509, 512.

[3] Ante, § 57.

vendor and purchaser when the vendor derives title through a sheriff's deed, immediately or remotely, and in contests between the sheriff and the purchaser at the execution sale. It is plain that a title resting upon a void judgment cannot be forced upon one who, by the terms of his contract, express or implied, may demand a marketable title.[1] It remains then to consider whether a purchaser from the sheriff, having regard to the maxim *caveat emptor*, may refuse to complete his contract or demand restitution of the purchase money upon the ground that the judgment upon which the execution issued was absolutely void. We have already seen that mere error and irregularities in judicial proceedings do not expose a judgment or decree to collateral attack, and, therefore, do not affect the title of a purchaser at a judicial sale. What is there said applies with equal force to titles under execution sales. The reversal of an erroneous judgment does not affect the title of a purchaser under the judgment[2] unless the judgment plaintiff was himself the purchaser.[3] Nor do mere irregularities in the proceedings subsequent to judgment, for example, failure of the sheriff to make return or a correct return of the execution vitiate the title of the purchaser,[4] though there are matters occurring after judgment that will render a sale under execution absolutely void, as will be seen hereafter.[5]

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[1] Post, ch. 30, § 297.

[2] Ante, p. 88; Backhurst v. Mayo, Dyer, 363; Drury's Case, 8 Coke, 281 (early ed. 143). Shultz v. Sanders, 38 N. J. Eq. 154. Williams v. Cummings, 4 J. J. Marsh. (Ky.) 637; Reardon v. Searcy, 2 Bibb (Ky.), 202; Brown v. Combs, 7 B. Mon. (Ky.) 318. McLogan v. Brown, 11 Ill. 519. Smith v. Kelley, 3 Murp. (N. C.) 507. McGuire v. Ely, Wright (Ohio), 520.

[3] Freeman on Judgments, § 482; Freeman on Executions, § 347. See ante, p. 89, as to judicial sales. Bank of U. S. v. Bank of Washington, 6 Pet. (U. S.) 19. Bryant v. Fairfield, 51 Me. 148. Mullin v. Atherton, 61 N. H. 20. Stroud v. Kasey, 25 Tex. 740; 78 Am. Dec. 556. Kingsbury v. Stoltz, 23 Ill. App. 411. Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459. Turk v. Skiles, 38 W. Va. 404. Hoe's Case, 5 Coke, 90 (Lond. ed. 1826, vol. 3, p. 183); Goodyere v. Ince, Cro. Jac. 246; Eyre v. Woodfine, Cro. Eliz. 278.

[4] Forest v. Camp, 16 Ala. 642; Love v. Powell, 5 Ala. 58; Driver v. Spence, 1 Ala. 540. Heath v. Black, 7 Blackf. (Ind.) 154; State v. Salyers, 19 Ind. 432. Clark v. Lockwood, 21 Cal. 220. Phillips v. Coffee, 17 Ill. 154; 63 Am. Dec. 357. Shaffer v. Bolander, 4 Greene (Io.), 201.

[5] Post, § 62. Webber v. Cox, 6 T. B. Mon. (Ky.) 110; 17 Am. Dec. 127. Miner v. Natchez, 4 Smed. & M. (Miss.) 602; 43 Am. Dec. 488. Hendrickson v.

A purchaser at a sale under execution, issued on a void judgment, acquires no title.[1] The weight of authority seems to be that if the proceedings in a suit antecedent to the sale under execution are so defective that a title free from collateral attack by a party to the suit cannot be assured to the purchaser, he will be relieved from his bid, if the purchase money remains unpaid. The proceedings prior to the sale must be adequate to divest the title of the judgment debtor. "Every purchaser," says a recent writer upon this subject, "has a right to suppose that by his purchase he will obtain the title of the defendant in execution. The promise to convey this title is the consideration upon which his bid is made. If the judgment is void, or if, from any cause, the conveyance when made cannot invest him with the title held by the parties to the suit or proceeding, then his bid or other promise to pay is without consideration, and cannot be enforced against him. He may successfully resist any action for the purchase money, whether based upon the bid or upon some bond or note given by him."[2] These principles address themselves to our sense of equity and right, and many cases may be found which sustain them.[3] But it is not to be denied that they strongly encroach upon, and are, perhaps, inconsistent with the doctrine *caveat emptor* as applied to execution sales. Want of jurisdiction rendering the judgment void must appear upon the face of the proceedings resulting in the judgment, and the purchaser, by examining the proceedings, would be advised of the defect. If he

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Railroad Co., 34 Mo. 188; 84 Am. Dec. 76. Smith v. Kelley, 3 Murph. (N. C.) 507. Jackson v. Rosevelt, 13 Johns. (N. Y.) 97. Riddle v. Bush, 27 Tex. 675.

[1] Roberts v. Stowers, 7 Bush (Ky.), 295. Collins v. Miller, 64 Tex. 118.

[2] Freeman Void Jud. Sales, § 48. Bynum v. Govan, (Tex.) 29 S. W. Rep. 1119; Halsey v. Jones, (Tex.) 25 S. W. Rep. 696. The same principles have been applied in respect to probate and judicial sales proper. See those titles, ante, this chapter.

[3] Boykin v. Cook, 61 Ala. 472, the court saying: "If the sale be void then no one is bound by the purchase; and unless the plaintiff actually realizes the proceeds the debt remains unsatisfied." Thrift v. Fritz, 77 Ill. 55. This, however, was a judicial sale. Burns v. Ledbetter, 56 Tex. 282. The cases of Dodd v. Nelson, 90 N. Y. 243, and Verdin v. Slocum, 71 N. Y. 345, are cited to the text proposition in Freeman on Void Jud. Sales, § 48, but it will be found on examination that these were judicial or quasi judicial sales, in which the purchaser was merely resisting a confirmation of the sale, on the ground that the title was defective — a right which is conceded to him, we believe, everywhere.

chooses to bid without examining the record he must, if the rule *caveat emptor* is to be strictly applied, accept the risk of eviction and complete his purchase. It is as easy for him to inform himself as to want of jurisdiction in the court to render the judgment under which the sheriff sells, as it is to discover a want of title in the execution defendant, and no reason is perceived why he should be held to his bargain in the one case and relieved in the other. It would seem more consistent to relieve him in both cases, or to hold him bound in both. In Pennsylvania a purchaser at a sheriff's sale may move to have to have the sale set aside at any time before the deed is executed and delivered. This was done in a case in which the purchaser at a sale under execution on a void judgment, bid to protect his interests as a mortgagee of the premises. The sale was set aside and the purchaser relieved from his bid.[1]

§ 62. **Title under a void execution sale.** The judgment on which an execution is issued may be unimpeachable, and the title of the defendant may be indefeasible, yet, for some matter occurring after the rendition of judgment, the title of a purchaser under the execution may be worthless. The reports abound with cases in which the judgment debtor, or those claiming under him, have recovered the premises from the execution purchaser or his assigns, upon the ground that the sale itself, without regard to the validity of the antecedent judgment, was void. This has occurred, to mention some of the most notable instances, where a sale has been made under an execution levied after return day;[2] under an execution against "William V.," on a judgment against "H. W. V.;"[3] under execution issued after the death of the execution defendant, the judgment not having been revived;[3] where an appraisement had not been made or waived, and the land sold for less than its appraisable value;[1] where the sheriff sold the fee simple instead of first offering the rents and profits for seven years, as required by statute;[2] where the sheriff sold premises in the hands of a receiver without leave of the court;[3] where the sheriff sold upon a day other than one prescribed by law;[4] where the sale was made by the sheriff of A. county under an execution directed to the sheriff of B. county;[5] where the sale was made under an execution issued on a judgment that had been paid, though not satisfied of record,[6] and under an execution issued on a justice's judgment which was not docketed until it had become barred by limitation.[7] Numerous other instances of void sales under execution will be found in the reports of the several States.

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[1] Connelly v. Philadelphia, 86 Pa. St. 110; Shakespeare v. Delaney, 86 Pa. St. 108.

[2] Freeman on Executions, §§ 58, 106, and cases cited. Hawes v. Rucker, (Ala.) 11 So. Rep. 85; Morgan v. Ramsey, 15 Ala. 190; Smith v. Munday, 18 Ala. 182; 53 Am. Dec. 221. Jefferson v. Curry, 71 Mo. 85. Cain v. Woodward, (Tex.) 12 S. W. Rep. 319; Terry v. Cutler, 4 Tex. Civ. App. 570; 23 S. W. Rep. 539. *Contra,* Jackson v. Rosevelt, 13 Johns. (N. Y.) 97.

[3] Morris v. Balkham, 75 Tex. 111; 12 S. W. Rep. 970.

[4] Cunningham v. Buck, 45 Ark. 267.

The rule that a sale under a void judgment does not bind the purchaser, applies with equal force, it is conceived, where the sale itself is void because of some matter occurring subsequent to the judgment, or because the officer had no authority to sell. Upon this point it has been said by an able judge: "The general rule very clearly is that there is no implied warranty in sales made by a sheriff or other ministerial officer in his official capacity, but that applies exclusively to the quality and property of the thing sold.

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[1] Capital Bank v. Huntoon, 35 Kans. 577; 1 Pac. Rep. 369, and cases there cited. See Freeman Void Jud. Sales, § 27. *Contra*, Shaffer v. Bolander, 4 Greene (Io.), 201.

[2] Gantly v. Ewing, 3 How. (U. S.) 707, disapproving Doe v. Smith, 4 Blackf. (Ind.) 228.

[3] French v. Pratt, 7 N. Y. Supp. 240; otherwise, if the judgment on which the execution issued was rendered before the appointment of the receiver. In re Loos, 50 Hun (N. Y.), 67; 3 N. Y. Supp. 383; Bank v. Risley, 19 N. Y. 369.

[4] Lowdermilk v. Corpenning, 101 N. Car. 649; 8 S. E. Rep. 117, and cases there cited. But see *contra*, Brown v. Christie, 27 Tex. 75; 84 Am. Dec. 607.

[5] Terry v. Cutler, 4 Tex. Civ. App. 70; 23 S. W. Rep. 539.

[6] Shaffer v. McCracken, (Iowa) 58 N. W. Rep. 510. Norgren v. Edson, 51 Minn. 567; 53 N. W. Rep. 876. Hardin v. Clark, 1 Tex. Civ. App. 565; 21 S. W. Rep. 977. If a judgment has been satisfied, though not canceled of record, a *bona fide* purchaser under an execution issued on the judgment will get no title. Wood v. Colvin, 2 Hill (N. Y.), 566; 38 Am. Dec. 598; Carpenter v. Stilwell, 11 N. Y. 61; Craft v. Merrill, 14 N. Y. 456. He succeeds merely to the position of the judgment creditor, subject to all equities in favor of the judgment debtor, without regard to the question of notice. Frost v. Yonkers Sav. Bank, 70 N. Y. 553; 26 Am. Rep. 627. See *contra*, Nichols v. Dissler, 31 N. J. L. 461; 86 Am. Dec. 219.

[7] Cowen v. Withrow, (N. Car.) 19 S. E. Rep. 645.

Thus, in a sale made by a sheriff of goods taken in execution, there is no implied warranty on the part of the sheriff that the goods are intrinsically worth anything, or that the defendant has any property in them. He only undertakes to sell the interest which the defendant may happen to have in the goods, in the condition in which they are. But the principle does not apply where the sheriff or other officer assumes an authority where none is given by law. It will hardly be questioned that if a sheriff induce persons to purchase at his sale by pretending that he has the authority of law for the sale, when in truth he has not, the purchaser must be without remedy. It is a fraud for which he would be responsible, and the principle applies equally where he acts upon a void authority. In any case the sheriff is bound to show that he is legally authorized to do that which he assumes to do *virtute officii.*"[1] It is to be here observed that if an execution defendant, or one who succeeds to his rights, having grounds upon which the sale under execution may be collaterally attacked, be guilty of laches in the assertion of that right, so that by reason of his negligence the purchaser or his assignees so alter their situation with respect to the property that to vacate the sale would inflict great injury upon them, the sale will be permitted to stand.[2] So, also, if the defendant accept the surplus of the proceeds of the sale, after the execution has been satisfied, such acceptance being deemed a ratification of the sale, or at least a waiver of the right to attack the sale.[3] A purchaser at a sale under execution cannot be affected by secret frauds and irregularities of which he had no notice.[4] And, generally, it may be said that a purchaser from one who holds under a sheriff's deed cannot be affected by any defect or invalidity in the sale itself or in the proceedings anterior thereto of which he had no notice. These propositions being sound, it is plain that the purchaser under execution could not seek relief from his bid in a case in which he might successfully resist a collateral attack upon the title as a purchaser without notice of the matters and things upon which the attack is based.

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[1] Stoney v. Shultz, 1 Hill Eq. (S. C.) 464; 37 Am. Dec. 429.

[2] Regney v. Small, 60 Ill. 416. Capital Bank v. Huntoon, 35 Kans. 577; 11 Pac. Rep. 772.

[3] Freeman Void Jud. Sales, § 50. Huffman v. Gaines, 47 Ark. 226; 1 S. W. Rep. 100.

[4] Freeman Void Jud. Sales, § 41.

§ 63. TAX SALES. The maxim *caveat emptor* applies with great strictness to tax sales.[1] Tax titles are esteemed the most uncertain of all, and are universally regarded with suspicion and distrust; hence it is but seldom that property sold for taxes brings more than the amount of the taxes due. The purchaser buys at a mere nominal price, and if he gets nothing by his purchase, he has, in the absence of statutory provisions, no recourse upon any one. In some of the States, however, he is by statute in a manner subrogated to the benefit of the tax lien discharged with the money arising from the sale; the person seeking to have the sale vacated being required as a condition of relief to reimburse the purchaser to the extent of the taxes legally chargeable on the land, with costs of sale and interest. In other States, in case of a sale void for errors and omissions in the proceedings the purchaser is allowed to have recourse upon the city or county by whose authority the sale and conveyance was made.[2]

The rule *caveat emptor* has been held to extend not only to purchasers at tax sales, but to transferees of the title so acquired. Thus, it has been held that the assignor of a tax lease given upon a sale for unpaid taxes, warrants nothing more than the genuineness of the lease and his ownership. It is presumed that the assignee took the title at his own risk.[3]

§ 64. SALES BY TRUSTEES, ASSIGNEES, ETC. The rule *caveat emptor* has been held to apply to sales under trusts for the payment of debts. The trustee, it has been said, sells merely such title as is vested in him by the deed creating the trust, and there is no implied warranty on his part that the title is good, so that if the title be in fact defective, the purchaser can neither detain the unpaid purchase money nor recover back that which has been paid.[4] Such a sale stands upon the same footing as would a sale by the trust grantor himself, with express disclaimer of good title. But where the trustee, selling at public auction, announces that the land is sold free and clear of all incumbrances, and it afterwards appears that incumbrances exist, it has been held that the purchaser will be relieved.[1] It seems, however, that if the conveyance to the trustee contains covenants for title, the benefit of them will pass to the purchaser at the trustee's sale, and he may maintain an action thereon against the grantor.[2] And if the sale be for any reason void, other than for fraud on the part of the purchaser, he will be subrogated to the rights of the creditor secured by the trust.[3] If by mistake the purchaser gets materially less land than the trustee purported to sell, it has been held that he cannot recover back such part of the purchase money as may have been paid, from the trustee or the beneficiary of the trust, but that he may apply to the court for a rescission of

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[1] Blackwell on Tax Titles, § 994; Black. on Tax Titles (2d ed.), § 463. The cases and authorities will be found collected in these works. The limits of this treatise will not admit of their consideration here at length.

[2] Black. on Tax Titles (2d ed.), §§ 464, 477, et seq.; Logansport v. Case, 124 Ind. 254; 24 N. E. Rep. 88; Watkins v. Winings, 102 Ind. 330; 1 N. E. Rep. 638; Parker v. Goddard, 81 Ind. 294. Russell v. Hudson, 28 Kans. 99. Merriam v. Rauen, 23 Neb. 217. Hart v. Smith, 44 Wis. 213.

[3] Boyd v. Schlisenger, 59 N. Y. 301, distinguished in Bensel v. Gray, 80 N. Y. 517.

[4] Rawle Covts. (5th ed.), § 238 n.; 26 Am. & Eng. Encyc. of L. 934, 940; Sutton v. Sutton, 5 Grat. (Va.) 234, 56 Am. Dec. 109; Peterman v. Laws, 6 Leigh (Va.),

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529. Fleming v. Holt, 12 W. Va. 143. In this case, the court, after observing that the purchaser at a judicial sale, that is, a sale by a commissioner of the court, might object to the title at any time before confirmation of the sale, continued: "A sale by a trustee, like a sale by a commissioner, is without warranty, but there is this obvious difference between the two: The contract of the purchaser at a sale by the commissioner is incomplete till his bid is accepted by the court, who is the real seller of the property, the commissioner of sale being the mere agent of the court. The bid is accepted by the court by the confirmation of the sale; after that, though the purchaser, before the deed is made to him, finds out that the title to the land is defective, he is, nevertheless, bound to receive it and pay the purchase money. In a sale by a trustee, the court does not accept the bid of the purchaser, but it is accepted by the auctioneer when he knocks the land down, and on the making by him of a memorandum of the sale and its terms signed by the auctioneer, the contract for the sale is as complete as the contract for the sale made by a commissioner is when the court accepts the bid by confirming the sale. After such knocking down of the land by the auctioneer and the making of the memorandum, the purchaser must accept the deed and pay the purchase money, though he does find the title defective. He must, if he wishes to do so, investigate the title in this case, as in the other, while the contract is incomplete; that is, in the last case, before the land is knocked down to him." In other words, he must examine the title before he bids, and if he bids without examining the title, he takes the risk of the failure of title.

[1] Schaeffer v. Bond, 70 Mo. 480.

[2] This, upon the principle that any kind of a conveyance will pass the benefit of covenants for title. Post, "Covenant of Warranty," § 157.

[3] Clarke v. Wilson, 56 Miss. 753; Bonner v. Lessly, 61 Miss. 392.

the contract, and to have the sale set aside, thereby relieving him from the payment of deferred installments of the purchase money.[1]

The rule *caveat emptor* applies also to sales under assignments to secure the payment of debts, and to sales by assignees in bankruptcy.[2] It has been held, however, that if assignees in bankruptcy advertise in the usual way, that is, without stating that they will sell only such estate as the bankrupt has, they cannot compel specific performance if the title be bad.[3] In New York it has been held that there is an implied contract at a sale by an assignee in bankruptcy that the contract is good, but if the purchaser accept a conveyance without covenants, he will be without relief.[4]

Sales by guardians are made only in pursuance of judicial authority, and are subject to confirmation by the court. The purchaser will be entitled to a reference if the title is doubtful, and, of course, may resist confirmation of the sale if the title be defective.[5] After the sale is confirmed it is apprehended upon general principles that the rule *caveat emptor* applies, at least so far as to prevent restitution of the purchase money upon the ground of a paramount title outstanding in a stranger. The purchaser may object that a guardian's sale, under which the vendor claims title, was made without notice to the wards of the proceeding in which the authority to sell was obtained.[6] But the validity of a sale by a foreign guardian, who has complied with the requirements of the statute in making the sale, cannot be collaterally attacked by the purchaser in an action for the purchase money.[7]

§ 65. SUBROGATION OF PURCHASER AT JUDICIAL AND MINISTERIAL SALES.—Subrogation where sale is void. We have seen that a purchaser who, by the terms of his contract, express or implied, is entitled to a conveyance of the premises free from incumbrances, may, for the protection of his estate, pay off any lien or charge upon the property, and be subrogated to the benefit thereof against the vendor; he may either deduct the amount so paid from the purchase money remaining due, or, if the purchase money has been paid, he may enforce the lien or charge against other estate of the vendor.[1] This right is given by law, and is in nowise rested upon any implied contract between the parties.[2] But the equitable doctrine of subrogation as enforced in behalf of a purchaser at a judicial or ministerial sale, is much more restricted in its application. He cannot discharge incumbrances on the property, and assert them against the creditor at whose instance the sale was made, by deducting the amount so expended from the unpaid purchase money, nor, as a general rule, enforce them against the estate of the debtor whose liability was solved by the proceeds of the sale. If he is subrogated at all, it is to the rights of the creditor at whose instance the sale was made, and not to the rights of a stranger, whose claim he satisfies in order to protect his title. We shall, however, consider the subject in the two following aspects: (1) Where the sale was void, and the proceeds have been applied to the discharge of some lien upon the premises, or of some liability of the debtor. (2) Where the sale was valid, and the purchaser has been evicted from the premises by an adverse claimant, or compelled to remove prior incumbrances in order to protect his title.

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[1] Coons v. North, 27 Mo. 73.

[2] Ante, this section. As to sales by assignees in bankruptcy, post, this section and cases cited.

[3] McDonald v. Hanson, 12 Ves. 277; White v. Folzambe, 11 Ves. 344; Deverell v. Bolton, 18 Ves. 511, overruling Pope v. Simpson, 5 Ves. 145.

[4] Clark v. Post, 113 N. Y. 17; 20 N. E. Rep. 573.

[5] In re Browning, 2 Paige Ch. (N. Y.) 64. In this case the title was referred though the sale had been confirmed. See, also, Brown v. Christie, 27 Tex. 73; 84 Am. Dec. 607.

[6] Shipp v. Wheless, 33 Miss. 647. Wiley v. White, 3 Stew. & P. (Ala.) 355.

[7] Pferrman v. Wattles, 86 Mich. 254; 49 N. W. Rep. 40.

Subrogation of a purchaser at a void judicial or ministerial sale may be accomplished either by allowing the purchaser to enforce against the claimants of the estate, the specific lien, charge, debt or liability for the collection of which the invalid sale was made, or by compelling such claimants to refund to the purchaser, as a condition precedent to the recovery of the estate, the purchase money paid by him at the sale, and applied to the satisfaction of such debt or lien. In this way substantial justice is done between all parties, and the effect is especially beneficial to the debtor and the creditor, for such a practice lessens the danger of loss to the purchaser, and encourages bidding at judicial and ministerial sales. Besides, "nothing can be more unjust than to permit a debtor to recover back his property, because the sale was irregular, and yet allow him to profit by that irregular sale to discharge his debts."[1]

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[1] Post, § 204.

[2] Sheld. Sub. § 1.

There are cases which decide that a purchaser at a void judicial or ministerial sale cannot be subrogated to the benefit of the debt or lien discharged by the proceeds of the sale, some upon the ground that the rule *caveat emptor* denies the purchaser relief;[2] some upon the ground that payment of the debt with the proceeds of the sale is an absolute satisfaction thereof, and leaves nothing to which the purchaser can claim to be subrogated,[3] and some upon the ground that the purchaser is a mere volunteer and entitled to no consideration.[4] It is not to be denied that the doctrine is incompatible with a strict application of the rule *caveat emptor*, for in most cases the purchaser would be advised, upon diligent inquiry, that the steps necessary to a valid sale had not been taken. The case is merely one in which the rule *caveat*[5] *emptor* is subordinated to the higher equities of the purchaser. The objection that the lien or debt is discharged, and that there is nothing to which the purchaser can be subrogated, appears merely sophistical, and would, if sound, destroy the doctrine of subrogation in any case, and the argument that the purchaser is a volunteer would seem to deserve as little consideration, for the sale is treated as an equitable assignment, or rather an assignment by operation of law, of all the rights, powers and privileges of the creditor in the premises.[1] The purchaser obviously does not stand upon the same ground as one who officiously pays the debt of another. Accordingly the weight of authority in America has established the rule that an innocent purchaser at a sheriff's[2] or administrator's[3] sale, or other ministerial or judicial sale,[1] will, if such sale, for any cause, prove invalid, be subrogated to all the rights, remedies and privileges of the creditor at whose instance such sale was made, and that the purchaser will have a lien on the land for his reimbursement if he be in possession.[2] In some of the States this right is secured to the purchaser by statute.[3] A purchaser at a probate sale will not be substituted to the benefit of the claim against the heirs or devisees if the land sold was not in fact liable to the satisfaction of such claim. The purchaser cannot acquire any rights in the premises greater than those of the executor or administrator.[4] If the administrator misappropriate the purchase

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[1] Dufour v. Camfranc, 11 Mart. (La.) 615; 13 Am. Dec. 360.

[2] Frost v. Atwood, 73 Mich. 67, the court saying: "Every one is bound to satisfy himself of the authority under which a judicial sale is made and buys at his peril. It would be a contradiction in terms to hold a sale void for want of authority to make it and yet valid enough to create a lien for the purchase money. Where individuals sell their own lands and receive pay for them, there can be no want of authority, and the question is only one of title. But a sale made by quit-claim deed without covenants and without fraud or misrepresentation does not entitle the purchaser to reclaim his money. This bill is an attempt not only to give to a void probate sale the effect of a warranty, but to go further and bind the land itself, which was sold without right, for its repayment." Bishop v. O'Conner, 69 Ill. 431, distinguishing Kinney v. Knoebel, 51 Ill. 112; Bassett v. Lockwood, 60 Ill. 164. Salmond v. Price, 13 Ohio, 383; 43 Am. Dec. 204.

[3] Richmond v. Marston, 15 Ind. 134. Disapproved in Muir v. Berkshire, 52 Ind. 149.

[4] Richmond v. Marston, 15 Ind. 134. Disapproved in Muir v. Berkshire, 52 Ind. 149.

[5] Valle v. Fleming, 29 Mo. 163; 77 Am. Dec. 557, the court saying that the law bases "the equitable rights of the purchaser, not upon his knowledge or ignorance of the condition of the title, but upon the ground that the purchaser has discharged a judgment against the estate or debtor for which the one or the other stood chargeable by a purchase of property made under process of the law, and, therefore, has the equitable right to be reimbursed out of the estate or property of the debtor." In Wilson v. Holt, 83 Ala. 528; 3 So. Rep. 321, it was doubted whether the rule *caveat emptor* would extend to defects which would not be disclosed by an examination of the claim of title or to secret equities which could not have been discovered by the exercise of ordinary diligence.

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[1] Brobst v. Brock, 10 Wall. (U. S.) 519. Robinson v. Ryan, 25 N. Y. 320; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Stackpole v. Robbins, 47 Barb. (N. Y.) 212. Seller v. Lingerman, 24 Ind. 264; Muir v. Berkshire, 52 Ind. 149; Carver v. Howard, 92 Ind. 172. Gilbert v. Cooley, Walker's Ch. (Mich.) 494. Johnson v. Robertson, 34 Md. 165, a case in which a foreclosure sale was declared void for want of jurisdiction of the persons of the defendants. The court, by ALVEY, J., said: "The purchaser should be protected so far that if he has paid the purchase money, and it has been applied to the payment of the mortgage debt, or so far as he has paid and applied the purchase money, he should be subrogated to the mortgagee, and the mortgage, to the extent of such payment, treated as assigned to him.

[2] Sheldon on Subrogation, § 38; 24 Am. & Eng. Encyc. of L. 261; 24 id. 571; Freeman Void Jud. Sales, § 52. Beeson v. Beeson, 9 Pa. St. 279; Jackson v. McGinniss, 14 Pa. St. 331. Webb v. Coons, 11 La. Ann. 252. Howard v. North, 5 Tex. 290; 51 Am. Dec. 769; Andrews v. Richardson, 21 Tex. 287; Morton v. Welborn, 21 Tex. 772; Stone v. Darnell, 25 Tex. Supp. 430; 78 Am. Dec. 582; Johnson v. Caldwell, 38 Tex. 217; McDonough v. Cross, 40 Tex. 285; Burns v. Ledbetter, 56 Tex. 282; Jones v. Smith, 55 Tex. 383. O'Kelly v. Gholston, (Ga.) 15 S. E. Rep. 123. Rev. St. Ind. 1881, § 1084; Reilly v. Burton, 71 Ind. 118; Ray v. Detchon, 79 Ind. 56; Short v. Sears, 93 Ind. 505; Gillette v. Hill, 102 Ind. 531; 1 N. E. Rep. 551; Paxton v. Sterne, 127 Ind. 289; 26 N. E. Rep. 557. Bentley v. Long, 1 Strobh. Eq. (So. Car.) 43; 47 Am. Dec. 523. Sands v. Lynham, 27 Grat. (Va.) 291; 21 Am. Rep. 348, which, however, was a sale under decree in chancery to enforce a judgment lien. Brown v. Brown, 73 Iowa, 430. Goring v. Shreve, 7 Dana (Ky.), 64. McHany v. Schenck, 88 Ill. 357. Spindler v. Atkinson, 3 Md. 423; 56 Am. Dec. 755; Campbell v. Lowe, 9 Md. 500; 66 Am. Dec. 339.

[3] Sheld. on Subrogation, § 209; Woerner's Am. Law of Adm. § 485. Davis v. Gaines, 104 U. S. 386. Blodgett v. Hitt, 29 Wis. 169; Winslow v. Crowell, 32 Wis. 639. Halsey v. Jones, 86 Tex. 488; 25 S. W. Rep. 696. Neel v. Carson, 47 Ark. 421; 2 S. W. Rep. 107. Rev. St. Ind. 1881, § 1084; Walton v. Cox, 67 Ind. 164; Duncan v. Gainey, 108 Ind. 579; 9 N. E. Rep. 470; Stutts v. Browne,

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112 Ind. 370; 14 N. E. Rep. 230. Hudgin v. Hudgin, 6 Grat. (Va.) 320; 52 Am. Dec. 124; Sands v. Lynham, 27 Grat. (Va.) 291; 21 Am. Rep. 348. Springs v. Harven, 3 Jones Eq. (N. Car.) 96; Perry v. Adams, 98 N. Car. 167; 3 S. E. Rep. 729. Robertson v. Bradford, 73 Ala. 116; Wilson v. Holt, 83 Ala. 528; 3 So. Rep. 321; Ellis v. Ellis, 84 Ala. 348; 4 So. Rep. 868. Valle v. Fleming, 29 Mo. 152; 77 Am. Dec. 557; Haff v. Price, 50 Mo. 228; Shroyer v. Nickell, 55 Mo. 264; Jones v. Manley, 58 Mo. 559; Evans v. Snyder, 64 Mo. 517; Sims v. Gray, 66 Mo. 613; Snider v. Coleman, 72 Mo. 568; Schaefer v. Causey, 8 Mo. App. 142. Lee v. Gardiner, 26 Miss. 521; Jayne v. Boisgerard, 39 Miss. 796; Short v. Porter, 44 Miss. 533; Gaines v. Kennedy, 53 Miss. 103; Hill v. Billingsly, 53 Miss. 111; Cole v. Johnson, 53 Miss. 94; McGee v. Wallis, 57 Miss. 638; 34 Am. Rep. 484; Pool v. Ellis, 64 Miss. 555; 1 So. Rep. 725. Cathcart v. Sugenheimer, 18 So. Car. 123, where the principle of the text was applied to an invalid sale of a lunatic's lands for the payment of his debts. Levy v. Riley, 4 Oreg. 392, *semble*. *Contra*, Nowler v. Coit, 1 Ohio, 519; 13 Am. Dec. 640.

[1] Jones on Mortgages, § 874 et seq.; 26 Am. & Eng. Encyc. of Law, 935; 24 id. 261; Sheldon on Subrogation, §§ 31, 33. The majority of the illustrations below were cases of invalid foreclosure sales. Robinson v. Ryan, 25 N. Y. 320; Winslow v. Clark, 47 N. Y. 261; Miner v. Beekman, 50 N. Y. 337. Johnson v. Sandhoff, 30 Minn. 197. Honaker v. Shough, 55 Mo. 472. Frische v. Kramer, 16 Ohio, 125; 47 Am. Dec. 368. Curtis v. Gooding, 99 Ind. 45. Hays v. Dalton, 5 Lea (Tenn.), 555. Haymond v. Camden, 22 W. Va. 180; Hull v. Hull, 35 W. Va. 155; 13 S. E. Rep. 49. *Contra*, Branham v. San Jose, 24 Cal. 585.

[2] Geohegan v. Ditto, 2 Metc. (Ky.) 433; 74 Am. Dec. 413. If the purchaser is fully subrogated to all the rights of the judgment creditor he would have a lien by virtue of the judgment, it would seem, without regard to the question of possession.

[3] Rev. Code N. Car. ch. 45, § 27. Code Civ. Proc. Cal. § 708; Hitchcock v. Caruthers, 100 Cal. 100. Rev. St. Iowa (1865), 3321. Code Civil Proc. N. Y. § 1440. But the purchaser will not, under this statute, be entitled to relief if he be guilty of fraud at the sale.

[4] Frost v. Atwood, 73 Mich. 67. In this case an administratrix procured a license to sell for the payment of debts certain devised estate in the hands of the devisee, when, by the law of Michigan, the creditor alone and not the admin-

money derived from the invalid sale, so that the same shall not have been applied to the payment of the debts of the estate, there will be nothing to which the purchaser can be subrogated, and he will be without relief.[1] The rights of the purchaser in the premises are co-extensive with those of the creditor to whom he claims to be subrogated. If the debt discharged from the proceeds of the sale under execution was not a lien or charge upon the property sold, the doctrine of subrogation does not apply.[2] Nor can the purchaser claim any priority or precedence to which the creditor, whose lien he claims, was not entitled.[3] In respect to void sales in proceedings for partition it is to be observed that if the purchase money has been distributed among those entitled, they and those claiming under them will be estopped from setting up their title against the purchaser until they reimburse him the amount paid by him for the land.[4]

The doctrine of subrogation as applied to the relief of purchasers at void execution or probate sales is undoubtedly of comparatively recent origin. As late as the year 1835 a judge declared that he had not been able to find a single case in England or in America in which this relief had been granted to the purchaser, upon a bill expressly filed by him for that purpose,[5] though the courts had been in the habit of refusing relief to the execution defendant, or other person seeking to recover the estate, until he should reimburse the purchaser for the improvements made by him. Afterwards this relief was granted upon bill filed by the purchaser,[6] and from mere reimbursement for improvements, redress to the purchaser has been enlarged to entire restitution of the purchase money.

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istrator had power to subject property in the hands of the devisee to the payment of the testator's debts. The purchaser was ejected from the property by the devisee. He afterwards filed his bill against the devisee, claiming to be subrogated to the benefit of the liens discharged with the purchase money paid by him, which bill was dismissed. The case contains *dicta* which apparently deny the right of a purchaser at a void private sale to be subrogated to the lien of the probate creditor in any case.

[1] Pool v. Ellis, 64 Miss. 555. Bennett v. Coldwell, 8 Baxt. (Tenn.) 483.

[2] Sheld. on Subrogation, § 209; Bennett v. Coldwell, 8 Baxt. (Tenn.) 483.

[3] Duncan v. Gainey, 108 Ind. 579; 9 N. E. Rep. 470.

[4] Gaines v. Kennedy, 53 Miss. 103. Chambers v. Jones, 72 Ill. 275. Bland v. Bowie, 53 Ala. 152; Goodman v. Winter, 64 Ala. 410; 38 Am. Rep. 13. Favill v. Roberts, 50 N. Y. 222.

[5] Chancellor WALWORTH in Putnam v. Ritchie, 6 Paige Ch. (N. Y.) 405.

[6] Bright v. Boyd, 1 Story C. C. (U. S.) 478. Hatcher v. Briggs, 6 Oreg. 31.

§ 66. **Subrogation of purchaser where sale is valid.** It has been held that if a debtor have no title to lands sold under execution against him the purchaser may, in equity, recover from him the amount paid for the property, though no fraud in relation to the sale be imputed to the debtor, and this, upon the ground that the purchaser's money has gone to discharge a valid obligation of the execution debtor, and that the former should in equity be substituted to the place of the creditor, and treated as an assignee of his rights in the premises.[1] This doctrine seems a complete administration of justice between the parties, placing them substantially in the same position in which they were before the debtor's liability was incurred. But it cannot be reconciled with the rule *caveat emptor*,[2] and it has also been repudiated upon less cogent grounds, namely, that the liability of the execution debtor is completely extinguished by the payment of the purchase money, and that the purchaser, with respect to such payment, is to be regarded as a mere volunteer.[3] In some of the States, if the execution plaintiff become the purchaser of the premises, and it afterwards appears that the execution debtor had no title to the property, the apparent satisfaction of the judgment by the sale will be canceled and the plaintiff allowed to take out a new execution.[4] This practice is equitable and just, and prevails, it is believed, in most of the States. But it is clearly inconsistent with the rule *caveat emptor*, for there would seem to be nothing in the relations of the execution plaintiff to the parties and subject-matter that would place him upon higher ground than a stranger in respect to the title. There are cases which do not recognize the distinction, and which hold the purchaser bound in either case.[1] It would seem that the ends of justice are subserved by disregarding the rule *caveat emptor*, whether the execution plaintiff or a stranger becomes the purchaser, so far as to permit either to have a new execution, the one in his own right and the other as equitable assignee.

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[1] Muir v. Craig, 3 Blackf. (Ind.) 293, following McGhee v. Ellis, 4 Litt. (Ky.) 244; 14 Am. Dec. 124, a case in which the sale was of a slave to whom the execution debtor had no title, the court saying that the principle applied with the same force to sales of real property as to sales of personalty. Dunn v. Frazier, 8 Blackf. (Ind.) 432; Preston v. Harrison, 9 Ind. 1; Pennington v. Clifton, 10 Ind. 172; Julian v. Beal, 26 Ind. 220; 89 Am. Dec. 460. Reed v. Crosthwaite, 6 Iowa, 219; 71 Am. Dec. 406. Moore v. Allen, 4 Bibb (Ky.), 41, where, however, the purchaser seems to have been induced to bid by the fraudulent conduct of the execution debtors. White v. Park, 5 J. J. Marsh. (Ky.) 603; Geoghegan v. Ditto, 2 Metc. (Ky.) 433; 74 Am. Dec. 413; McLaughlin v. Daniel, 8 Dana (Ky.), 182, case of personal property.

[2] Vanscoyoc v. Kimler, 77 Ill. 151; Bishop v. O'Connor, 69 Ill. 431; Bassett v. Lockard, 60 Ill. 164.

[3] Bishop v. O'Conner, 69 Ill. 431.

[4] Freeman on Executions, §§ 54, 301, 352. Cross v. Zane, 47 Cal. 602. Ritter v. Henshaw, 7 Iowa, 98; Ladd v. Blunt, 4 Mass. 402; Tate v. Anderson, 9 Mass. 92; Gooch v. Atkins, 14 Mass. 378. Magwire v. Marks, 28 Mo. 193; 75 Am. Dec. 121. Swaggerty v. Smith, 1 Heisk. (Tenn.) 403. Townsend v. Smith, 20 Tex. 465; 70 Am. Dec. 400; Andrews v. Richardson, 21 Tex. 287. Tudor v. Taylor, 26 Vt. 444. Price v. Boyd, 1 Dana (Ky.), 434. This right is also in substance secured to the purchaser by statute in some of the States, whether he was a

The doctrine of subrogation, being cognizable in equity only, will never be applied in favor of a purchaser who has been guilty of fraud in the procurement of the sale in respect to which he seeks relief.[2]

Whatever doubt may exist as to the true rule with respect to the right of subrogation of a purchaser at a sale under execution or by an administrator, when he has been evicted by the holder of a paramount title, there would seem to be none where the purchaser pays off incumbrances on the property to protect his title, and, certainly, none if the price paid by him for the property was less than its fair market value. The purchaser in such case will be presumed to have been aware of the existence of the incumbrance and to have made his bid accordingly.[3] Any other rule would operate a great

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stranger or a party to the execution. Code Civil Proc. Cal. § 708. Rev. Code N. Car. ch. 45, § 27. Code Civil Proc. N. Y. § 1440. Rev. St. Iowa (1865), § 3321. In Halcombe v. Loudermilk, 3 Jones L. (N. C.) 491, it was held that the purchaser, having such a remedy by action against the execution debtor, could not maintain a proceeding against him in equity for subrogation *eo nomine*. The same principle has been applied where the sale was of personal property. Whiting v. Brooks, 2 N. H. 79. Adams v. Smith, 5 Cow. (N. Y.) 280; Richardson v. McDougall, 19 Wend. (N. Y.) 80; Piper v. Elwood, 4 Den. (N. Y.) 165. The principle, however, applies without distinction to levies upon realty. Edde v. Cowan, 1 Sneed (Tenn.), 290; Swaggerty v. Smith, 1 Heisk. (Tenn.) 403.

[1] Vattier v. Lytle, 6 Ohio, 477; Salmon v. Price, 13 Ohio, 383; 42 Am. Dec. 204; Hollister v. Dillon, 4 Ohio St. 205. Perry v. Williams, Dudley (S. Car.), 44. Vanscoyoc v. Kimler, 77 Ill. 151. Freeman v. Caldwell, 10 Watts (Pa.), 10. Halcombe v. Loudermilk, 3 Jones L. (N. C.), 491.

[2] Sheld. Subrogation, § 44; Freeman Void Jud. Sales, § 54; 26 Am. & Eng. Encyc. of L. 268, 269. McCasky v. Graff, 23 Pa. St. 321; 62 Am. Dec. 336; Gilbert v. Hoffman, 2 Watts (Pa.), 66; 26 Am. Dec. 103. Elam v. Donald, 58 Tex. 316.

[4] Walden v. Gridley, 36 Ill. 523; Bassett v. Lockwood, 60 Ill. 164. Threlkeld v. Campbell, 2 Grat. (Va.) 198; 44 Am. Dec. 384. Harth v. Gibbes, 3 Rich. L. (S. Car.) 316.

injustice, for the purchaser might, by recovering the amount of the incumbrances from the execution debtor, acquire the estate for a trifling sum. But if the purchaser should pay the fair market value for the property, and an incumbrance of which all parties were ignorant should afterwards be discovered, and the purchaser should be compelled to remove the same in order to protect himself, no reason is perceived why he would not be as much entitled to subrogation either to the benefit of the incumbrance so discharged or to the lien of the judgment under which he purchased as if he had been evicted by an adverse claimant.[1] If the existence of an incumbrance should be seduously and fraudulently concealed from the purchaser, or if false and fraudulent misrepresentations should be made to him in that regard by any one interested in making the sale, he would have his action to recover damages for the deceit. The purchaser, of course, cannot apply any part of the unpaid purchase money to the discharge of prior incumbrances on the premises. Whatever may be his right of subrogation as against the execution debtor or other person primarily bound, he has none against the creditor at whose instance the sale was made.[2]

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[1] In Walden v. Gridley, 36 Ill. 523, it was said that it might be that a purchaser under an execution who paid off a prior judgment to protect his title would have his remedy over against the execution debtor for the amount so contributed to pay his debt. Where premises are expressly sold in partition, subject to all incumbrances, the purchaser cannot have the purchase money applied to the discharge of an incumbrance, the existence of which was unknown to all parties because of error in indexing. Buttron v. Tibbitts, 10 Abb. N. Cas. (N. Y.) 41.

[2] Osterbury v. Union Trust Co., 93 U. S. 424. Farmers' Bank v. Peter 13 Bush (Ky.), 591. Harth v. Gibbes, 3 Rich. L. (So. Car.) 316.

CHAPTER VI.

COVENANTS WHICH THE PURCHASER HAS A RIGHT TO DEMAND.

USUAL COVENANTS. § 67.
FROM GRANTORS IN THEIR OWN RIGHT. § 68.
FROM FIDUCIARY GRANTORS. § 69.
FROM MINISTERIAL OFFICERS. § 70.

§ 67. **USUAL COVENANTS.** Covenants for title, as will hereafter be seen, are agreements by the vendor in solemn form, inserted in the conveyance to the purchaser for his protection in case his title should be afterwards overthrown, or incumbrances upon the property successfully asserted. As a general rule the purchaser's right to relief against the vendor, in case he should suffer loss through a defective title after the contract has been executed by a conveyance, depends upon the covenants which that conveyance contains. If there are no covenants the almost universal rule is that the purchaser is, in the absence of fraud or mistake, absolutely without relief at law or in equity.[1] Consequently, the right of the purchaser to require that the conveyance shall contain covenants adequate for his protection, is of the most vital importance to him, and should, in those States where the purchaser is held entitled to a conveyance with general covenants, never be deemed to have been parted with, except upon clear evidence that, by the terms of the contract, the vendor was bound only to execute a quit-claim conveyance, or a conveyance without any covenants whatever.

The usual covenants for title in the American practice are those: (1) of seisin; (2) of good right to convey; (3) against incumbrances; (4) of warranty; (5) for quiet enjoyment, and (6) for further assurance.[2] Of these the most important are the covenants for seisin, against incumbrances, and of warranty. The covenant of good right to convey is embraced in that for seisin, and that for quiet enjoyment in the covenant of warranty. The covenant for further assurance is not generally used throughout the country.[1] The same necessity does not exist for it as in England, where a very artificial and complicated system of conveyancing prevails. The nature and incidents of each of these covenants will be hereafter explained. For our present purposes it is only necessary to say that each of them is either, (1) general, that is, against the acts, claims and demands of any and all persons whomsoever; or (2) special or limited, that is, against the acts and claims of the grantor or of any person claiming by, through or under him. A conveyance with special or limited covenants only is commonly called a "quit claim," and is, with respect to defects of title not arising from some act of the grantor or those claiming under him, no more in effect than a conveyance without covenants of any kind.[2] From what has been said it follows that the question, "What are the usual covenants for title?" is to be considered in two aspects, namely, (1) whether all five (or six) of the covenants can be required from the vendor, and (2)

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[1] Post, ch. 27.

[2] 4 Kent Com. 471; Rawle Covts. (5th ed.) § 21; Murphy v. Lockwood, 21 Ill. 618. The following is an approved form of the several covenants for title in use in America. They usually constitute the last clauses of a conveyance. Such expressions as are necessary to make the covenant special or limited are inserted below in parentheses: "Doth hereby covenant for himself his heirs executors and administrators that (notwithstanding any act matter or thing by him done) he the said (vendor) is now lawfully seised of the said premises And hath good right to convey the same That the same are free from all incumbrances (done suffered or committed by him) And that the said (purchaser) his heirs and assigns shall and may at all times hereafter freely peaceably and quietly enjoy

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the same without molestation or eviction of him the said (vendor) or any person or persons whomsoever (lawfully claiming or to claim the same by from or under him them or any of them). And that he the said (vendor) shall at all times hereafter at the request and expense of the said (purchaser) his heirs and assigns make and execute such other assurances for the more effectual conveyance of the said premises as shall be by him reasonably required And that he the said (vendor) and his heirs all and singular the messuages and tenements etc hereby granted and mentioned or intended so to be with the appurtenances took the said (purchaser) his heirs and assigns against him the said (vendor) and his heirs and against all and every other person or persons lawfully claiming or to claim the same or any part thereof (by from or under him them or any of them) shall and will by these presents warrant and forever defend." See Rawle Covts. (5th ed.) p. 29.

[1] Wilson v. Wood, 2 C. E. Gr. (N. J. Eq.) 216.

[2] The term "quit claim" is generally defined or considered to be a deed without covenants of any kind as to the title, or a deed with special or limited covenants for title only. Rawle Covts. (5th ed.) § 30. But in those States in which by statute or judicial construction general covenants of warranty are implied from certain words of grant, such as the words "do hereby sell and convey" a deed without express covenants for title is, of course, not necessarily a quit claim, even though the words "quit claim" are employed in the operative words of conveyance, if language from which general covenants can be implied is used. Wilson v. Irish, 62 Iowa, 266; 17 N. W. Rep. 511; Sibley v. Bullis, 40 Iowa, 429. See also, Taylor v. Harrison, 47 Tex. 454, 461; 26 Am. Rep. 304. Baldwin v. Drew, (Tex. Civ. App.) 180 S. W. 614.

whether the covenants given must be general and unlimited, or limited and special.

In the English practice the purchaser, in the absence of express contract to the contrary, undoubtedly had the right to call for all of the covenants for title.[1] Such, also, is the rule in those of the American States in which the covenant of warranty is not by law or custom deemed to embrace the other covenants.[2] But in some of the States this right has been held to be limited or qualified by particular expressions in the contract — expressions which in other States have been denied that effect. Thus in New York and elsewhere it has been held that an agreement by the vendor to execute a "warranty deed" obliged him to insert in his deed no other covenant than that of warranty.[3] On the other hand, in Indiana and elsewhere it is considered that such an agreement entitles the purchaser to all the principal covenants for title.[4] So, also, where the vendor agreed to convey with the "usual covenants."[5]

In some of the States it is an established rule that no covenants for title can be required from the seller, if the contract of sale contains no provision for such covenants, nor for any particular form of deed.[5a]

If the contract be silent as to the number, nature and kinds of covenants for title into which the vendor must enter, the better opinion seems to be that the parties will be presumed to have contracted in that respect with reference to the known use and custom of the locality in which the land is situated.[1] In many of the States it is not customary to insert any other covenant than that of general warranty in a fee simple conveyance.[1a] When such a custom prevails, it is apprehended that the vendor could be required to enter into no other covenant for title unless the contract expressly provided for other covenants. In this respect the parties will be deemed to have been governed by the *lex rei sitæ* and not by the *lex loci contractu.*[2] But where the question is whether certain language in a deed creates a particular covenant for title or what covenants the deed in fact contains, the law of the place of the contract governs.[3] In some of the States it is held that a purchaser is not entitled to *all* the covenants for title unless the contract expressly requires them.[4]

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[1] 2 Sugd. Vend. ch. 14, § 3.

[2] Post, notes 4 and 5; Murphy v. Lockwood, 21 Ill. 618.

[3] Kirkendall v. Mitchell, 3 McL. (U. S.) 144. Wilsey v. Dennis, 44 Barb. (N. Y.) 354.

[4] Clark v. Redman, 1 Bl. (Ind.) 379; Leonard v. Bates, 1 Bl. (Ind.) 172; Dawson v. Shirley, 6 Bl. (Ind.) 531; Linn v. Barkey, 7 Ind. 69; Bethell v. Bethell, 92 Ind. 318, 321. Bull v. Weisbrod, 185 Iowa 318, 170 N. W. 536. Bowen v. Thrall, 28 Vt. 382.

[5] Wilson v. Wood, 2 C. E. Gr. (N. J. Eq.) 216; 88 Am. Dec. 231. Drake v. Barton, 18 Minn. 462. An agreement to execute a deed containing "the usual full covenants and warranty of title' will not be satisfied by the tender of a deed containing a covenant of general warranty only; the deed must contain also covenants of *seisin* and against incumbrances. McKleroy v. Tulane, 34 Ala. 83.

[5a] Van Eps v. Schenectady, 12 Johns. 442, 7 Am. Dec. 330; Ketchum v. Evertson, 13 Johns. 359, 7 Am. Dec. 384; Emerick v. Hackett, 192 N. Y. 162, 84 N. E. 805.

The student and the practitioner in those jurisdictions in which the covenant of warranty is not held to embrace all the other covenants for title should be warned against attributing to that covenant too wide a scope. At the first glance, it would appear that this covenant is amply sufficient for the protection of the purchaser under all circumstances.[1] This is true, as a general rule, in cases where the defective title results in an eviction of the purchaser. But where there has been no eviction and the grantor is neither an insolvent nor a non-resident, it is very generally held throughout the United States that the purchaser cannot resist the payment of the purchase money, even though there has been a total failure of the title.[2] It seems, however, that if the conveyance to the purchaser had contained a covenant for *seisin*, which is broken as soon as made, if the title be bad, the purchaser might detain the purchase money, provided he restored the premises to the vendor.[3] It is hardly necessary to say that these observations apply only to cases where the contract has been executed by a conveyance. The covenant of warranty cannot be treated as a covenant against incumbrances, except in a few of the States, where it is held to include all the other covenants for title.[3a] The necessity for the covenant against incumbrances will be felt where the purchaser seeks to compel the vendor to remove an incumbrance from the premises which exceeds in amount the consideration of the conveyance.[4]

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[1] Dwight v. Cutler, 3 Mich. 586; 54 Am. Dec. 105. Wilson v. Wood, 2 C. E. Gr. (N. J. Eq.) 216; 88 Am. Dec. 231, where held also that the question what are the usual covenants in deeds in a given locality may be referred to a master in chancery for inquiry and report. Henderson v. Hay, 3 Bro. Ch. 632. What are usual covenants for title is, it seems, a question of fact to be determined by custom and usage of the locality where the land lies. Rawle Covts. (5th ed.) § 31. Bennett v. Womack, 3 Car. & P. 96. Putnam Inv. Co. v. King, 96 Kan. 109, 150 Pac. 559.

[1a] Dickinson v. Hoomes, 8 Grat. (Va.) 353. Green v. Irving, 54 Miss. 454; 28 Am. Rep. 360. Leary v. Durham, 4 Ga. 601, LUMPKIN, J., saying that in a practice of more than twenty-five years he had never seen a deed containing all five of the covenants for title.

[2] Gault v. Van Zile, 37 Mich. 22, per COOLEY, C. J. Here it was held that the purchaser was entitled to such deed as is usual by custom of the *rei sitæ;* this in analogy to the rule that the sufficiency of a deed is to be determined by the *lex rei sitæ.* 2 Pars. Cont. 571, note h; Hosford v. Nichols, 1 Paige Ch. (N. Y.) 220.

[3] Bethell v. Bethell, 54 Ind. 428; S. C., 92 Ind. 318, and 23 Am. Rep. 650. Here the land was in Missouri, and the deed was made in Indiana. It was held that the Missouri law that certain covenants should be implied from words of grant in the deed would not prevail in Indiana, so as to oblige the court to construe the deed as containing these covenants. In another State a contrary view has been taken of the law in respect to covenants which run with the land. Dalton v. Taliaferro, 101 Ill. App. 592.

[4] Lounsbery v. Locander, 10 C. E. Gr. (N. J.) 554; Thayer v. Torrey, 37 N. J. L. 345; Newark Sav. Inst. v. Jones, 37 N. J. Eq. 449.

If the vendor was fraudulently induced to insert a covenant against incumbrances in his deed, he is entitled to have the deed reformed so as to express the true intention of the parties.[4a]

§ 68. **FROM GRANTORS IN THEIR OWN RIGHT.** Assuming that, by contract, express or implied, the purchaser may require all the several covenants for title,[5] the next question and the more important one is whether he may insist that those covenants shall be general and unlimited, and not merely limited or special. In England, a vendor who actually purchased the estate himself for money, and did not acquire it by gift, devise or descent, can be required to enter into covenants only against his own acts, or those of persons claiming under him.[1] If he did not acquire the estate for a valuable consideration, his covenants must extend to the acts of the last purchaser.[2] But in no case could he be required to extend his covenants beyond the acts of the last purchaser. In

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[1] Stewart v. West, 14 Pa. St. 336, where GIBSON, C. J., speaking of the covenant of general warranty, said: "In Pennsylvania, it has been retained by unprofessed scriveners as a nostrum supposed to contain the virtues of the whole five, but its potency has not been recognized by the bench."

[2] Post, ch. 16.

[3] Post, ch. 26.

[3a] Findlay v. Toncray, 2 Rob. (Va.) 374, 379; Wash. City Sav. Bank v. Thornton, 83 Va. 157; 2 S. E. Rep. 193.

[4] Post, ch. 21.

[4a] Lyndon Lumber Co. v. Sawyer, 135 Wis. 525; 116 N. W. 255.

[5] Church v. Brown, 15 Ves. 263. In this case Lord ELDON said that if a man covenanted to sell a fee simple estate free from all incumbrances, and says no more, it is clear that the covenant carries *in gremio*, and in the bosom of it, the right to proper covenants.

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[1] 2 Sugd. Vend. (14th ed.) 232, 234; 3 Powell Conv. 206, 210; Wakeman v. Dutchess of Rutland, 3 Ves. Jr. 233; Lloyd v. Griffiths, 3 Atk. 267; Pickett v. Loggon, 14 Ves. 239; Thackeray v. Wood, 6 B. & S. (Q. B.) 773. The following extract from the opinion of Lord ELDON, in Browning v. Wright, 2 Bos. & Pul. 13, 22, clearly sets forth the English rule as to the extent of covenants that may be required of one selling a fee in his own right. "This transaction is a purchase of an estate of inheritance in fee, and the first question is, what will be the nature and effect of a conveyance carrying such a contract into execution? If a man purchase an estate of inheritance and afterwards sell it, it is to be understood, *prima facie*, that he sells the estate as he received it, and the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his acts and those of his ancestor; and if by devise, it is not unusual for him to covenant against the acts of the devisor as well as his own. In fact he says, I sell this land in the same plight that I received it, and not in any degree made worse by me. It was argued that if this were so, a man who has only an estate for life might convey an estate in fee, and yet not be liable to the purchaser. This seems at first to involve a degree of injustice, but it all depends on the fact whether the vendor be really putting the purchaser into the same situation in which he stood himself. If he has bought an estate in fee, and at the time of the re-sale has but an estate for life, it must have been reduced to that estate by his own act, and in that case the purchaser will be protected by the vendor's covenants against any act done by himself. But if the defect in his title depend upon the acts of those who had the estate before him, and he honestly but ignorantly proposes to another person to stand in his situation, neither hardship or injustice can be done. What is the common course of business in such a case? An abstract is laid before the purchaser's counsel; and though to a certain extent he relies on the vendor's covenant, still his chief attention is directed to ascertaining what is the estate, and how far it is supported by the title. The purchaser, therefore, not being misled by the vendor, makes up his mind whether he shall complete his bargain or not, and if any doubts arise on the title, it rests with the vendor to determine whether he will satisfy those doubts by covenants more or less extensive. *Prima facie*, therefore, in the conveyance of an estate of inheritance we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs.

[2] 2 Sugd. Vend. (8th Am. ed.) 232.

America, the rule prevailing in most of the State is that the vendor's covenants must be general or unlimited,[1] and that they must be full, that is consisting of all the usual covenants and not merely a covenant of general warranty. Especially does this rule prevail in the younger States and in sparsely settled communities where accurate and thorough examinations of title are frequently dispensed with, and in which, as a necessary consequence, titles are more insecure than in older and more densely populated sections, where few transfers of real property are made, except upon the advice and assistance of competent persons.[1] In several of the Atlantic States the generally prevalent rule is that in the absence of express provision to the contrary, the vendor can be required to covenant only against his own acts.[2] And it has been held that if the purchaser enters into a *sealed* agreement of sale, *e. g.*, a title bond, without requiring the vendor to insert provisions

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[1] Witter v. Biscoe, 13 Ark. 422; Bagley v. Fletcher, 44 Ark. 153; Rudd v. Savelli, 44 Ark. 145. Steele v. Mitchell, Pr. Dec. (Ky.) 47; Fleming v. Harrison, 2 Bibb (Ky.), 171; 4 Am. Dec. 691; Vanada v. Hopkins, 1 J. J. M. (Ky.) 293; 19 Am. Dec. 92; Andrews v. Ward, 17 B. Mon. (Ky.) 518; Gaithor v. O'Doherty, (Ky.) 12 S. W. Rep. 306. Whiteworth v. Pool, 29 Ky. L. R. 1004; 96 S. W. 880. Clark v. Redman, 1 Bl. (Ind.) 379. Faircloth v. Isler, 75 N. C. 551; Gilchrist v. Buie, 1 Dev. & Bat. Eq. (N. C.) 358; Henry v. Liles, 2 Ired. Eq. (N. C.) 407. Vardeman v. Lawson, 17 Tex. 11; Phillips v. Herndon, 78 Tex. 378. Even though the vendor understood that he was only to make a quit-claim deed, if such understanding was not known to the purchaser. Jones v. Phillips, 59 Tex. 609. Holland v. Holmes, 14 Fla. 390. Dwight v. Cutler, 3 Mich. 566; 64 Am. Dec. 105; Allen v. Hazen, 26 Mich. 143. Herryford v. Turner, 67 Mo. 296, 298. Kenny v. Hoffman, 31 Grat. (Va.) 442; Hoback v. Kilgore, 26 Grat. (Va.) 442; 21 Am. Rep. 317; Dickinson v. Hoomes, 8 Grat. (Va.) 353, 394; Rucker v. Lowther, 6 Leigh (Va.), 259. *Cf.* Remington v. Hornby, 4 Munf. (Va.) 140. Tavenner v. Barrett, 21 W. Va. 656, 681. Clark v. Lyons, 25 Ill. 105. Johnston v. Piper, 4 Minn. 195. Davis v. Henderson, 17 Wis. 110. Tremaine v. Lining, Wright (Ohio), 644; but see Pugh v. Chasseldine, 11 Ohio, 109; 37 Am. Dec. 414. The purchaser is entitled to a deed with general warranty whether he buys at auction or private sale. Goddin v. Vaughn, 14 Grat. (Va) 102, 117. An agreement in the contract of sale that the land sold "'shall be in the quiet and peaceable possession of the vendee forever without any let, hindrance, suit, molestation or trouble entitles the purchaser to a conveyance with general warranty. Slack v. Thompson, 4 T. B. Mon. (Ky.) 462. A bond to make "'sufficient title" requires a deed with general warranty. Hedges v. Kerr, 4 B. Mon. (Ky.) 528. An agreement to give a "warranty deed" means a deed with general warranty. Allen v. Hazen, 26 Mich. 142. Johnston v. Piper, 4 Minn. 192 (133). In Allen v. Yeater, 17 W. Va. 128, the vendor conveyed "with warranty." This was held to mean with general warranty. It was said that the deed, being taken most strongly against the grantor, he should have conveyed with "special warranty" if he desired to limit his liability. A bond to "make indefeasible title in fee simple, such as the State requires," demands a deed with covenant of general warranty. Kelly v. Bradford, 3 Bibb (Ky.), 317; 6 Am. Dec. 656. So, also, an agreement to make "as good a deed as can be had" Day v. Burnham, 89 Ky. 76; 11 S. W. Rep. 807. An agreement to "make a sufficient title as far as their claim extends on said lands" obliges the vendors to convey with special warranty only. Gilchrist v. Buie, 1 D. & B. Eq. (N. Car.) 357. So, also, an agreement "to furnish a satisfactory abstract of title and give a quit-claim deed." Fitch v. Willard, 73 Ill. 92. In Day v. Burnham, 89 Ky. 76; 11 S. W. Rep. 807, it was said that the bond of a vendor in general terms to convey land

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upon payment by the vendee of the agreed purchase money is in legal contemplation a covenant that he has or will procure and make a good title to the entire quantity sold and in his deed warrant the title against all claims, and that such undertaking is limited only when in plain terms so expressed. In the State of Washington the grantee has by statute the same rights under a quit-claim deed, except as to an after-acquired estate, that he would have under a deed with general warranty. Ankeny v. Clark, (Wash. Ty.) 20 Pac. Rep. 586.

[1] With respect to the American doctrine as to the covenants which the purchaser is entitled to require, Mr. Rawle, in his able and copious treatise on the law of Covenants for Titles, observes: "It is difficult to determine by general and precise rule what, on this side of the Atlantic, are the "usual covenants"—that is to say, the covenants which a vendor should give, and a purchaser expect — as, owing to various causes, the practice of conveyancing differs widely in the two countries. It is obvious that much of the practice which prevails where the state of society has long been permanent, the titles old, and to a greater or less extent carefully examined at every purchase, loses its application in a comparatively new country, and the same covenants which might satisfy a purchaser in England or Massachusetts might not satisfy a purchaser in Idaho or Wyoming. As precision of conveyancing increases, a purchaser is less anxious for general covenants than where he buys in comparative ignorance of the title, and relies upon such covenants for his protection. Hence, a great difference will be found to exist as to the practice, not only on the different sides of the Atlantic, and among different States, but even between different parts of the same State." Covts. for Title (5th ed.), p. 35, referring to Whitehead v. Carr, 5 Watts (Pa.), 369, and Pitcher v. Livingston, 4 Johns. (N. Y.) 14; 4 Am. Dec. 229. These remarks were approved in Dwight v. Cutler, 3 Mich. 566; 64 Am. Dec. 105.

[2] See Rawle Covts. (5th ed.) § 289. Kyle v. Kavanaugh, 103 Mass. 356, 359; 4 Am. Rep. 560. Mead v. Johnson, 3 Conn. 592; Dodd v. Seymour, 21 Conn. 480. Ketchum v. Evertson, 13 Johns. (N. Y.) 359; 7 Am. Rep. 384; Gazley v. Pierce, 16 Johns. (N. Y.) 267; Fuller v. Hubbard, 16 Cow. (N. Y.) 13; 16 Am Dec. 423; Van Eps v. Schenectady, 12 Johns. (N. Y.) 436; 7 Am. Dec. 330; Ryder v. Jenny, 2 Robt. (N. Y.) 68. Withers v. Baird, 7 Watts (Pa.), 229; 32 Am. Dec. 754; Espy v. Anderson, 14 Pa. St. 308, 312; Cadwalader v. Tryon, 37 Pa. St. 318, 322; Lloyd v. Farrell, 48 Pa. St. 78; Payne v. Echols, (Pa. St.) 15 Atl. Rep. 895. In Barlow v. Scott, 24 N. Y. 40, the seller having represented that he held under a warranty deed, and both parties supposing such to have been the case, the purchaser was held entitled to require a conveyance with general warranty.

obliging him to warrant the title generally, it will be presumed that it was the understanding and intention of the parties that there was to be no such warranty.[1] Of course, if there be an express contract with reference to the kind of title the purchaser is to receive, the covenants which he may require will depend upon the construction of that contract.[2] An agreement to give a "good and sufficient" title obliges the vendor to execute a warranty deed to the purchaser.[3]

An agreement to execute a deed clear of all incumbrances except a certain ground rent, entitled the purchaser to a deed with a covenant against incumbrances, excepting the ground rent. And the purchaser may rely upon such covenant, and is not bound to insist upon the removal of the incumbrance as a condition precedent to his acceptance of the title.[4] If by mistake the purchaser accepts a quit-claim instead of a deed with full covenants, to which under the contract he is entitled, the seller may be compelled to execute a deed with such covenants.[5] And a purchaser who has been fraudulently induced to accept a quit-claim deed will be entitled to relief.[6] A grantee who reconveys to his grantor upon rescission of the contract, can be required to covenant only against the acts of himself and those who claim under him.[7] To such a covenant the original grantor will, of course, be entitled.[8] It has been said that if it appear that both parties knew that the title of the seller was liable to be defeated by the happening of a certain contingency, it will be presumed that the seller engaged to convey with special warranty only.[9] However this may be, no ground for any such presumption can be easily perceived in a case in which both parties were aware that the title was defective, and the vendor sold at a fair price.[1] The seller often agrees to convey with general warranty in order to quiet the objections of the purchaser to the title. It has been held that if there be a cloud upon the title the purchaser cannot be required to accept a quit-claim deed.[2] It is the duty of the vendor to remove the cloud or incumbrance, or to assume the responsibility thereof by executing a deed with general warranty. A person who joins in a conveyance of land merely that an objection to the title may be removed, cannot, of course, be required to covenant generally.[3] Heirs who are directed to perform specifically the contract of their ancestor for the sale of his lands can be required to covenant only against their own acts.[4] In the English practice they are required to covenant also against the acts of the ancestor,[5] and there seems to be no good reason why they should not be required so to covenant in America, at least to the extent of assets which they may have received from the ancestor's estate.[6]

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[1] Johnston v. Mendenhall, 9 W. Va. 112. This distinction does not seem to have been recognized in Gaither v. O'Doherty, (Ky.) 12 S. W. Rep. 306, where it was held that if a title bond contain no stipulation as to title, the vendor must convey with warranty.

[2] Babcock v. Wilson, 17 Me. 372; 35 Am. Dec. 263.

[3] Toomey v. Read, 133 Ga. 855; 67 S. E. 100.

[4] Bryant v. Wilson, 71 Md. 440.

[5] Point Street Iron Works v. Simmons, 11 R. I. 496.

[6] Rhode v. Alley, 27 Tex. 443. See, also, Chastain v. Staley, 23 Ga. 26.

[7] Concord Bank v. Gregg, 14 N. H. 331.

[8] Shorthill v. Ferguson, 47 Iowa, 284.

[9] Dickinson v. Hoomes, 8 Grat. (Va.) 394.

At common law it was useless to require covenants from a married woman, since they could not be enforced. In England, however, and in some of the American States, it has been held that she may bind her separate estate in equity by her covenants. In other States it is considered that the power so to bind her separate estate depends upon the terms of the instrument creating that estate, but now in England, and in certain of the States, statutory provisions exist expressly or impliedly empowering a married woman to bind her separate estate by her covenants. In other States the power is expressly denied her by statute, except by way of estoppel.[7] Where such power exists no reason is perceived why the same covenants as might be required of one under no personal disabilities, should not be required of her; otherwise the grantee of a married woman might be compelled to pay the purchase money after he had been evicted by an adverse claimant, in consequence of the rule that a purchaser holding under a conveyance without covenants for title, is without relief in case he loses the estate.[1]

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[1] If the title of the vendor is questionable, he should covenant generally. Fearne Posth. Works, 110, 118. Browing v. Wright, 2 Bos. & Pul. 13.

[2] Potter v. Tuttle, 22 Conn. 513.

[3] Hoback v. Kilgore, 26 Grat. (Va.) 442, 445; 21 Am. Rep. 317.

[4] Hill v. Ressegieu, 17 Barb. (N. Y.) 162. Boggess v. Robinson, 5 W. Va. 402. Hyatt v. Seeley, 1 Kern. (N. Y.) 56.

[5] 2 Sugd. Vend. (8th Am. ed.) 232. Browning v. Wright, 2 Bos. & Pul. 22.

[6] Holman v. Criswell, 15 Tex. 395. This was denied in Hill v. Ressegieu, 17 Barb (N. Y.) 162, 167.

[7] See generally as to the power of a married woman to bind her estate by covenants for title, Rawle Covts. (5th ed.) § 306 et seq.

Persons executing mortgages,[2] and, presumably, deeds of trust to secure debts, unless the instrument in either case be a security for the purchase money of the estate,[3] must covenant against the acts of all persons whomsoever. The same covenants may be required of a lessor,[4] the reason being that the title is never examined upon a demise for years.

Tenants in common and joint tenants should covenant severally,[5] and the covenants of each should be extended no further than the undivided share of each.[6] The vendor cannot be required to covenant against acts of sovereignty, or against the public rights of the State, such as the riparian rights of the public in a river. The exercise of those rights, though resulting in an eviction, would not operate a breach of the covenant of warranty.[7] It seems that a bankrupt cannot be compelled to execute a conveyance with covenants, though it is the practice for him to give covenants.[1]

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[1] Post, ch. 27.

[2] Sugd. Vend. (14th ed.) 551; Wms. Real Prop. (8th Am. ed.) 447. Cripps v. Reade, 6 Term, 606 *ob*. In Lockwood v. Sturtevant, 6 Conn. 372, 384, the singular objection was made that covenants of seisin and of good right to convey in a mortgage are invalid. The objection of course was held untenable. See Lloyd v. Quimby, 5 Ohio St. 262, and Butler v. Seward, 10 Allen (Mass.), 466, for instances in which protection to the mortgagee was afforded by covenants for title.

[3] Williams Real Prop. (6th Am. ed.) 447, n. 4.

[4] Wms. Real Prop. (6th Am. ed.) 447, n. 1; Bart. Conveyancing, 75; Rawle Covts. (5th ed.) § 26.

[5] Coe v. Harahan, 8 Gray (Mass.), 198. Heirs joining in a deed with warranty, without restriction as to the interest owned by each, are joint and not several covenantors. Phipps v. Sappenfield, 54 Ind. App. 139, 102 N. E. 841.

[6] Rawle Covt. (5th ed.) p. 32, citing 1 Dav. Con. (3d ed.) 114. Armstrong v. Coal Co., 67 W. Va. 589, 69 S. E. 195. A covenant by a joint owner to the extent of his interest binds him only to that extent. Coster v. Mfg. Co., 1 Gr. Ch. (N. J.) 467.

[7] See post, § 143. Bigler v. Morgan, 77 N. Y. 312. Here the vendor contracted to convey by warranty deed to the purchaser a tract of land having oyster beds appurtenant thereto. It was held that all the contract bound the vendor to convey was a clear title to the upland, and such interest in the

§ 69. **FROM FIDUCIARY GRANTORS.** One who sells property in which he has no beneficial interest, for example, a trustee,[2] executor[3] assignee,[4] can be required to enter into no other covenant than that he has done no act to incumber the estate. In the English practice, however, the purchaser has been held entitled to require the usual covenants from *cestuis que trust*,[5] and the

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land covered by the water as the law of the State gave to the owner of the upland; that the riparian rights were subject to the public rights of the State, and that the vendor could not be required to warrant against them, or against parties claiming privileges granted by the State.

[1] Sugd. Vend. (14th ed.) 575. Waugh v. Land, Coop. 132. Ex parte Crowder, 2 Rose, 327.

[2] Dart V. & P. (5th ed.) 130; Sugd. Vend. (14th ed.) 574 (234); Lewin Trustees (1st Am. ed.), § 441; Rawle Covts. (5th ed.) § 33. Faircloth v. Isler, 75 N. Car. 551; Ennis v. Leach, 1 Ired. Eq. (N. C.) 416. Barnard v. Duncan, 38 Mo. 170, 181; 90 Am. Dec. 416. Fleming v. Holt, 12 W. Va. 143, 162; Tavenner v. Barrett, 21 W. Va. 656. If he agree to convey with warranty, the agreement is void and cannot be enforced. Brackenridge v. Dawson, 7 Ind. 383, 387. He may be required to insert a covenant against his own acts. Dwinel v. Veazie, 36 Me. 509; 69 Am. Dec. 84. A fiduciary vendor cannot be compelled to covenant for further assurance. Bart. Conv. 70. Worley v. Frampton, 5 Hare, 560. In Page v. Brown, 3 Beav. 36, it was held that executorial trustees, seeking specific performance of a contract made by their testator, must enter into such covenants as the testator would have been obliged to give.

[3] Sumner v. Williams, 8 Mass. 162, 201; 5 Am. Dec. 83, the court saying: "An administrator, acting under a license and exercising an authority to sell the real estate of his intestate, is not required by any duty of his office or trust to enter into a personal covenant for the absolute perfection of the title which he undertakes to convey, or for the validity of the conveyance beyond his own acts." Hodges v. Saunders, 17 Pick. (Mass.) 476. Shontz v. Brown, 27 Pa. St. 123. Grantland v. Wight, 5 Munf. (Va.) 295; Goddin v. Vaughan, 14 Grat. (Va.) 102. Covenants of title implied from the words "grant, bargain and sell," in a conveyance by administrators, impose no personal liability on them. Shontz v. Brown, 27 Pa. St. 123, 134. Nor those implied from the words "grant and demise" in a lease. Webster v. Conley, 46 Ill. 14; 92 Am. Dec. 234. And, generally, covenants for title will not be implied as against an executor. Dow v. Lewis, 4 Gray (Mass.) 468, 473. *Semble*, that if a committee of a lunatic, having no power at common law or by statute to make a lease of the lunatic's lands, execute such a lease, the usual lessor's covenants will be implied from the word *demise*, and the committee be held personally liable on the covenant. Knipe v. Palmer, 2 Wilson, 130.

[4] White v. Foljambe, 11 Ves. 337, 345. See, *ante*, § 64.

[5] Sugd. Vend. (14th ed.) 574, 575; Rawle Covts. (5th ed.) § 34. London Bridge Acts, 13 Simons, 176; Poulet v. Hood, L. R., 5 Eq. 115. But see

same rule has in a few instances been enforced in America.[1] The usual covenants may be required from an agent in behalf of his principal,[2] unless the power under which the agent sells and conveys expressly requires a conveyance without covenants.[3] A vendor having an interest, as well as a power, may be compelled to covenant personally to the extent of his interest.[4] But while

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Wakeman v. Duchess of Rutland, 3 Ves. 233; Cottrell v. Cotrell, L. R., 2 Eq. 330. Mr. Rawle says that the correct test of the application of the rule requiring *cestuis que trust* to give covenants would be the extent of the purchaser's liability to see to the application of the purchase money. This means, it is presumed, that the purchaser could not require covenants from the *cestuis que trust* unless he was obliged to see that the purchase money was applied to the purposes of the trust, and thus to become in a certain sense liable for the acts of the *cestuis que trust* and of the trustee in making the sale. Rawle Cov. (5th ed.) p. 46, n. This is doubtless true in all jurisdictions in which the purchaser upon a sale by him could be compelled to give no more than limited or special covenants. But it is not clearly perceived how any such rule can obtain in those courts in which upon such sale he would, in the absence of any special agreement, be required to convey with general or unlimited covenants.

[1] Rawle Covts. (5th ed.) § 34, citing Crabtree v. Levings, 53 Ill. 526, which, however, appears to have decided no more than that a purchaser of land from one who has not the legal title is entitled not only to covenants from him in whom is the title, but also from the person from whom he bought. In Barnard v. Duncan, 38 Mo. 181; 90 Am. Dec. 416, the English rule upon this point was said not to have been recognized in this country.

[2] Le Roy v. Beard, 8 How. (U. S.) 451; Taggart v. Stanbury, 2 McL. (U. S.) 543. Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 293; 19 Am. Dec. 92; Hedges v. Kerr, 4 Brown (Ky.), 524, 528. Bronson v. Coffin, 118 Mass. 156; 11 Am. Rep. 335. Hunter v. Jameson, 6 Ired. (N. C.) 252, case of personal property. Peters v. Farnsworth, 15 Vt. 155; 11 Am. Dec. 671. An agent authorized to convey lands of the commonwealth by quit-claim deed does not exceed his authority by warranting the land against all persons claiming under the commonwealth. Ward v. Bartholomew, 118 Mass. 161. A power of attorney which authorizes an agent to convey as fully and amply as the principal could, authorizes the agent to convey with covenants of general warranty. Taggart v. Stanbury, 2 McLean (U. S.) 543. There are several cases in which it has been held that one acting under a power has no authority to bind his principal with covenants for title. Nixon v. Hyserott, 5 Johns. (N. Y.) 58; Gibson v. Colt, 7 Johns. (N. Y.) 390; Van Eps. v. Schenectady, 12 Johns. (N. Y.) 436, 443; 7 Am. Dec. 330. Howe v. Harrington, 3 C. E. Gr. (N. J. Eq.) 496. Mead v. Johnson, 3 Conn. 592; Dodd v. Seymour, 21 Conn. 480. These decisions appear, however, to have been largely influenced by the New York and New England rule, that an agreement to make good title, or a sufficient deed, does not entitle the purchaser to covenants of warranty.

[3] Bart. Conv. 73. Hare v. Burges, 4 Kay & Johns. 57.

[4] Rucker v. Lowther, 6 Leigh (Va.), 259.

a fiduciary grantor cannot be required to convey with the usual covenants, if he should, nevertheless, execute such a conveyance, he will be personally bound by the covenants,[1] even though specified to be "in his capacity as administrator,"[2] the reasons being that, if he chooses to enhance the value of the purchaser's bargain by undertaking to assure the title, thereby possibly benefiting himself in an enlargement of the proceeds of the sale, he must take the consequences of his contract; and, further, that, if he were not liable, the grantee would have no remedy upon the covenants.[1] It is immaterial, with respect to the liability of the grantor, whether the deed is signed by him in his individual or in his fiduciary capacity.[2]

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[1] Hill on Trustees (3d Am. ed.), 413; Rawle Covts. (5th ed.) § 36. *Executors and administrators:* Mitchell v. Hazen, 4 Conn. 495; 10 Am. Dec. 169; Belden v. Seymour, 8 Conn. 24; 21 Am. Dec. 661. Aven v. Beckom, 11 Ga. 1. Baxter v. Camp, 126 Ga. 354; 54 S. E. 1036. Sumner v. Williams, 8 Mass. 162; 5 Am. Dec. 83, the leading case. Mellen v. Boarman, 13 Sm. & M. (Miss.) 100. Godley v. Taylor, 3 Dev. (N. C.) 178. Lockwood v. Gilson, 12 Ohio, 529. Kauffelt v. Leber, 9 Watts & S. (Pa.) 93. Mabie v. Matteson, 17 Wis. 11, *dict.* Barnett v. Hughey, (Ark.) 15 S. W. Rep. 464. In Sumner v. Williams, 8 Mass. 201; 5 Am. Dec. 83, the court said that an administrator or executor may covenant generally, "if he chooses thus to excite the confidence of purchasers and to enlarge the proceeds of the sale," and will, therefore, be personally bound. Such a contract is neither unlawful nor inconsistent. In Merritt v. Hunt, 4 Ired. Eq. (N. C.) 409, will be found an instance where an executor making an auction sale of lands offered to warrant the title himself in order to quiet the fears of intending purchasers as to the title. But a covenant by an executor in his "capacity as executor and not otherwise" has been held not to bind the executor personally. Thayer v. Wendell, 1 Gall. (C. C.) 37. So, also, a covenant by executors that they would warrant and defend "as executors are bound by law to do," they not being bound by the *lex rei sitæ* to warrant at all. Day v. Browne, 2 Ohio, 347. A covenant by executors "to the extent of their assets" will not bind them beyond the amount of assets in their hands at the time of eviction. Nicholas v. Jones, 3 A. K. Marsh. (Ky.) 385; Manifee v. Morrison, 1 Dana (Ky.), 208. In Georgia fiduciaries are not personally bound by their covenants unless the intention of personal liability be distinctly expressed. Code Ga. 2563, 2622; Clark v. Whitehead, 47 Ga. 521; Shacklett v. Ransom, 54 Ga. 353. *Trustees:* Bloom v. Wolf, 50 Iowa, 286, 288. Klopp v. Moore, 6 Kans. 30. Graves v. Mattingly, 6 Bush (Ky.), 361. Murphy v. Price, 48 Mo. 247. Duval v. Craig, 2 Wh. (U. S.) 56; Taylor v. Davis, 110 U. S. 330. But the trustee will not be bound if it clearly appear from the face of the deed that such was not the intention of the parties. Glenn v. Allison, 58 Md. 527. *Agents, etc.:* Stinchfield v. Little, 1 Greenl. (Me.) 231; 10 Am. Dec. 65. Duval v. Craig, 2 Wh. (U. S.) 56, *dict.* Sterling v. Peet, 14 Conn. 245. *Guardians:* Mason v. Caldwell, 5 Gil. (Ill.) 196; 48 Am. Dec. 330. Foster v. Young, 35 Ia. 27. Whiting v. Dewey, 15 Pick. (Mass.) 433. Holyoke v. Clarke, 54 N. H. 578. A guardian using the words "grant, bargain and sell," will be personally bound by the covenants implied therefrom. Foote v. Clark, 102 Mo. 394; 17 S. W. Rep. 981.

[2] Higley v. Smith, 1 D. Chip. (Vt.) 409; 12 Am. Dec. 701.

The rule that general covenants for title cannot be required from fiduciaries and others who convey *en auter droit* is equitable and just, so far as it is intended to protect such a grantor from personal liability on the covenants. At the same time it is obvious that the rule may result in much hardship to the buyer; for, as will hereafter be seen, he may be compelled to pay the purchase money, though he has been evicted from the estate, if the eviction be under a title to which his grantor's covenants do not extend.[3] It has been held that if it plainly appear from the face of the instrument that the fiduciary did not intend to bind himself personally by the covenants, he will not be bound; in such a case the plainly expressed intention of the parties controls.[4] Covenants entered into by a fiduciary cannot bind the trust estate or the *cestuis que trust,* except, of course, in cases where he is expressly authorized to enter into covenants.[5] A power to a trustee to sell real estate upon such terms as he may deem expedient gives him no authority to bind the estate by covenants.[6] And a statute giving an administrator power to convey land, gives him, by implication, no power to bind the estate by covenants for title.[1] A fiduciary, conveying with general covenants for title, will not only be personally bound thereby, but he will be estopped to set up afterwards any interest in the premises which he may have had at the time of the conveyance.[2]

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[1] Donohue v. Emery, 9 Met. (Mass.) 66. See, also, Story on Agency, § 263; Appleton v. Banks, 5 East. 148; Knipe v. Palmer, 2 Wilson, 130; Burrill v. Jones, 3 B. & Ad. 47; Norton v. Herron, 1 C. & P. 648. If the covenants of an agent are sufficient to bind the principal, the agent will not be bound. Kent v. Chalfant, 7 Minn. 491.

[2] Belden v. Seymour, 8 Conn. 24; 21 Am. Dec. 661.

[3] Post, ch. 27. In Texas this injustice may be prevented, so far as deeds of trust to secure debts are concerned, by a rule which permits the trustee to bind the creator of the trust with covenants for title. Thurmond v. Brownson, 69 Tex. 597; 6 S. W. Rep. 778.

[4] Glenn v. Allison, 58 Md. 527.

[5] Osborne v. McMillan, 5 Jones L. (N. C.) 109. Klopp v. Moore, 6 Kans. 27, 30. Kauffelt v. Leber, 9 Watts & S. (Pa.) 93. Lockwood v. Gilson, 12 Ohio St. 529, *dict.* A bond given by an administrator to convey land of his intestate by *warranty* deed is unauthorized and will not bind the estate. Mason v. Ham, 36 Me. 573. The same rule applies in sales of personal property. Worthy v. Johnson, 8 Ga. 236; 52 Am. Dec. 399.

[6] Welch v. Davis, 3 So. Car. 110; 16 Am. Rep. 630.

§ 70. **MINISTERIAL GRANTORS.** No covenants of any kind can be required from mere ministerial grantors, such as sheriffs, tax collectors and others who are made by law the mere *media* for the transfer of legal title.[3] Nor can any covenant be implied from the language of the conveyances which they execute.[4] If, however, they choose to insert covenants for title, they will be bound by them. Thus it has been held that municipal officers having no authority to bind the municipality will be personally bound by covenants for title inserted in a conveyance by themselves in their official capacity.[5] A tax collector who executes a tax deed with covenants in the form prescribed by statute cannot be held personally liable on those covenants.[6] Covenants for title cannot be required from the crown, nor from the commonwealth, nor the federal government.[7] But it has been held that if the commonwealth convey with covenants of warranty, she will be estopped from afterwards setting up a claim to the property.[8]

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[1] Osborne v. McMillan, 5 Jones L. (N. Car.) 109.

[2] Foster v. Young, 35 Iowa, 27. Heard v. Hall, 16 Mass. 458. See *post*, "Estoppel," ch. 21.

[3] Friedly v. Scheetz, 9 S. & R. (Pa.) 156; 11 Am. Dec. 691. Mitchell v. Pinckney, 13 So. Car. 203. The reason is that the rule *caveat emptor* strictly applies in all sales by persons acting in a ministerial capacity. See *ante*, "Caveat Emptor," ch. 5.

[4] Dow v. Lewis, 4 Gray (Mass.), 468.

[5] Sterling v. Peet, 14 Conn. 245.

[6] Wilson v. Cochran, 14 N. H. 397. Gibson v. Mussey, 11 Vt. 212.

[7] 2 Sugd. Vend. ch. 14 § 111; Rawle Govts. (5th ed.) § 3. State v. Crutchfield, 3 Head (Tenn.), 113.

[8] Comm'th v. Andre, 3 Pick. (Mass.) 224; Comm'th v. Pejepscut, 10 Mass. 155.

CHAPTER VII.

ABSTRACT OF TITLE.

IN GENERAL. § 71.
ROOT OF TITLE. § 72.
DUTY TO FURNISH ABSTRACT. § 73.
PROPERTY IN THE ABSTRACT. § 74.
TIME IN WHICH TO EXAMINE THE TITLE AND VERIFY THE ABSTRACT. § 75.
SUMMARY OF THE VARIOUS SOURCES OF OBJECTIONS TO TITLE. § 76.
  Objections which appear from the instruments under which title is claimed. § 77.
  Objections which appear from the public records. § 78.
  Objections which appear upon inquiries in pais. § 79.

§ 71. **IN GENERAL.** In the English practice an abstract of title appears to be an epitome of the various documents in the possession of the vendor which evidence his title, such as deeds, wills, and affidavits respecting births, marriages, deaths, pedigrees, and other matters materially affecting the title.[1] The unwillingness of the vendor to allow the muniments of his title to go out of his possession probably gave rise to the custom of making abstracts of their contents for the leisurely inspection of the purchaser. In America an abstract has been defined to be "a statement in substance of what appears on the public records affecting the title." [2] This definition is perhaps sufficiently exact for practical purposes, but it should be remembered that there may be facts of vital importance to the title which nowhere appear of record, such as the proofs necessary to establish title by descent, or title by adverse possession. The abstract should, of course show the ability of the vendor to establish all such facts by competent evidence. It is customary in some localities to take the affidavits of persons cognizant of such facts, and cause them to be recorded among the land records of the county where the land lies. These affidavits, however, are merely persuasive to the purchaser, and are inadmissible as evidence in any proceeding in which the validity of the title is attacked.[1] In the American practice the abstract shows not only all conveyances affecting the title back to its root,[2] but all liens or incumbrances of record which may affect the estate or interest which the purchaser is to acquire, and in the case of titles derived from the judgments or decrees of courts in judicial proceeding, or from the ministerial acts of officers of the government, the existence of all facts without which the proceedings or acts in question would be not voidable merely, but absolutely void. In fine, the abstract is the outcome of a careful and accurate examination of the title, and should show all that such an examination of the title would disclose. It should also show the essential parts of every instrument in the vendor's chain of title, such as the names of the parties, description of the property conveyed or devised, words of grant or devise, and the like. The manner in which an abstract is prepared is an inquiry not within the scope of this work. Practical suggestions and forms will be found in several valuable treatises upon the subject.[3] According to the English practice, the vendor's solicitor prepares the abstract from the muniments of title in his possession; and he is held criminally responsible if he knowingly suppresses an instrument which would show a defect in the title. It is the duty of the purchaser's solicitor to compare the abstract with the originals, and if, by negligence, he fails to detect a material discrepancy in the abstract, he will be responsible to the purchaser for any loss that may ensue. "This examination," says Lord St. Leonards, "*should never be left to an incompetent person.* In the case of wills, particularly, the solicitor is bound to read through the whole will. Upon him devolves the duty of seeing that the evidence is what it purports to be, and that the deeds and wills are duly attested, and the receipts on all deeds properly indorsed and signed. An estate has been lost principally from the manner in which the receipt was indorsed, which would have led a vigilant purchaser to inquire further, when he would have discovered the fraud which had been committed."[1]

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[1] 2 Sugd. Vend. (8th ed.) ch. Ill. Hollifield v. Landrum, (Tex. Civ. App), 71 S. W. 979, citing the text.

[2] Union Safe Dep. Co. v. Chisholm, 33 Ill. App. 647, citing Warvelle Abst. 3. A better definition is said, in Sparkman v. Davenport, (Tex. Civ. App.) 163 S. W. 410, to be that given in Hollifield v. Landrum, *supra*, namely, "the substance of what appears in the public records affecting the title, and also a statement in substance of such facts as do not appear upon the records which are necessary to perfect the title." So, also, Wright v. Bott, (Tex. Civ. App.) 163 S. W. 361.

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[1] 2 Sugd. Vend. (8th ed.) 15 (417).

[2] A certificate attached to a paper stating that it is a "full and true abstract of the title," covers suits affecting the title as well as conveyances or incumbrances. Thomas v. Schee, 80 Iowa, 237; 45 N. W. Rep. 539.

[3] *American:* Warvelle on Abstracts, 1892; Martindale on Abstracts, 1890. *English:* Preston on Abstracts; 2 Sugd. Vend. ch. 11. A case of want of reasonable care, skill and diligence in preparing an abstract may be seen in Thomas v. Schee, (Iowa) 45 N. W. Rep. 539. Where the contract requires a good title, free and clear of all incumbrances as shown by abstracts, the abstract must contain a full summary of all grants, conveyances, wills, records, and judicial proceedings whereby the title is in any way affected, and all incumbrances and liens of record, and whether they have been released or not. . . . But it is not implied that the abstract shall show matters not of record, nor all the facts and circumstances connected with the conveyances which might affect the title, such, for example, as possession, or who were the legal heirs of a deceased owner where administration was not had within the jurisdiction, and matters of that kind. The abstract may be supplemented with evidence of facts and circumstances explanatory of the record and showing good title free of incumbrances in the vendor. Atteberry v. Blair, 244 Ill. 363, 91 N. E. 475, 135 Am. St. Rep. 342. The abstract

An original abstract of title showing unsatisfied liens of record may be received in evidence in the action by the purchaser for breach of contract in failing to make title.[2]

The abstract does not show a marketable title unless it is brought down to date[2a]; and its sufficiency is to be determined as of the time fixed by the parties for the performance of the contract.[2b]

§ 72. **ROOT OF TITLE.** Title to real property is in most cases evidenced by written instruments, such as deeds and wills, but it is possible that the title may be complete though altogether unsupported by documentary evidence, as in the case of descent from sole heir to sole heir during a period of sixty years or more. And,

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should show whether grantors in the claim of title were married or single. Bragg v. Chilcote, 176 Ill. App. 371. Where the contract requires that the abstract shall show title in the vendor to date, and the abstract furnished shows title in a stranger, the objection is not cured by a subsequent conveyance to the vendor, since liens upon the property may have attached in the meanwhile that would not be shown by the abstract. Drury v. Mickleberry, 144 Mo. App. 212, 129 S. W. 237; Union Safe Dep. Co. v. Chrishelm, 36 Ill. App. 647.

[1] 2 Sugd. Vend. (8th Am. ed.) 8 (411).

[2] Fagan v. Davison, 2 Duer (N. Y.), 153.

[2a] Gant v. Dunlap, (Tex. Civ. App.) 188 S. W. 1020.

[2b] Denny v. Cox, 206 Ill. App. 512.

again, there may be titles which, with respect to the documents or records upon which they rest, are apparently perfect, yet by reason of some matter or thing not disclosed by these evidences of title are in reality worthless, as where some one of the deeds in the chain of title is a forgery, or some event has transpired by which the estate of the present occupant has determined; *e. g.*, the death of a *cestui que vie*, when the estate which the vendor proposes to sell is held for the life of another only. The rule *caveat emptor* requires the purchaser to inquire into all these matters, and examine all of the vendor's evidences of title, whether they are preserved in the shape of documents and public records or consist simply of facts to be ascertained by inquiries *in pais*. This examination he must carry back until he arrives at what is commonly called the "root of title."

The root of title is title existing in some one, through whom the vendor claims, at a time in the past sufficiently remote to bar, by force of the Statute of Limitations or by the lapse of time, all adverse claims to the premises theretofore accruing, or which may accrue after the removal of personal disabilities of possible adverse claimants. The general rule is that the purchaser may require the vendor to show a title free from defects and incumbrances for a length of time that would bar any adverse claim existing at the beginning of that period, including all savings in favor of persons under disabilities.[1] This period was, in England, fixed at sixty years until within a comparatively recent date, when it was changed by statute to forty years.[2] In the older American States the English practice of showing title for sixty years back has been very generally followed. The statutory periods of limitation are, as a general rule in those States, too short to afford absolute protection to a purchaser. In every case in which there is reasonable ground to believe that there are adverse interests against which the usual period to which the title is carried back would not prove a bar, the purchaser may require that a title be shown beyond that period; for example, in the case of a right outstanding in a remainderman or in a person under disabilities.[1]

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[1] Williams Real Prop. 450; 1 Sugd. Vend. (8th ed.) ch. 10; Warvelle Abst. 610; Martindale Abst. § 18; Post, "Doubtful Titles," § 292. Paine v. Miller, 6 Ves. 349. Cooper v. Emery, 1 Phil. 338. Blackburn v. Smith, 2 Exch. 783. Moulton v. Edmonds, 1 De G., F. & J. 246.

[2] 1 Sugd. Vend. (8th Am. ed.) 551 (366).

In most of the American States west of the Alleghanies, where all public grants of land to individuals are comparatively recent, it is customary to carry the title back to its emanation from the government, and for the purchaser, when entitled to an abstract, to insist upon one commencing with that date.[2] It is apprehended, however, that even in those States the purchaser can require the vendor to show a title at no more remote period than one sufficient to bar all adverse claimants, including those under personal disabilities and remaindermen, unless there be something in the case to take it out of the general rule that a title founded on adverse possession for the statutory period of limitation is marketable.[3]

§ 73. **DUTY TO FURNISH ABSTRACT.** In England the duty devolves upon the vendor to furnish an abstract of title to the purchaser irrespective of any agreement upon the subject,[4] the reason being that the purchaser, in the absence of any record of the vendor's muniments of title, must be given an opportunity to inspect them or their equivalents, unless the purchaser has agreed to take the title, such as it is, or, as it is technically expressed, "without requiring the vendor to produce his title." But it is usual in that country to insert in the contract or common conditions of sale a provision that the vendor shall, within a specified time, prepare at his own expense and deliver to the purchaser an abstract of the title.[5] If there is any doubt as to the vendor's ability to deliver a sufficient abstract by the specified time, it is said to be better to omit this provision, the reason being that if the vendor fail to deliver the abstract within the time in which he would be required to furnish the same independently of any agreement upon the subject, or if, when delivered, it be imperfect, the purchaser will be absolved from his obligation to make objections within a limited time.[1] In America the rule obliging the vendor to furnish an abstract has been announced in some cases,[2] though the same reasons for it do not generally exist. Here the purchaser may always, as a general rule, ascertain the state of his vendor's title by an examination of the public records, so that the question who shall furnish the abstract of title is no more in ordinary cases than the question who shall bear the expense of examining the title and preparing the abstract. Accordingly it has been held in several cases that in the absence of any agreement upon the subject, no duty devolved upon the vendor to supply the purchaser with an abstract of the title.[3] It seems, however, to be the opinion of several text writers that a different rule applies as between mortgagor and mortgagee, and that the duty devolves upon the mortgagor to bear the expenses of searching the title, upon the ground that the mortgagee is entitled to the full amount of his loan and interest, without discount for expenses incurred in preparing the security and ascertaining its value.[1]

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[1] 1 Sugd. Vend. (8th. Am. ed.) 551 (366).

[2] Warvelle Abst. 145. McCarty v. Helbling, 73 Oreg. 356; 144 Pac. 499. In the city of Washington, in the District of Columbia, it is customary to carry the examination back to the conveyances by the original proprietors of the land on which the city stands to the government, now a period of about 100 years, or eight times that of the Statute of Limitations.

[3] Post, ch. 31; Martindale Abst. § 17.

[4] 2 Sugd. Vend. (8th. ed.) 29 (428); Dart. Vend. (5th. ed.) 125.

[5] Dart Vend. & Purch. (5th. ed.) 125.

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[1] Southby v. Hutt, 2 Myl. & C. 207; Sherwin v. Shakespear, 5 De G., M. & G. 517; Upperton v. Nicholson, L. R., 6 Ch. App. 436; Blacklow v. Laws, 2 Ha. 40.

[2] Chapman v. Lee, 55 Ala. 616. Mart. Abst. 9 citing Connolly v. Pearce, 7 Wend. (N. Y.) 131, and Carpenter v. Brown, 6 Barb. (N. Y.) 149; Brewer v. Fox, 62 Ill. 609.

[3] Easton v. Montgomery, 90 Cal. 313; 27 Pac. Rep. 280, citing Espy v. Anderson, 14 Pa. St. 312; Carr v. Roach, 2 Duer (N. Y.), 20. See, also, Bolton v. Branch, 22 Ark. 435; Knox v. McMurray, 159 Iowa 171; 140 N. W. 652; Thompson v. Robinson, 65 W. Va. 506, 64 S. E. 718; Turn Verein v. Kionka, 255 Ill. 392; 99 N. E. 684; 43 L. R. A. (N. S.) 44; Warvelle Abst. § 10. In Easton v. Montgomery, *supra*, it was said by HARRISON, J.: "Ordinarily parties entering into an executory agreement for the purchase and sale of real estate make provisions therein specifying the time allowed for examination of the title, for furnishing abstract, making report of defects and objections, specifying the time within which the vendor may thereafter make his title good, and the character of the conveyance to be executed by him; but, in the haste attendant upon the excitement of a 'boom,' these formal requisites are frequently omitted, and the construction of the contract is left to implication or established rules. It is evident from the provision inserted in the memorandum, 'title to prove good or no sale, and this deposit to be returned,' that it was contemplated by the parties that an examination of the title was to be made on behalf of the plaintiff (purchaser) and that upon such examination it might be found defective. As no time was specified within which such examination should be made, a reasonable time therefor was implied. The parties did not agree that the condition of the title should be ascertained from any particular abstract, or from an abstract to be furnished by the vendor, and in this respect the case is distinguished from Smith v. Taylor, 82 Cal. 533; 23 Pac. Rep. 217, and from Boas v. Farrington, 85 Cal. 535; 24 Pac. Rep. 787. The agreement being silent upon this point, it was incumbent upon the plaintiff to provide the abstract and to satisfy himself as to the condition of the title. * * * If, upon such examination, it appeared to him that the title was defective, it then became his duty to report to the vendor the particulars wherein such defects were

If the contract does not fix the time in which the abstract is to be furnished, it must be furnished within a reasonable time.[1a] If the vendor agrees to furnish an abstract within a specified time, but fails so to do, the purchaser cannot be required to extend the time; he may rescind the contract and recover his deposit.[2] Where the contract provides that an abstract shall be furnished within a reasonable time, what is a reasonable time depends upon the circumstances of each case.[3] And he cannot put the purchaser in default until he has furnished the abstract.[3a] An agreement to furnish an abstract is sufficiently complied with by notifying the vendee where it can be found, if it be accessible to the vendee, and if he raises no objection at the time.[4] An objection grounded on the failure to furnish an abstract within a specified time is waived by subsequent acceptance of the abstract without objection, and cannot be urged by the purchaser as an excuse for his failure to tender the purchase-money in proper time.[5] It is waived also by the purchaser's insistence on the correction of a

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claimed to exist, and, in the absence of any time fixed by the agreement, within which the vendor should remove these defects or satisfy his objections, a reasonable time would be allowed therefor. The burden is on the vendee to point out the defects in the title." In the case of Taylor v. Williams, 45 Mo. 80, it was held that an agreement of sale, containing the provision "title to be satisfactory and a warranty deed given," did not impose on the vendor the duty of furnishing an abstract of title. So, also, an agreement to "make good title and give a warranty deed." Tapp v. Nock, 89 Ky. 414; 12 S. W. Rep. 713.

[1] Mart. on Abst. 9, citing Willard on Real Est. & Conv. 559.

[1a] Runnells v. Pruitt, (Tex. Civ. App.) 204 S. W. 1017.

[2] Williams v. Daly, 33 Ill. App. 454; Howe v. Hutchison, 105 Ill. 501; Des Moines, etc., Real Est. Co. v. Beale, 78 Ill. App. 40.

[3] Jackson v. Conkin, 50 Ill. App. 538.

[3a] Matheson v. Live Stock Co., (Tex. Civ. App.) 176 S. W. 734.

[4] Papin v. Goodrich, 103 Ill. 86.

[5] Ky. Distilleries, etc., Co. v. Warwick Co., 109 Fed. 28; 48 C. C. A. 363. Compare, Gant v. Dunlap, (Tex. Civ. App.) 188 S. W. 1020.

mistake in the abstract after the expiration of the prescribed time.[1] If the vendor agrees to furnish an abstract, and furnishes one which shows a defective title, the purchaser may rescind the contract and recover the money paid, though the vendor had a good title as a matter of fact.[2] Where the vendor agrees to furnish an abstract within a specified time, which is not done, and the purchaser thereafter treats the default as immaterial and continues his payments under the contract, he will be deemed to have waived the delivery of the abstract, and cannot recover his deposit.[3] In a case in which time was not of the essence of the contract, a vendor who agreed to furnish by a specified time an abstract showing a perfect title, was allowed to tender the abstract at the hearing of a suit subsequently brought by him for specific performance.[4]

In some localities it seems that it is common to treat an abstract of title as merchantable or unmerchantable, without regard to the nature of the title it discloses.[5] The value of the abstract depends, of course, upon the skill with which it is prepared and upon the reputation and ability of the compiler. An agreement to furnish an abstract would seem necessarily to imply that the document should be thorough and complete, and should be made by a competent person.

§ 74. **PROPERTY IN THE ABSTRACT.** The purchaser has a temporary right of property in the abstract while the sale is being negotiated, and the absolute ownership if the sale be consummated.[6] As between mortgagor and mortgagee, it has been held that an abstract furnished by the mortgagor to assist the mortgagee in examining the title became a part of the security for the loan, and might be retained by the mortgagee until the mortgage was discharged.[1]

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[1] Evans v. Orchard Co., 103 Ark. 212, 146 S. W. 511.

[2] Boas v. Farrington, 85 Cal. 535; 24 Pac. Rep. 787.

[3] McAlpine v. Reicheneker, 56 Kan. 100; 42 Pac. 339.

[4] Gates v. Parmly, 93 Wis. 294; 66 N. W. 253; 67 N. W. 739.

[5] Warvelle Abstracts, ch. 1, § 7. Proof by a vendor that he furnished an abstract made by the recorder of deeds, together with the testimony of a number of real estate dealers that abstracts furnished by such recorder were merchantable, establishes, *prima facie*, the delivery of a "merchantable" abstract. Harper v. Tidholm, 155 Ill. 370; 40 N. E. Rep. 575.

[6] Coppinger on Title Deeds, Lond. 1875; Mart. Abst. 11. This is the English rule, and there seems to be no reason why it should not apply in this country. Roberts v. Wyatt, 2 Taunt. 288; Langlow v. Cox, 1 Chit. 98. 2 Sugd. Vend. 428, 429; Warvelle Abst. 11. Chapman v. Lee, 55 Ala. 616.

§ 75. **TIME IN WHICH TO EXAMINE THE TITLE AND VERIFY THE ABSTRACT.** The contract of sale usually specifies a time in which the purchaser may examine the title before completing the purchase. If no time be specified, he will be entitled to a reasonable time for that purpose, but cannot keep the contract open indefinitely so as to avail himself of a rise in the value of the property or escape loss in case of depreciation.[2] He cannot be required to pay the purchase money before he has examined the abstract, unless he has expressly stipulated so to do.[3] It has been held that if the contract provide that the purchaser shall be furnished an abstract of title, and shall have a specified time in which to examine the title and pay the purchase money, the purchaser must determine in that time whether he will take the title, and that he cannot tender the purchase money after that time, even though no abstract of the title was furnished.[4]

The purchaser is entitled to a reasonable time within which to determine by investigation the validity of apparent liens disclosed by the record.[5] After the purchaser has examined the abstract or investigated the title in the time allowed for that purpose, it is his duty to point out or make known his objections to the title, if any, so as to give the vendor an opportunity to remove them.[1] This rule has been held not to apply where the defect is one that cannot, in the nature of things, be removed before the time fixed for completing the contract. Thus, where the objection was that the abstract showed no authority in the officers of a corporation to execute a deed through which the vendor derived title, and it appeared that the corporation had been dissolved since the deed was executed, it was held that the purchaser was not in default in failing to raise that objection before the day fixed for completing the contract.[2] Where the conditions of sale provide that the purchaser shall have a specified time in which to examine title, he may, of course, at the expiration of that time, abandon the purchase, if he finds that the vendor has not such a title as the contract requires.[3] And even though, at the expiration of the specified time, the purchaser makes no objection to the title, the vendor can maintain no action on the contract if his title is not such as the purchaser may demand.[4] But the purchaser cannot, at the expiration of that time, recover back his deposit unless he has notified the vendor that the title is unsatisfactory, and that he intends to rescind.[5] The purchaser must make all of his objections at one time, and within a reasonable time after the abstract is furnished. He cannot induce the vendor to spend money in removing objections, and then raise others which cannot be removed.[6] If the abstract, when furnished, is not such, as to form and fullness, as the purchaser is entitled by the contract to require, he must promptly make his objection. He cannot accept the abstract, keep it until the time allowed the vendor in which to furnish an abstract has passed, and then insist upon its insufficiency as a breach of the contract.[1]

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[1] Holm v. Wust, 11 Abb. Pr. (N. S.) (N. Y.) 1113. In Williams v. Daly, 33 Ill. App. 454, it seems to have been held that an abstract made by taking a copy in writing from a former abstract made by another office, taking a letter-press copy from that copy and, from the letter-press copy, copying again, was not such an abstract as the purchaser was entitled to require. As to the validity of copies of abstracts generally, see the observations of Mr. Warvelle in his work on Vendors, vol. 1, p. 295.

[2] Hoyt v. Tuxbury, 70 Ill. 331.

[3] Penna Min. Co. v. Thomas, 204 Pa. 225; 54 Atl. 101.

[4] Kelsey v. Crowther, (Utah) 27 Pac. Rep. 695.

[5] Allen v. Atkinson, 21 Mich. 361, COOLEY, J., saying that when the purchaser showed an apparent incumbrance of record, the most that the vendor could insist upon "is that he shall satisfy himself within a reasonable time whether the apparent incumbrance is a valid one or not. It would be out of all reason to insist that the vendee, at his peril, should take a title apparently incumbered, and that the vendor should have a right to demand the immediate performance of the contract by the vendee, when apparently his own deed would be insufficient to give the complete title he had agreed to convey. Nor do I think thirty days was an unreasonable time to take for this purpose when the mortgagee resided at a distance, and when it does not appear that the situation of the parties had in the meantime been changed, or that anything had occurred to render the contract less fair and equal than it was when entered into.

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[1] Post, ch. 32. Easton v. Montgomery, 90 Cal. 307; 27 Pac. Rep. 280. Goodell v. Sanford, (Mont.) 77 Pac. 522. Compare Lessenich v. Sellers, 119 Iowa, 314; 93 N. W. 348.

[2] McCroskey v. Ladd, (Cal.) 28 Pac. Rep. 216. Hennig v. Smith, 151 N. Y. Supp. 444.

[3] Mead v. Fox, 6 Cush. (Mass.) 199.

[4] Packard v. Usher, 7 Gray (Mass.) 529.

[5] Anderson v. Strasburger, 92 Cal. 38; 27 Pac. Rep. 1095, and cases cited.

[6] Polk v. Stevenson, 71 Iowa, 278. Defects in the title not pointed out in the abstract within the time specified by the contract, are to be treated as waived. Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623; Sage Land & Imp. Co. v. McCowen, 30 Cal. App. 126, 157 Pac. 244; Lieber v. Nicholson, (Tex.) 206 S. W. 512; Davenport v. Sparkman, (Tex.) 208 S. W. 658. After having pointed out specific objections to the title, the purchaser cannot, when sued for breach of his contract, urge additional objections to the title which the vendor has had no opportunity to meet, and which were known to the purchaser at the time the original objections were made. Cowdrey v.

Where the contract provides for time in which to examine the title, the purchaser will be presumed to have investigated the title, to have examined every deed or instrument forming part of it, especially if recorded and to have known every fact disclosed by the record or the existence of which was suggested by the record.[2]

A provision in the contract that the purchaser shall give written notice of the acceptance of the abstract, is waived by the acceptance of verbal notice without objection.[3] If the purchaser, after having the title examined, accepts it and pays part of the purchase money, he cannot afterwards rescind the contract and recover back his payment on the ground of defects in the title.[4] If the abstract be returned for removal of objections, the purchaser, having waited a reasonable time for a satisfactory abstract, is justified in refusing to perform.[5]

§ 76. **SUMMARY OF THE PRINCIPAL SOURCES OF OBJECTIONS TO TITLE. General Observations.** We shall elsewhere consider in this work what circumstances render a title so doubtful that it will not be forced upon a purchaser.[6] It is our purpose here merely

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Greenlee, 126 Ga. 386, 55 S. E. 918. While, in case of defects not pointed out within the required time, specific performance by the purchaser might not be decreed, yet being himself in default in the respect mentioned he is not entitled to recover back the purchase money. Lieber v. Nicholson, (Tex.) 206 S. W. 512. It has been held that the purchaser will not be precluded from further objections to the title if, in the meanwhile, the situation of the vendor remains unchanged. Linscott v. Moseman, 84 Kan. 541, 114 Pac. 1088.

[1] Moot v. Business Men's Assn., 157 N. Y. 201; 52 N. E. Rep. 1. In this case the contract provided for an abstract "truly showing the condition of the title." The document furnished was a mere abstract of the indexes of the records in the county clerk's office, and did not show certain objections to the title, which, however, were of an unimportant kind, and which the court held the vendor had the right to remove.

[2] Moot v. Business Men's Assn., 157 N. Y. 201, 52 N. E. 1.

[3] Domestic Bldg. Assn. v. Guadiano, 195 Ill. 222, 63 N. E. 98.

[4] Warner v. Hamill, 134 Iowa 279, 111 N. W. 939.

[5] Coonrod v. Studebaker, 53 Wash. 32, 101 Pac. 489.

[6] Post, ch. 31.

to point out the several sources whence it may appear that a title is absolutely bad.

An absolutely bad title to real property, as between vendor and purchaser, consists in the want of any *one* of the elements of a good title. These, as has been shown, consist in the rightful ownership of the property, the rightful possession thereof, the appropriate legal evidences of rightful ownership and the freedom of the estate from liens or incumbrances of any kind.[1] A man may be the rightful owner of an estate, but if he is out of possession his title is bad, so far as a purchaser from him is concerned;[2] and, of course if he be not the rightful owner, his title is bad without reference to the question of possession. So, also, if he be the rightful owner but is wrongfully in possession, as where he commits a breach of the peace in ejecting an occupant of the premises. But he may be both the rightful owner and rightfully in possession under a deed sufficient to pass the legal title, and yet his title may not be such as a purchaser may require. For example, the deed under which he holds may not have been admitted to record, or may have been admitted to record upon an insufficient certificate of acknowledgment. The title is also absolutely bad not only where it is open to attack after it has passed to the purchaser, but also wherever the purchaser must institute any proceeding at law or in equity to secure himself in the enjoyment of the estate. The purchaser will also be entitled to his action if the vendor have not the *quantity* of estate which he has agreed to sell and convey. Thus, he may have only a life estate, or an estate for years, or an estate upon condition, and his title to the same may be clear and unimpeachable, yet if by the contract the purchaser is entitled to a conveyance of the fee simple, a breach results, and an action for damages accrues.

With respect to what particular facts or circumstances constitute a good legal title, or demonstrate a complete want of title, it must suffice to say that the inquiry is impracticable here, since the answer would involve a review of the whole body of the law of real property. An infinite variety of facts and circumstances enter into the composition of every title, and the existence or non-existence of any one of these may be fatal to the title. Hence, it has been said by a great judge that there is no such thing as a mathematical certainty of a good title.[1] But the state of every title is capable of being ascertained or established with a reasonable degree of certainty. The policy of the law is that as far as possible title to lands, to the extent that it depends upon the fact of alienation or transfer from one person to another, shall be evidenced by written instruments of a solemn kind, such as deeds, wills, judgments or decrees. Also, that these instruments shall be made matters of public record open to the inspection of the whole world; and that certain of them, that is, deeds, shall be void for certain purposes if not entered, or not lawfully entered, upon the public record. Also, that certain matters collateral to the title, such as liens, charge or incumbrances upon the estate, shall likewise be entered of record, so as to bind subsequent purchasers for value and without actual notice of their existence. Hence, it follows that the sufficiency of the title is, in a great measure, to be determined by an inspection of the public records, and of instruments which evidence the vendor's title. Indeed, the great majority of objections to title that are commonly made spring from these sources, such, for example, as that the vendor has no documentary evidence of his title, or that some one of the deeds under which he holds is defective on its face; or that his deed has not been admitted, or has been improperly admitted, to record; or that the record discloses liens and incumbrances upon the estate. But it is obvious that there may be fatal defects of title which neither appear from the public records nor upon the face of any instrument under which title is claimed. Thus, a deed executed by a married woman is in most jurisdictions void unless her husband joins as a party, but the fact that a grantor in a deed in the vendor's chain of title was a married woman would not ordinarily appear except upon inquiries made among those likely to know the fact. So it is possible for a title to be good though evidenced altogether by matter *in pais,* such, for example, as a title by inheritance or by adverse possession for a great number of years.[2] Where the defect of title appears upon the face of the instrument under which title is claimed, or from the public records, the rules which protect a purchaser for value have no application, for two obvious reasons; first, because in such a case the purchaser is charged with notice of the defect; and, secondly, because those rules afford protection only against *latent equities*, which may result in a destruction of the title and not against an absolute want of title, such as results from an instrument on its face insufficient to pass the title; for example, a tax deed void on its face for want of compliance with certain statutory requisites as to its contents.[1]

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[1] Ante, p. 2.

[2] 1 Sugd. Vend. (8th. ed.) 387, 579.

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[1] Lord HARDWICKE in Lyddall v. Weston, 2 Atk. 20.

[2] Jaeger v. Harr, 62 Oreg. 16, 123 Pac. 61.

But while it is impracticable in this work to enter upon a consideration of the laws respecting real property in all the phases in which they may be material to the question of want of title in a vendor, it is believed that a categorical summary of the principal sources of objections to title, having reference to those laws will be found useful as an aid to the memory in the examination of a title. An attempt has been made to present such a summary here, under the following heads: (1) Defects and Objections to Title which appear upon the Face of some instrument under which Title is claimed. (2) Defects and Objections to Title which appear from the Public Records. (3) Defects and Objections to Title arising from matters *in pais* or those which appear upon Inquiry *dehors* the Public Records, and apart from any Instrument under which Title is claimed. This summary, while necessarily general in its character, embraces, it is believed, references to all of the principal and most important sources of objections to title.

(I)

§ 77. DEFECTS AND OBJECTIONS WHICH APPEAR UPON THE FACE OF SOME INSTRUMENT UNDER WHICH TITLE IS CLAIMED.—

DEEDS. Practically there are but two vehicles or instruments for the transfer of title to lands *inter partes*, namely: (1) Deeds, including letters patent or public grants; and (2) Wills. As to deeds, it is obvious that these, in several respects, may appear upon their faces insufficient to transfer title. As a general rule, in the American States, deeds are entered at large upon the public records, and in the examination of titles many content themselves with a perusal of the record or office copy of the deed; but this is never a safe course, as there may be an imperfection in the deed which can only appear by an inspection of the original, for example, a fraudulent erasure, interlineation, or other alteration therein. The sufficiency of a title should never be passed upon by counsel until he has carefully perused every instrument lying in the vendor's chain of title, and until he is satisfied that every such instrument has been laid before him or has been seen by him. The most disastrous consequences have resulted, and are in many cases likely to result, from neglect of this seemingly unnecessary caution.

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[1] Cogel v. Ralph, 24 Minn. 194. See post, this chapter, § 79.

The principal defects which will appear upon the face of an original deed are as follows:

Insufficient Signing.

See ante, § 32; 3 Washb. Real Prop. 270.

Insufficient Sealing.

See ante, § 32, and authorities there cited.

Insufficient Execution.

This may occur in the case of a conveyance by a corporation, as, where the instrument runs in the name of the officers of the corporation, and not in the name of the corporation itself; or when the formalities, if any, required by the corporate charter, or special legislation, have not been observed. So, also, where a deed executed in pursuance of a power, omits any of the formalities prescribed by the power.

Insufficient Words of Conveyance.

See ante, § 19.

Insufficient Description of the Premises.

This, as may be seen, may be so vague and indefinite as to render the instrument not only ineffectual as notice to subsequent purchasers, but void as between the parties. Ante, § 20. Wait v. Smith, 92 Ill. 385. 1 Greenl. Ev. § 301. Mesick v. Sunderland, 6 Cal. 298.

Illegal Subject-matter and Consideration.

Such, for example, as a deed of assignment which makes an unlawful preference among creditors; or a deed which imposes an unlawful restraint upon alienation; or a conveyance for any illegal purpose.

Incompetency of Parties.

This may sometimes appear upon the face of a conveyance, with respect either to the grantor or the grantee. Thus, a conveyance by a commissioner of court which shows that the commissioner was appointed by a court in a State other than in which the premises lay, shows on its face the incompetency of the grantor. So, also, a conveyance by an executor who does not profess to act under a testamentary power. Contee v. Lyons, 19 D. C. 207. Brush v. Ware, 15 Pet. (U. S.) 93. Dowdy v. McArthur, 94 Ga. 577; 21 S. E. Rep. 148.

An example of incompetency of the grantee occurs where the conveyance is to a corporation not authorized by law to hold real estate; or where a trustee or fiduciary becomes a purchaser of the trust estate. Painter v. Henderson, 7 Pa. St. 48.

Diminutions in the Quantity of the Estate Intended to be Purchased.

This head has reference to that part of a deed which determines the nature and extent of estate conveyed. The great bulk of conveyances in this country consists merely of transfers of the fee from one person to another. Limitations or conditions by which the estate is liable to be defeated, do not so frequently occur with us as in England, where deeds are perhaps more employed than wills in family settlements. Still, the purchaser must carefully examine each deed that lies in the vendor's chain of title, in order to see, among other things, that each transfers as large an interest as the vendor has undertaken to sell, and that the estate conveyed is not liable to be defeated or diminished by any event that may transpire in the future. In the large cities, it is common to find in deeds, conditions that no noxious trade shall be conducted on the premises, or that no buildings of a certain kind shall be erected thereon. Conveyances of land for religious purposes are frequently made upon condition that the premises shall be exclusively used for that purpose. So, in other cases of gift, for example, a conveyance of a court house site, to revert to the donor and his heirs when no longer used for that purpose.

Covenants Running with the Land.

In many instances, covenants are inserted in deeds binding the grantee to do certain collateral things, for example, to keep a mill dam and raceway in repair, to maintain division fences and the like. These, as a general rule, run with the land and bind a subsequent purchaser. So, also, covenants not to use the premises for specified purposes. They diminish the value of the premises and constitute grounds upon which the purchaser may reject the title. Post, § 305.

Constructive Notice from Recitals.

A purchaser is not only charged with notice of every deed which lies in the chain of his vendor's title, but if any of those deeds contain recitals which would put a man of ordinary prudence upon inquiry respecting the rights of third parties in the premises, he will be charged with notice of those rights, provided they might have been discovered by the exercise of reasonable diligence. Thus, where a deed is executed in pursuance of a power of attorney, a subsequent purchaser is charged with notice of any defect in the power. Morris v. Terrel, 2 Rand. (Va.) 6. And except in those States where a vendor's lien must be expressly reserved by the grantor on the face of his deed, a recital in the deed showing that the purchase money is unpaid puts a subsequent purchaser upon inquiry, and he must ascertain at his peril whether the purchase money has been paid since the execution of the deed. Woodward v. Woodward, 7 B. Mon. (Ky.) 116. Numerous cases illustrating the doctrine of constructive notice from recitals in deeds under which the purchaser claims may be found in the reports. They show the necessity of a careful perusal of every deed in the vendor's chain of title.

Insufficient Authentication for Record.

This is one of the most important points to which the attention of the purchaser must be directed. Authentication of a deed for the purposes of registry consists either in the attestation of the deed by subscribing witnesses, or in the acknowledgment thereof before certain officers in the manner provided by law. We have seen that, in some of the States, the acknowledgment of the deed, or the attestation of subscribing witnesses, is not only necessary to authenticate the same for registry, but to make the deed valid as between the parties. Ante, § 23, *et seq.*, where, also, the several requisites of a valid certificate of acknowledgment are considered.

Reservation of Liens or Charges upon the Estate Conveyed.

Liens for purchase money, annuities, charges for support and maintenance of the grantor, and the like, are frequently reserved on the faces of conveyances; and all deeds in the chaim ot title should be carefully examined, with this fact in mind.

Duty to See to the Application of the Purchase Money.

In certain cases of defined and limited trusts, the purchaser of the trust subject is required to see that the purchase money is applied to the purposes of the trust; otherwise the trust will attach to the premises in his hands. This must be borne in mind in the purchase of a trust estate. 2 Sugd. Vend. (8th Am. ed.) ch. 18; 2 Washb. Real Prop. (4th ed.) 528 (211).

Cancellations, Obliterations, Erasures, Interlineations and Alterations.

These, or any one of them, may be of a kind and character sufficient to destroy the validity of the deed. Their existence, of course, can only be known by an inspection of the original deed.

Fraud Apparent on the Face of a Deed.

As a general rule, fraud seldom appears on the face of a conveyance, so as to charge a subsequent purchaser with notice. It sometimes happens, however, that the provisions of deeds purporting to be trusts for the benefit of particular parties are framed so palpably in the interest of the grantor that the courts do not hesitate to pronounce them void, as having been executed for the purpose of delaying creditors. An example will be found in Johnson v. Thweatt, 18 Ala. 741, where property of the value of $7,000 was conveyed in trust to secure a debt of $150, and several other small debts not yet due, the deed permitting the grantor, in the meanwhile, to remain in possession of the premises. The deed was held void on its face, and a *remote purchaser* thereunder charged with notice of the fraud.

Want of Statutory Recitals.

> In some of the States it is required by statute that certain deeds executed in pursuance of a sale under judicial authority, or by an officer acting in a ministerial capacity, such as a tax collector, shall contain recitals, showing the concurrence of particular facts on which the validity of the sale depends. See 3 Washb. Real Prop. 222, 229; Freem. Void Jud. Sales (2d ed.), § 47; Blackw. Tax Titles, § 790. Wherever such provisions exist they should be borne in mind in the examination of a title.

PATENTS. These must, of course, conform in all their features to the requirements of the laws of the State in which they were issued.[1] Those laws differ to such an extent in the several States that it would be impracticable to indicate here every particular in which a patent may be upon its face defective. It should be observed, however, that every purchaser under a patent is charged with notice of any defect apparent upon its face, there being no difference in that respect between patents and the deeds of individuals.[2]

WILLS. The most common objections to title apparent upon the face of a will under which title is claimed consist of some restriction, limitation or qualification of the estate of the devisee, or of some charge or incumbrance thereon created by the will. As a general rule questions which might arise as to the due execution of the will are concluded by the sentence admitting the will to probate; certainly in all cases in which the probate was resisted. And even after an *ex parte* probate, it is hardly to be presumed that the will would have been admitted with evidence upon its face that it was not legally executed, as if, *e. g.* it should lack the number of witnesses required by law.

Incompetency of the Testator.

> This may sometimes appear upon the face of a will, as when its provisions are so foolish and unnatural as to show that the testator was devoid of testamentary capacity. Examples may be found in the books.

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[1] See the case of McGarrahan v. Mining Co., 96 U. S. 316, where it is said by Chief Justice WAITE that every part of the execution of a patent, such as the signature by the proper officer, sealing and countersigning, and every other statutory requirement, is essential to the validity of the instrument.

[2] Bell v. Duncan, 11 Ohio, 192. Moore v. Hunter, 1 Gilm. (Ill.) 317.

Incompetency of the Devisee.

This, of course, cannot occur when the devisee is a living person who can be ascertained, and who is not a subscribing witness to the will. But in some of the States testators are prevented by law from devising more than a certain portion of their real estate to corporations. And in certain other States devises to corporations of any real property whatever are declared void.

Invalidity of the Devise.

This may occur in several ways, *e. g.*, because of some patent ambiguity in respect to the persons whom it is intended shall take under the will, or in respect to the subject-matter of the devise; or, because the will is too vague, uncertain and indefinite in its provisions; or, because its provisions are unintelligible, or in any respect unlawful, as where they create a perpetuity.

Diminutions in the Quantity of the Estate Intended to be Purchased.

In America deeds are seldom more than simple transfers of the fee from seller to the buyer. Contingent remainders and executory limitations are rarely met with except in wills. With testators who have estates to bestow there is usually a desire to impose restraints upon the alienation of those estates, to provide against possible untoward events of the future, and to secure to the objects of their bounty and the descendants of them, as long as may be, the benefits of their gifts. The consequence is that wills are often found to contain intricate and complicated dispositions of property, making it necessary for all parties to invoke the aid of the courts in the interpretation of the devise. The intention of the testator must sometimes be extracted from a number of seemingly repugnant or inconsistent provisions of the instrument. Hence, the question what interest or estate the devisee takes is often a matter of great nicety and difficulty, and requires for its solution an intimate acquaintance with the rules of law which govern in the creation and limitation of estates and in the construction of wills. The purchaser should never complete the contract until he has carefully perused any will that may lie in the vendor's chain of title.

Legacies Charged on Realty, Annuities, etc.

Any will which lies in the vendor's chain of title should be carefully examined to see that it contains no legacy, annuity or the like that is charged on the realty in the hands of the devisee.

Fraudulent Alterations and Forgeries.

A will is, of course, susceptible of fraudulent alteration after it has taken effect. An example will be found in Wilson's Case, 8 Wis. 171. The original will should always be inspected by the purchaser; there may be indications upon its face that it is a forgery.

Insufficient Signing and Attestation.

Probate courts often exact with great rigor proof of compliance with all formalities and ceremonies prescribed by law for the execution of wills, and, therefore, a sentence of such a court admitting a will to probate is a reasonably fair assurance to a purchaser that the will carries on its face no evidence that it was not entitled to probate. It seems, however, that an *ex parte* admission of a will to probate is not conclusive upon persons in interest, and the will is liable to be avoided upon an issue *devisavit vel non.* The purchaser should, therefore, satisfy himself by an inspection of the instrument that, for anything that appears on its face, it has been properly admitted to probate.

(II)

§ 78. DEFECTS AND OBJECTIONS TO TITLE WHICH APPEAR FROM THE PUBLIC RECORDS. The term "public records," in the sense in which it is here used, means not only the books of registry in which deeds, wills, judgments and the like are entered, but all records of a judicial or official nature which are open to the inspection of the public, such as the minutes of court proceedings, order books, original papers in suits at law or in equity, tax-office records, land-office records, and other records and documents of a like nature.

(1) DEFECTS AND OBJECTIONS TO TITLE WHICH APPEAR FROM THE REGISTERS OF CONVEYANCES, LIENS AND INCUMBRANCES.

The registers, commonly known as "Deed Books," "Land Records," "Judgment Lien Dockets," "Mechanic's Lien Docket," exist, it is apprehended, in all the States. The uses and purposes for which they are intended are so well known that no remark about them is deemed necessary.

Absence of Record Evidence of Title.

If the public records do not show title in a vendor, that fact will, in most cases, be treated as a defect in his title. If he holds under a deed, that deed should have been entered of record, so as to bind subsequent purchasers and creditors. If he has no deed his title is merely equitable, (unless he claims by inheritance or adverse possession) and is not such as a purchaser can be compelled to accept. And if, by the contract, he is to receive a "good title of record," it has been held that he may reject a title by adverse possession. Ante, § 6. But see *post,* § 292.

Prior Conveyances.

The possibility of a prior conveyance of the premises by the vendor, or his predecessor in title, is one of the principal reasons for examining the public registers. The prime object of the registry acts is to protect purchasers against secret liens and conveyances. The general rule is that a search for prior conveyances by the vendor, or any one through whom he claims, need be extended back no further than the date at which the record shows title in the vendor, or the person against whom the search is made. Rawle Covt. for Title (5th ed.), § 259, p. 406.

Executory Contracts.

Executory contracts for the sale of lands are very generally included in the registry acts of the different States, and, therefore, when duly admitted to record, are binding upon subsequent purchasers from the vendor without notice. See the statutes of the several States.

Homestead Estates.

These, in some of the States, are required to be described in writing by the claimant, and the description entered upon the public records. See 1 Washb. Real Prop. (4th ed.) 366 et seq.

Mortgages.

These, of course, must be recorded in order to bind subsequent purchasers without notice. See the registry acts of the several States.

Deeds of Trust to Secure Debts.

This is the commonest form of incumbrance in several of the States, and takes the place of mortgages and vendor's liens. It is, of course, embraced in the registry acts everywhere.

Declaration of Trust.

This is a declaration in writing by one in whom the legal title to land is vested, that he holds the title in trust for certain specified purposes, or for the use and benefit of certain persons. It must be spread upon the records in order to bind subsequent purchasers. Its nature and incidents may be seen in 2 Washb. Real Prop. ch. 3, § 3, p. 500 (190).

Defeasances.

A defeasance is a separate instrument, executed by and between the parties to an original deed, by which such original deed is to be defeated upon the happening of a certain event. It is seldom met with in this country, but is sometimes employed where property has been conveyed by a deed absolute in form, but in fact a security for the payment of money. Defeasances must be recorded in order to bind subsequent purchasers. 2 Washb. Real Prop. 61 (495).

Judgments.

A judgment is the commonest form of incumbrance on real property. But it is perhaps in no State a lien as against a purchaser for value and without notice, until entered upon what is commonly called the "judgment lien docket." In searching for judgments the purchaser should be careful to see that the lien has not been continued in favor of a surety, who has discharged the judgment and who is entitled to be subrogated to the benefit of the lien. This privilege has been accorded to the surety in some of the States, even as against a purchaser without notice. See Am. & Eng. Encyc. of L. art. "Subrogation."

Lis Pendens and Attachment.

The rule of the common law is that every person is presumed to have notice of the proceedings of the courts, and that a purchaser of property that is in litigation must take subject to whatever decree or judgment may be pronounced in respect to such property. But this rule has been modified by statutes in most of the States, which provide that no *lis pendens* or attachment shall be valid as against a *bona fide* purchaser for value without actual notice, unless a memorandum thereof describing the premises, the title of the cause, and the names of the parties, shall have been entered upon the register of deeds. Warvelle Abstracts, 463, 465; Story Eq. 405; 2 Washb. Real Prop. 252 (593).

Mechanics' Liens.

See the statutes of the respective States.

Vendor's Liens.

These, in several of the States where there has been a conveyance to the vendor, must be reserved upon the face of the conveyance in order to bind a subsequent purchaser. See the laws of the respective States in this regard.

Forthcoming Bonds and Recognizances.

These, in some of the States, have the effect of judgment as soon as they become forfeited, and bind the lands of the obligor from that time. Consult the laws of each State in this regard.

Official Bonds.

Are by statute in several of the States made liens upon the real property of the obligor until he is discharged from his official obligations. See Warvelle Abstracts, p. 456.

Debts of Decedents.

These are very generally made liens upon the estate of a decedent in the hands of his heirs or devisees. Warvelle Abstracts, p. 455. But in Virginia, to make the lien effective after one year from the death of the decedent, suit for the administration of the assets of his estate must have been begun, and a notice thereof, or *lis pendens*, entered in the register of conveyances. Va. Code, 1887, §§ 2667, 3566.

Miscellaneous Statutory Liens.

We have now enumerated the principal liens or incumbrances which may bind an estate in the hands of a subsequent purchaser. It is probable, however, that special or peculiar liens exist by statute in some of the States. Wherever such is the case they should be added to the foregoing summary and borne in mind when examining a title.

(2.) DEFECTS AND OBJECTIONS TO TITLE WHICH APPEAR FROM PUBLIC RECORDS, OTHER THAN REGISTERS OF DEEDS AND JUDGMENT LIEN DOCKETS.

Taxes and Assessments.

These are everywhere made liens upon the real estate of the taxpayers. They are to be searched for at the tax offices.

Irregular, Illegal and Invalid Tax Sales.

If a tax deed is found in the vendor's chain of title, it is of vital importance to inquire (1) whether the tax assessment was authorized by law; (2) whether the tax or assessment was laid or imposed in accordance with the law, and (3) whether all the requirements of the law preliminary to the sale and execution of the deed had been complied with. The first inquiry is, of course, to be determined by an inspection of the law. The other two inquiries may, in a great measure, be determined by an examination of the records in the tax offices, it being the policy of the law that, as far as possible, the fulfillment of all of its requirements in regard to the imposition and collection of taxes shall be evidenced by documents returned to, and entries made in the records of the tax office. As to the various respects in which a tax title may be defective, see Blackwell on Tax Titles; Black on Tax Titles; 2 Washb. Real Prop. 221 (541); Devlin on Deeds, ch. 38, p. 647. By the common law, the burden devolved on the purchaser of a tax title to show affirmatively that all the prerequisites to a valid sale for taxes had been complied with, but by statute in most of the States the tax deed is made presumptive evidence of a valid tax and valid sale, and the burden imposed upon the adverse claimant to show an infirmity in the tax or the sale.

Want of Jurisdiction in Judicial Proceedings.

The examination of a title derived through a sale under a judgment or decree would be an interminable affair if the purchaser were obliged to inquire whether any error or irregularity existed in the proceedings for which the judgment or decree might be reversed. So far as the proceedings antecedent to the sale is concerned, he is only required to see that the court had jurisdiction to render the judgment or decree under which the sale was had. This, in most cases, will appear from the face of the proceedings; as where the pleadings state a case not within the jurisdiction of the court, or where there is nothing to show service of process on the defendant, or where the pleadings omit some formality required by law to give the court jurisdiction; for example, the want of an affidavit to the bill in a suit for the sale of an infant's lands. Numerous other instances will occur to the reader. But the court may have been without jurisdiction to render the judgment or decree, and there may be nothing upon the face of the pleadings or the proceedings to apprise the purchaser of that fact. For example, if A. should file his bill against his coparcener, B., for partition, fraudulently omitting C., another coparcener, the decree in the cause would not bind C., who might thereafter file his bill against the purchaser under the decree, and have a re-partition of the premises. In such a case the purchaser could discover the want of jurisdiction in the court only by inquiries made *in pais.*

Lis Pendens.

By the common law all persons are charged with notice of the proceedings of the courts, and a purchaser of property whereof the title was in litigation takes subject to whatever judgment or decree may be pronounced in respect thereto. In the absence of any statute to the contrary, it is apprehended that the purchaser would be bound, though he had no actual notice of the litigation, and though no memorandum thereof had been registered, docketed or indexed in the registry offices.

Senior Patents or Grants of Public Lands.

These, of course, will appear from the records in the land offices of the several States, and of the United States.

Proceedings in Eminent Domain.

Such, for example, as a municipal ordinance providing for the opening of a street or alley. All persons are presumed to have notice of such proceedings. See Warvelle Abst. 360.

(III)

§ 79. DEFECTS AND OBJECTIONS TO TITLE ARISING FROM MATTERS IN PAIS, OR THOSE WHICH APPEAR UPON INQUIRY DEHORS THE PUBLIC RECORDS, AND APART FROM ANY INSTRUMENT UNDER WHICH TITLE IS CLAIMED. If the vendor have the actual legal title to the estate, the purchaser is not concerned to inquire whether any equities exist in third parties by which that title may be defeated, unless, of course, there are facts known to him which should lead him to inquire as to the rights of third parties. If this were not true, there would be little assurance of safety in the purchase of any title, and there would be practically no limit to the inquiries *in pais* which a purchaser would be compelled to make. But it is to be observed that this rule applies only where the vendor has the actual legal title, in other words, as has been elsewhere said, where the legal title is in A., and the equitable title is in B., and a third person buys from A. without notice of B.'s equity.[1] The rules respecting purchasers without notice are framed for the protection of him who purchases a legal estate and pays the entire purchase money without notice of an outstanding equity. They do not protect a person who acquires no semblance of title.[2] In such a case the rule *caveat emptor* applies.[3] Thus, as a simple illustration, if the vendor held under a forged deed, the purchaser would not be protected, while if the deed was genuine, but merely voidable, as having been procured by fraudulent representations, or as having been executed in fraud of creditors, and the purchaser had no notice of the facts, he could not be deprived of the estate. This distinction is further illustrated by the case of Texas Lumber Manufacturing Company v. Branch.[1] Rueg, the owner of a large real property, died, leaving a wife and a brother and sister. After the death of Rueg, his wife gave birth to a child by him, which child died very shortly after birth, leaving its mother as its heir, who thus became entitled to the Rueg estate. But the brother and sister of Rueg, conceiving themselves to be his heirs, conveyed his lands to a third person. Meanwhile, Rueg's wife, presumably ignorant of her rights as heir of her infant child, laid no claim to the estate, but married again and died, leaving children, who brought an action, as her heirs, to recover the estate from one claiming under the deed executed by the brother and sister of Rueg. The defendant pleaded that he was a *bona fide* purchaser of the lands, without notice of the plaintiffs' rights, but the court held that the doctrine of "purchaser without notice" did not apply in such a case, those under whom the defendants claimed having had no semblance of title to the estate. But while a purchaser for value without notice cannot be affected by matters *in pais*, which establish rights in equity in favor of third persons against the vendor, he is not thereby excused from making inquiries *in pais* which would show the absence of any legal title in the vendor. The rule *caveat emptor* applies as well where the want of title is to be established by the testimony of witnesses only, as where it appears from the public records or from the instruments under which the vendor claims. Among other equities which may avoid the title of the vendor, but which do not affect a purchaser for value without notice, may be mentioned the following: The right of a third person to impress the estate with a resulting trust;[2] a right to treat as a mortgage a deed that is absolute in form;[3] a right to vacate a deed as having been procured from the grantor by force, fraud, duress or mistake;[4] the right to vacate a deed executed in fraud of creditors;[1] the right to fix a lien upon the premises for the purchase money;[2] the right to compel a conveyance of the legal title from the vendor. The general rule is that a purchaser for value and without notice, who has paid the purchase money in full, is not affected by latent frauds or equities of any kind.[3]

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[1] Wells v. Walker, 29 Ga. 450.

[2] Vattier v. Hinds, 7 Pet. (U. S.) 207, 271; Sampeyrac v. United States, 7 Pet. (U. S.) 222; Boone v. Chiles, 10 Pet. (U. S.) 177; Wilson v. Mason, 1 Cranch (U. S.), 45. Cogel v. Raph, 24 Minn. 194. Snelgrove v. Snelgrove, 4 Des. (S. C.) Eq. 274.

[3] Hurst v. McNeil, 1 Wash. (C. C.) 70. Daniel v. Hollingshed, 16 Ga. 190.

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[1] 60 Fed. Rep. 201.

[2] 2 Washb. Real Prop. 484 (177).

[3] Hicks v. Hicks, (Tex.) 26 S. W. Rep. 227.

[4] Wood v. Mann, 1 Sumn. (C. C.) 500. 3 Washb. Real Prop (4th ed.) 260 (565), 339. But see, as to duress, Anderson v. Anderson, 9 Kans. 116, where it was held that a married woman's deed, executed under duress, was void even as against a purchaser for value without notice. Contra, White v. Graves, 107 Mass. 325.

Incompetency of Parties to Deeds or Wills, with Respect to Infancy, Coverture, Alienage, Mental Capacity or other Disabilities.

A deed executed by a person incompetent to contract or to convey, passes no title, even as against a purchaser for value without notice. So, also, a conveyance or devise to an alien enemy. The purchaser can, of course, ascertain the competency of the parties only by inquiries *in pais*. As a matter of fact these inquiries are seldom made in respect to remote grantors, the risk in such cases being generally considered slight.

Adverse Occupancy of the Premises.

The purchaser should never omit to inquire as to the occupancy of the premises. The record title may be apparently perfect, and there may be nothing to indicate a want of title in the vendor, but the fact that the premises are in the adverse possession of a stranger. In such a case he is put upon inquiry, and charged with notice of the rights of the occupant. 3 Washb. Real Prop. (4th ed.) 317.

The Non-performance of Conditions Antecedent and Subsequent, and the Happening or Non-happening of Contingencies upon which an Estate Depends.

These should be shown by affidavits.

The Occurrence of Marriages, Births and Deaths, wherever they would Affect the Vendor's Title.

All such facts must be ascertained by inquiries *dehors* the record, and should be embodied in affidavits to be used in verifying the abstract.

Forgeries of Deeds or Wills, and Fraudulent Alterations or Insertions therein.

The purchaser should examine the original of all deeds, as well as the copies of record. He takes the risk of having the actual state of the title correspond with that which appears of record. The registration of a deed, void from forgery, interlineation or other like cause, will not protect the purchaser. Gray v. Jones, 14 Fed. Rep. 83. Reck v. Clapp, 98 Pa. St. 581; Arrison v. Harmsted, 2 Barr (Pa.), 191; Wallace v. Harmsted, 8 Wright (Pa.), 494; 53 Am. Dec. 603; Van Amringe v. Morton, 4 Wharton (Pa.), 382; 34 Am. Dec. 517.

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[1] 3 Washb. Real Prop. (4th. ed.) 333.

[2] Warvelle Vend. 699.

[3] Cogel v. Raph. 24 Minn. 194. Flannagan v. Oberthier, 50 Tex. 379.

Dower and Curtesy Rights.

The existence of these must be ascertained by inquiries *dehors* the record.

Latent Ambiguities in the Description of the Thing Granted or Devised, or of the Persons who are to Take as Grantees or Devisees.

Where these occur they must, of course, be explained by evidence *aliunde*, if, indeed, they may be explained at all. See 1 Greenl. Ev. § 297.

Insufficiency of the Evidence to Establish Title by Inheritance.

If the vendor's abstract shows title in him as heir it should be sustained by the affidavits of those having knowledge of the fact of inheritance.

Insufficiency of the Evidence to Establish Title by Adverse Possession.

If the vendor claims by adverse possession there should be affidavits to show such a possession under color of title for a period sufficient to bar the rights of all persons, including those under disabilities when the cause of action accrued.

The Want of Jurisdiction of the Person in Judicial Proceedings.

See ante, "Caveat Emptor," § 49. An illustration will be found, ante, § 78.

The Existence of Physical Incumbrances Upon the Premises.

Such, for example, as a private right of way, a mill dam or the like. Post, ch. 31, § 305.

Want of Possession under the Several Deeds in the Vendor's Chain of Title.

It is a familiar rule that an unbroken chain of conveyances down to the plaintiff in ejectment is no evidence of title in him unless possession under and in pursuance of such conveyances appears. Stevens v. Hosmer, 39 N. Y. 302. As a matter of fact, however, in the examination of a title possession is always presumed to have followed the several conveyances under which the vendor claims, and an inquiry into the fact of possession is never made unless there is something in the case to excite the suspicions of the purchaser.

Want of Delivery of Deeds; Wrongful Delivery of an Escrow.

See Devlin on Deeds, §§ 264, 267, 323.

The Existence of an Unrecorded Deed within the Period During which such a Deed is by Statute, in some States, Allowed to Relate back and Bind Subsequent Purchasers from the Time of Acknowledgment.

See the statutes of the several States. Martindale's Abst. p. 25.

CHAPTER VIII.

WAIVER OF OBJECTIONS TO TITLE.

IN GENERAL. § 80.
WAIVER BY TAKING POSSESSION. § 81.
LACHES OF PURCHASER. § 82.
WAIVER BY CONTINUING NEGOTIATIONS. § 83.
WAIVER IN CASES OF FRAUD. § 84.
WAIVER BY PURCHASING WITH NOTICE OF DEFECT. § 85.

§ 80. **IN GENERAL.** The expression "waiver of objections to title," as generally used, means a waiver of the right to recover damages against the vendor for inability to perform his contract by reason of a defective title, or of the right of the purchaser to rescind or abandon the contract on the ground of the insufficiency of the vendor's title.[1] In either case the principles upon which the existence of the waiver is determined are the same; and it is, therefore, apprehended that no inconvenience can result from treating the subject generally, without reference to the particular form of relief which the vendor claims to have been waived. The doctrine of waiver of objections to the title relates chiefly to cases in which the contract remains unexecuted by a conveyance of the premises. If the purchaser accept a conveyance without covenants for title, the rule is general that he can have no relief at law or in equity if the title prove defective. Strictly speaking, however, this is more a matter of contract than of waiver implied from the acts and conduct of the purchaser. Still, there are rights respecting a defective title which the purchaser may waive even after the contract has been executed; for example, the right to rescind the contract on the ground of fraud, assuming that the conveyance was accepted without knowledge of the fraud.[2]

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[1] This is without doubt the general acceptation of the expression in the American practice. More v. Smedburgh, 8 Paige (N. Y.), 600. But such a definition is perhaps too broad for the English practice, for there it has been held that if a purchaser have actually waived his right to call for a title, and afterwards for the purpose of settling a conveyance a deed is produced which shows a bad title, he will not be compelled in equity to accept the bad title. 1 Sugd. Vend. 347, citing Warren v. Richardson, Yo. 1; Wilde v. Fort, 4 Taunt. 334; Hume v. Bentley, 5 De G. & Sm. 520; Geoghegan v. Connolly, 8 Ir. Ch. Rep. 598. Such a case, however, is not likely to arise in America, all conveyances as a general rule being there spread upon the public records and open to the inspection of the purchaser. The general doctrines relating to waiver of objections to title will be found in Mr. Fry's valuable treatise on Specific Performance (3d Am. ed.), § 1305.

It must be borne in mind that a waiver of objections to the title is not the equivalent of a waiver of *all* the rights of the purchaser in respect of the defective title, for it may be that the waiver was brought about by the reliance of the purchaser upon the covenants for title that he had a right to expect. In other words, the purchaser does not, by waiving the right to rescind the contract, or to recover damages for the violation thereof while it remains executory, waive the right to a conveyance with covenants for title adequate for his protection in a case in which the contract entitles him to such covenants. An act which amounts to a waiver of the right to reject a defective title is not necessarily a waiver of the right to compensation for the defect.[3] Neither is an agreement by the purchaser to accept a deed without warranty to be construed as of itself a waiver of the right to require the production of a clear title. On the contrary, the presumption is that the purchaser intends to insist upon that right, inasmuch as he will have no warranty to protect him if the title should prove defective.[4]

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[2] Post, this chapter, §§ 82, 84.

[3] 1 Dart Vend. 437; 1 Sugd. Vend. 343. Calcraft v. Roebuck, 1 Ves. Jr. 221. Roach v. Rutherford, 4 Desaus. (S. C.) 126; 6 Am. Dec. 606. See, also, Palmer v. Richardson, 3 Strobh. Eq. (S. C.) 16. A sale of "all his (the vendor's) interest in the devise made to him by his father, F. B., deceased, in a certain tract," etc., is not a contract of hazard, the reference to the devise being merely descriptive of the property, and the purchaser is entitled to indemnity against incumbrances on the land. Price v. Browning, 4 Grat. (Va.) 68. In the case of Evans v. Der Germania Turn Verein, 8 Ill. App. 663, the title had been examined and prononuced good by the purchaser's attorneys. The purchaser then paid part of the purchase money, took possession, made material alterations in the premises, collected rents, and otherwise treated the contract as valid and subsisting. Afterwards, on a second examination of the title by other attorneys, it was pronounced bad, and the purchaser sought to rescind the contract. Rescission was refused, the court saying, among other things, that the contract, which was conditioned on the purchaser's acceptance of the title, had been made absolute by his conduct in the premises, *but that the sellers were not absolved from their obligation to convey to the purchaser at the proper time a good title, free from incumbrance.* In Goddin v. Vaughn, 14 Grat. (Va.) 102, it was intimated that a purchaser buying and taking possession with notice of defect of title waives his right to insist upon covenants of general warranty from the vendor. Perhaps such a decision was unnecessary, as the sale was by an executrix, from whom no general covenants for title could be required. But the authorities cited by the court sustain a materially different proposition, namely, that in such a case the purchaser waives his right to *rescind* the contract or reject the title. It can hardly be denied that a purchaser, after being informed of an objection to the title, may, and in fact does in many cases, proceed with the bargain and look to the covenants which he

Obviously a waiver of objection to the title must be the relinquishment or abandonment of some right with respect to the title to which the purchaser under the contract is entitled, and contemplates objections which were either unknown to the purchaser at the time of the contract or without reference to which the contract was concluded. If the purchaser bought only such right, title or interest as the vendor had, expressly taking the risk of the title, there can be, in the nature of things, no opportunity for any question of waiver. Hence, it follows that the waiver may be implied, (1) from the acts and conduct of the purchaser with respect to defects of title coming to his knowledge after the conclusion of the contract, and (2) from the mere fact that the contract was made by the purchaser with knowledge that a clear and unincumbered title could not be had. It should be observed here that waiver of objections to title in the sense in which the term is commonly employed is not an element of the contract between the parties, but rather an implication of law from the acts of the purchaser.[5] Where, in a contract for the sale of land, a day is fixed for the conveyance of the property, if the vendee wishes to object to the title he must give notice of his objections a reasonable time previous to the day fixed for making the conveyance to enable the vendor to remove the objections to the title and to make the conveyance at the time specified, or a court of equity may consider a strict performance of the contract by a conveyance on the specified day as waived.[6] But a purchaser may in some cases be deemed to have waived his right to a strict performance

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is to receive for his protection. True, a purchaser may expressly agree to take the title, such as it is, without warranty, but it seems scarcely fair to him to *imply* such an agreement from the mere fact of his taking possession with knowledge of the defective title.

[4] Leach v. Johnson, 114 N. C. 87. Gallimore v. Grubb, 156 N. C. 575; 72 S. E. 628.

[5] 1 Sugd. Vend. (8th Am. ed.) 517 (343).

[6] More v. Smedburgh, 8 Paige (N. Y.), 600. Allen v. Adams, 162 Iowa 300; 143 N. W. 1092. Hobson v. Lenox (Mo. App.) 201 S. W. 961.

of the contract on a specified day without being held to have waived his right to rescind in case the vendor be unable eventually to remove the objections to the title.[7]

If the vendor can establish a case of waiver of objections, he should not ask to have the title referred to a master or take any other step showing that he does not rely on the waiver.[8]

A purchaser may waive or lose his right to rescission by an express confirmation of the contract,[9] or by dealing with the property as his own after knowledge of the circumstances which entitle him to rescission,[10] or by a presumed acquiescence in the title disclosed by the vendor, even though possession has not been taken.[11]

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[7] CARR. J., in Jackson v. Ligon, 3 Leigh (Va.), 194 (179).

[8] 1 Sugd. Vend. 347, citing Harwood v. Bland, 1 Fla. & Ke. 540.

[9] 1 Sugd. Vend. 252, citing Chesterfield v. Janssen, 2 Ves. 146; Roche v. O'Brien, 1 Bal. & Beat. 355; Cole v. Gibbons, 3 P. Wms. 290; Morse v. Royal, 12 Ves. 355; Sandeman v. Mackensie, 1 J. & H. 613. The fact that the purchaser's counsel approves the abstract of title submitted by the vendor does not amount to a waiver of all reasonable objections to the title. Deverell v. Bolton, 18 Ves. 505. An objection to the title on the ground of incumbrances is waived where, upon an offer to procure releases, the vendor's attorney says that it is unnecessary, as he proposes to rely upon a deficiency in the area of the premises. Cogswell v. Boehm, 5 N. Y. Supp. 67.

[10] Campbell v. Fleming, 1 Ad. & El. 40. 2 Sugd. Vend. (8th Am. ed.) 22 (423). An agreement by the purchasers that judgment might go against them for the purchase money in consideration of the dissolution of an injunction against them for cutting down timber, has been held a waiver of objections to the title. McDaniel v. Evans, (Ky.) 14 S. W. Rep. 541. So, also, the execution of a new note for the purchase money to an assignee of the original note, in consideration of further indulgence. Wills v. Porter, 5 B. Mon. (Ky.) 416. Three months' delay by the purchaser in giving notice of rescission after judgment in favor of an adverse claimant has been held no waiver of the right to rescind. Wilcox v. Lattin, 93 Cal. 588; 29 Pac. Rep. 226.

[11] Fordyce v. Ford, 4 Bro. C. C. 494. Forsyth v. Leslie, 77 N. Y. Supp. 826; 74 App. Div. 517. A common provision in the English conditions of sale, with respect to waiver of objections to the title may be found in the case of Soper v. Arnold, L. R., 14 App. Cas. 429, and is as follows: "All objections and requisitions (if any) in respect to the title or the abstract, or anything appearing therein, respectively, shall be stated in writing and sent to the vendor's solicitor within seven days from the delivery of the abstract, and all objections and requisitions not sent within that time shall be considered to be waived, and in this respect shall be deemed the essence of the contract." This time may be enlarged by acts of the vendor amounting to a waiver. 1 Sugd. 267. Cutts v. Thodey, 13 Sim. 206.

But the purchaser must have been fully apprised of the facts[12] and of his legal rights,[13] and the effect of his acts,[14] and must have acted of his own free will[15] before he will be deemed to have waived his right to rescission.

The purchaser may, of course, waive objections to the title in express terms, but in most instances the waiver is implied from his acts and conduct.[16] In the English practice a waiver of objections to the title means a waiver of the right to examine the title, that is, to require the vendor to produce a title and support it by proper evidence. In each case the question is whether the purchaser intended to waive this right;[17] but such an intention may be inferred from his acts without having been directly expressed, and this, though he swear that he did not mean to waive the objections.[18] Taking possession with notice of the objections, failure to insist on objections disclosed by an abstract furnished, granting a lease of the premises, have each been held a waiver of objections.[19]

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[12] Life Asson. v. Siddall, 7 Jur. (N. S.) 785. See, also, cases cited 1 Sugd. Vend. (8th Am. ed.) 384. It seems that if the vendor was guilty of fraud in respect to the title, the purchaser will be presumed not to have been apprised of his rights. Baugh v. Price, 1 Wil. 320.

[13] Cockerell v. Cholmeley, 1 Rus. & My. 425.

[14] Dunbar v. Tredennick, 2 Bal. & Beat. 317; Waters v. Thorn, 22 Beav. 547.

[15] 1 Sugd. Vend. 253, citing Crowe v. Ballard, 3 Bro. C. C. 117; Scott v. Davis, 4 My. & Cr. 91; Wood v. Downes, 18 Ves. 120; King v. Savery, 5 H. L. Cas. 627; Brereton v. Barry, 11 Ir. Ch. 109.

[16] 1 Sugd. Vend. 343. Dorsch v. Andrus, 111 Minn. 287, 126 N. W. 1071. Dunn v. Mills, (Kans.) 79 Pac. 146, a case in which the purchaser made no objection to the abstract furnished by the vendor, and took possession of the premises. In Kreibich v. Martz, 119 Mich. 343; 78 N. W. 124, a case in which the vendor had subsequently conveyed the premises to a stranger, it was held that the purchaser waived his right to rescind by requiring the stranger to furnish him with an abstract of title, and negotiating with him respecting the payments. The purchaser by specifying an objection to the title waives objections not specified. Ante, § 75. Condit v. Johnson, 158 Iowa 209, 139 N. W. 477. He waives an objection to the title also by requesting the vendor to execute and forward a deed to the property. Frantz v. Vincent, 152 Iowa 680, 133 N. W. 121. Specific objection to a clause in a deed in the vendor's chain of title is not waived by giving a wrong reason for the objection. Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072.

[17] Dowson v. Solomon, 1 Drew. & Sm. 1.

[18] Ex parte Sidebotham, 1 Mon. & Ay. 655.

[19] *Infra*, this chapter.

The purchaser does not waive his right to rescission for defect of title by reselling the premises, since it must be presumed that he intends to obtain a good title himself in order to perform his contract with his vendee.[20] An approval of the title by the purchaser's counsel will not bind the purchaser as a waiver of objections.[21] Nor will the purchaser's acceptance of an abstract as satisfactory amount to a waiver of objections not appearing on the abstract, and if he can prove the title bad *aliunde,* he will be entitled to rescind.[22] Nor do acts of ownership, where possession has been authorized, amount to a waiver.[23] The general rule is that the purchaser, by retaining the abstract, waives objections to the title; [24] but the acceptance of the abstract as satisfactory does not deprive the purchaser of the right to require that it shall be supported by proper evidence when necessary.[25] Nor does the purchaser waive objections to the title by retaining the abstract a reasonable length of time to enable him to make necessary searches of the record for the purpose of verifying the abstract.[26] But having accepted the abstract as satisfactory, and being in default in the payment of the purchase money, he thereby waived the objection that the abstract did not show title in the vendor.[27]

The purchaser, by receiving the abstract after the time in which by the contract it was to be furnished, waives his right to rescind for non-compliance with the contract in that respect, but does not waive his right to rescind for want of good title shown by the abstract.[28]

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[20] Knatchbull v. Grueber, 1 Mad. 170. McCracken v. San Franciso, 16 Cal. 591. Moore v. Price, 46 Tex. Civ. App. 304, 103 S. W. 234. But see, Pierce v. Pettit, 46 Wash. 668, 91 Pac. 190 and Joyce v. Hagelstein, (Tex. Civ. App.) 163 S. W. 356.

[21] Deverell v. Bolton, 18 Ves. 505; Harwood v. Bland, 1 Fla. & Ke. 540.

[22] 1 Sugd. Vend. 347; 1 Yo. & Coll. 570.

[23] Duncan v. Cafe, 2 M. & W. 244. See post, "Waiver by Taking Possession." § 81.

[24] Ky. Distilleries Co. v. Blanton, 149 Fed. 31, 80 C. C. A. 343; Kane v. Jones, 46 Wash. 631, 91 Pac. 2; Lang v. Hedenberg, 277 Ill. 368, 115 N. E. 566.

[25] Southby v. Hutt, 2 My. & Cra. 207.

[26] Lessenich v. Sellers, 119 Iowa, 314; 93 N. W. 348.

[27] Lang v. Hedenberg, 277 Ill. 368, 115 N. E. 566.

[28] Bragg v. Chilcote, 177 Ill. App. 371.

§ 81. **WAIVER BY TAKING POSSESSION.** The general rule is that if the purchaser takes possession of the estate with knowledge of incumbrances and defects of title, he thereby waives his right to rescind the contract, or to recover damages against the vendor.[29] But this rule does not apply when the purchaser was not aware of the objections to the title when he took possession;[30] nor where the contract authorizes him to take possession before a title is made;[31] nor where under the contract he is entitled to call for a good title and takes possession with the concurrence of the vendor;[32] nor where the vendor had agreed to remove the objection to the title.[33] There must also be circumstances to show that the purchaser intended to accept such title as could be made, and to rely for his redress upon the covenants for title which he was to receive from the vendor.[34] It is obvious that great injustice may be done the purchaser by a too liberal interpretation of his acts as a waiver of objections to the title, and there are decisions which restrict such conclusions to cases in which an intention to waive the objections by taking possession clearly appears.[35] The mere act of taking possession of real estate and exercising acts of ownership over it will not preclude the purchaser from his right to examine the title, unless the court is satisfied that he intended to waive and has actually waived such right. The waiver is a question of intention and one of fact from all the circumstances, and not an arbitrary presumption of law

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[29] 1 Sugd. Vend. (8th Am. ed.) 11, 517. See post, "Waiver by Purchasing with Notice of Defect," § 85. Vancouver v. Bliss, 11 Ves. 464; Ex parte Sidebotham, 1 Mon. & Ayr. 655; 2 Mon. & Ayr. 146; Calcraft v. Roebuck, 1 Ves. Jr. 226. Tompkins v. Hyatt, 28 N. Y. 347; Caswell v. Black River Mfg. Co., 14 Johns. (N. Y.) 453. Christian v. Cabell, 22 Grat. (Va.) 99. Barnett v. Garnis, 8 Ala. 373. Mitchell v. Pinckney, 13 So. Car. 203; Roach v. Rutherford, 4 Desaus. (S. C.) 126; 6 Am. Dec. 606; Palmer v. Richardson, 3 Strobh. Eq. (S. C.) 16. Craddock v. Shirley, 3 A. K. Marsh. (Ky.) 1139. Richmond v. Gray, 3 Allen (Mass.), 25. McCauley v. Moses, 43 Ga. 577. Allen v. Adams, 162 Iowa, 300, 143 N. W. 1092. Zempel v. Hughes, 235 Ill. 424, 85 N. E. 641. In Beck v. Simmons, 7 Ala. 76, it was said by ORMOND, J.: "It would be contrary to equity and good conscience to permit one who proceeds so far in a purchase as to obtain possession with knowledge of a defect in the title to object afterwards the want of a title as a reason for not complying with his contract. If he knows that a defect can only be obviated by a judicial proceeding it is impossible to suppose that the time stipulated for the completion of the contract was considered by him an essential ingredient of the contract, as it could not be known what length of time it might take to obtain the title. The question, therefore, in such cases is not whether the party was able to make the title on the day stipulated, but whether there was unreasonable delay in obtaining it." Citing Seton v. Slade, 7 Ves. 265; Colton v. Wilson, 3 P. Wms. 190.

[30] 1 Sugd. Vend. (8th Am. ed.) 12. Stevens v. Guppy, 3 Rus. 171; Kirtland v. Pounsett, 2 Taunt. 145; Dowson v. Solomon, 1 Drew. & Sm. 1; Hearne v. Tomlin, Peake Ca. 192. Gaus v. Renshaw, 2 Pa. St. 34; 44 Am. Dec. 152. Simpson v. Klipstein, 89 N. J. Eq. 543, 105 Atl. 218. But see Briggs v. Gillam, cited in 1 Rich. Eq. (S. C.) 407, 408, where it was held that a party who goes into possession without knowledge of the title, and who afterwards, coming to the knowledge, continues in possession for a considerable time, using the property as his own, will be compelled to accept such title as the vendor can make.

[31] 1 Sugd. Vend. 343, citing Dixon v. Astley, 1 Mer. ch. 4, § 4; Wright v. Griffith, 1 Ir. Ch. 695; Sibbald v. Lourie, 18 Jur. 141; Thompson v. Dulles, 5 Rich Eq. (S. C.) 370); Stevens v. Guppy, 3 Rus. 171; Hendricks v. Gillespie, 25 Grat. (Va.) 181. This exception renders the rule comparatively of little importance in America, for in the vast majority of cases, especially those in which the payment of the purchase money and the execution of the conveyance are deferred, the contract provides that the purchaser shall

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have possession. In England it is the common practice to provide in the conditions of sale that the purchaser may take possession without prejudice to his right to object to the title. See Adams v. Heathcote, 10 Jur. 301.

[32] Dart Vend. (5th ed.) 434; 1 Sugd. Vend. (8th Am. ed.) 337. Magaw v. Lothrop, 4 Watts & S. (Pa.) 321. Burroughs v. Oakley, 3 Swan, 159. Burnett v. Wheeler, 7 M. & W. 364. In this case it was held that an express agreement to make a good title bound the vendor at law to remove defects in the title known to the parties at the date of the contract, and which were capable of being removed. The right to rescind is not lost by a verbal waiver of such agreement. Goss v. Nugent, 2 Nev. & Man. 35.

[33] Burnett v. Wheeler, 7 M. & W. 364, supra; Duncan v. Cafe, 2 M. & W. 244. In Barton v. Rector, 7 Mo. 524, where by the contract the purchaser was to have a conveyance with general warranty, he was allowed to rescind though he bought with notice of incumbrances on the land.

[34] Jones v. Taylor, 7 Tex. 240; 56 Am. Dec. 40; Hurt v. McReynolds, 20 Tex. 595; Hurt v. Blackstone, 20 Tex. 601; Littlefield v. Tinsley, 22 Tex. 259.

[35] In Corey v. Matheson, 7 Lans. (N. Y.) 80, it was said by MULLIN, P. J.: "It has been repeatedly said that a purchaser who takes and retains possession of lands under a contract of purchase is estopped from alleging a defect in the vendor's title. 1 Hilliard on Vend. 4, 223; Viele v. R. Co., 20 N. Y. 184. But the proposition thus broadly stated is not supported by any adjudged case that I have been able to find. * * * When the defect in the title is such as necessarily to lessen the value of the property, it will not be held waived except upon the most conclusive evidence that it was his intention so to do," citing King v. King, 1 Myl. & K. 442; Burroughs v. Oakley, 3 Swanst. 159; Minor v. Edwards, 12 Mo. 137; 49 Am. Dec. 121. See, also, to the same effect, Bank of Columbia v. Hagner, 1 Pet. (U. S.) 455. Jones v. Taylor, 7 Tex. 240; 56 Am. Dec. 48.

from the mere fact of taking possession.[36] But if he exercises acts of ownership after notice or information of defects in the title, he will, as a general rule, be deemed to have waived his objections to the title.[37] It has been held that a purchaser taking possession with knowledge that the vendor has made fraudulent representations as to the title, though he may thereby waive his right to rescind the contract, does not waive his right to recover damages for the fraud by action of deceit.[38]

When the purchaser becomes aware of facts respecting the title which give him a right to rescind the contract he must exercise that right promptly. It is an evidence of bad faith that he raises no objection to the title on account of known defects or incumbrances, until he is sued for the purchase money.[39] The question whether or not the purchaser waived his right to rescind the contract by taking possession when he knew the title to be defective, is not a question of law, but a question of fact to be determined by all the circumstances surrounding the transaction.[40] If the purchaser makes no objection to the title shown by the vendor, and takes possession but refuses to complete the contract afterwards on the sole ground that the vendor failed to tender a conveyance of the premises in due time, he will be deemed to have waived objections to the title.[41]

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[36] Page v. Greeley, 75 Ill. 400. Lilienthal v. Bierkamp, 133 Iowa 42, 110 N. W. 152.

[37] Canton Co. v. Balto. & Ohio R. Co., (Md.) 29 Atl. Rep. 821. Keepers v. Yocum, 84 Kan. 554, 114 Pac. 1063; Ann. Cas. 1912 A, 748; Nicholson v. Lieber, (Tex. Civ. App.) 153 S. W. 641. Where the purchaser sold certain fixtures on the premises to the vendor's husband, but when the fixtures were being taken down suggested that their removal be deferred until the examination of the title should be completed and found satisfactory, it was held that the acts of the purchaser in the premises did not constitute a waiver of the right to object to the title. Kountze v. Hellmuth, 67 Hun (N. Y.), 343; 22 N. Y. Supp. 204. Especially does the rule stated in the text apply where, after the purchaser took possession, the vendor, who had originally only a life estate in the premises, acquired the fee. Brown v. Pinniger, 81 N. J. Eq. 229, 86 Atl. 541.

[38] Whitney v. Allaire, 1 Comst. (N. Y.) 305.

[39] Hart v. Handlin, 43 Mo. 171. Dunn v. Mills, (Kans.) 79 Pac. 146, 502.

[40] 1 Sugd. Vend. (8th Am. ed.) 517 (343). Dowson v. Solomon, 1 Drew. & Sm. 1. Burroughs v. Oakley, 3 Swan, 159.

[41] Hun v. Bourdon, 68 N. Y. Supp. 112; 57 App. Div. 351.

§ 82. **LACHES OF PURCHASER.** The right to rescind may also be lost by lapse of time, even though the time elapsed be short of the statute of limitations.[42] Especially does this rule apply when the conditions of the parties have so changed that the vendor cannot be put in *statu quo*.[43] The purchaser must exercise his right to rescind within a reasonable time; there is no precise rule by which to determine what will constitute a reasonable time, each case being left to the sound discretion of the court, having in view the nature of the property affected, changes in its character and value, and the rights of persons interested.[44] Time will begin to run from the period when the right to relief was, or, with reasonable diligence, might have been discovered.[45] The purchaser is not chargeable with laches where both parties knew the title to be defective, and that it would take considerable time to remove the defect.[46] Nor where the delay is caused by the vendor's promises to make the title good.[47] But nothing can be clearer than the equity which compels him to complete the contract in a case in which, with knowledge of the objection to the title, he continues in the uninterrupted possession and enjoyment of the premises, without having paid any part of the purchase money,[48] and without offering to restore the premises to the vendor.[49]

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[42] 1 Sugd. Vend. 253. Medlicot v. O'Donel, 1 Bal. & Beat. 156; Morse v. Royal, 12 Ves. 374. Corbett v. Shulte, 119 Mich. 249; 77 N. W. 947. Lanitz v. King, 93 Mo. 513; 6 S. W. Rep. 263, where the plaintiff delayed twenty months in tendering performance and demanding a deed. Coleman v. Bank, 115 Ala. 307; 22 So. 84; seven years.

[43] Hunt v. Silk, 5 East, 449. Caswell v. Black River Mfg. Co., 14 Johns. (N. Y.) 453. Smith v. Detroit Min. Co., 17 S. Dak. 413; 97 N. W. 17.

[44] 1 Sugd. Vend. (8th Am. ed.) 389, n., where a large number of decisions illustrating the doctrines of equity in relation to the enforcement of stale demands and laches in the assertion of rights are collected, but many of which have no bearing upon the subject of rescission for defect of title other than by way of analogy. It would seem that the rules respecting waiver of objections to title presumed from laches apply only in cases where the purchaser had possession; otherwise, it would appear that there is as much reason to charge the vendor with laches in the enforcement of his rights as to fix that responsibility upon the purchaser. In Roach v. Rutherford, 4 Desaus. (S. C.) 126; 6 Am. Dec. 606, long possession by the purchaser and a confession of judgment for the purchase money were held a waiver of the right to rescind. In Guttschlick v. Bank of the Metropolis, 5 Cr. (C. C. U. S.) 435, the purchaser having rejected an insufficiently executed deed, judgment was given in his favor for restitution of the purchase money, though he had been in possession seven or eight years. No question of waiver of the right to rescind appears to have been raised. In the following cases a waiver of that right was presumed from long-continued possession and laches on the part of the purchaser: Adams v. Heathcote, 10 Jur. 301. Tompkins v. Hyatt, 28 N. Y. 347; Ballard v. Walker, 3 Johns. Cas. (N. Y.) 60; Watt v. Rogers, 2 Abb. Pr. (N. Y.) 261; Taylor v. Fleet, 1 Barb. (N. Y.) 471. Bell v. Vance, 6 Litt. (Ky.) 108; Hart v. Bleight, 3 T. B. Mon. (Ky.) 273; Lacey v. McMillan, 9 B. Mon. (Ky.) 523. So Pac. R. Co. v. Choate, 132 Cal. 278; 64 Pac. 1; Latimer v. Capay Valley L. Co., 137 Cal. 286; 70 Pac. 82. Vendees who have been in possession more than thirty years, making no effort to perfect their title or to rescind the contract, will, if reasonably secure in their title, be compelled to take it and pay the purchase money. Edwards v. Van Bibber, 1 Leigh (Va.), 183. As the vendor cannot perfect his title where time is material, so neither can the purchaser, buying with

§ 82-a. **Failure to object on "law day."** It has been held that a purchaser who makes specific objections to the title on the "law day," that is, the day fixed for the performance of the contract, cannot subsequently raise a new objection, even if it is valid, where it is one which might have been removed by the vendor. He must proceed with the contract and rely for his protection upon the covenants for title which he is to receive.[50]

§ 83. **WAIVER BY CONTINUING NEGOTIATIONS WITH THE VENDOR.** If the purchaser proceeds with his negotiations after he has been informed of defects in the title and knows that a good title cannot be made until those defects are cured, he will be held to his bargain[51] notwithstanding the expiration of the time

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knowledge that the title is defective, withhold the purchase money for an unreasonable time and then demand specific performance, the property having in the meanwhile greatly increased in value. Taylor v. Williams, 45 Mo. 80. In Taylor v. Williams, (Colo.) 31 Pac. Rep. 504, it was held that a delay of a month by the purchaser in electing to rescind the contract on the ground of defects of title shown by the abstract did not deprive him of the right to recover back his deposit and expenses.

[46] 1 Sugd. Vend. 254.

[46] Vail v. Nelson, 4 Rand. (Va.) 478.

[47] Shiffer v. Dietz, 53 How. Pr. (N. Y.) 372.

[48] Kennedy v. Woolfolk, 3 Hayw. (Tenn.) 195.

[49] So. Pac. R. Co. v. Choate, 132 Cal. 278; 64 Pac. 292.

[50] Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. 287. Benson v. Cromwell, 6 Abb. Pr. Cases, 83, 85. Garibaldi Realty Co. v. Santangelo, 149 N. Y. Supp. 669; 164 App. Div. 513. Wolford v. Jackson, 123 Va. 280, 96 S. E. 237. Ante, § 75.

[51] Griggs v. Woodruff, 14 Ala. 9. Rader v. Neale, 13 W. Va. 373. Grigg v. Landis, 6 C. E. Gr. (N. J. Eq.) 494. Vail v. Nelson, 4 Rand. (Va.) 478. Hester v. Rogers, 110 Ga. 362; 35 S. E. 715. Freeman v. Duncan, (Tex. Civ.

appointed for the completion of the contract, and though it will require a considerable further time in which to perfect the title.[52] But this rule does not apply if he continues in his subsequent negotiations to insist upon the objections to the title.[53] As has been tersely said: "A treaty cannot waive that about which the purchaser treats."[54] Payment of any part of the purchase money, after notice of a defect in the title, will, as a general rule, be treated as a waiver of the right to rescind.[55]

§ 84. **WAIVER IN CASES OF FRAUD.** The rule that the purchaser must promptly inform the vendor of his intention to rescind the contract on discovery of a defect in the title, especially applies in cases where the vendor was guilty of fraudulent representations in respect to the title.[56] If the purchaser continues

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App.) 138 S. W. 1060. In Flint v. Woodin, 9 Hare, 618, it was said by Sir J. WIGRAM, V. C.: "A purchaser who finds there is an objection, if he intends to rely upon it, must take his stand upon it at once; he cannot go on treating as if he had waived the objection and then turn round afterwards and attempt to avail himself of it." See, also, McMurray v. Spicer, L. R., 5 Eq. 527. A purchaser at an auction sale not informed of an outstanding interest in infant heirs may abandon his purchase and refuse to proceed; but, if he go on with the purchase, content to take such conveyance as can then be made and look to chancery for title to the infants' interests, he thereby waives his right to rescind. Goddin v. Vaughn, 14 Grat. (Va.) 102. The offer to rescind should be made as soon as the defect is discovered. Newell v. Turner, 9 Port. (Ala.) 420. An offer made by the purchaser, after examining the title, to take the land if he might pay for it in notes of third persons, which offer the vendor refused, is no waiver of the right to reject the title if bad. Mead v. Fox, 6 Cush. (Mass.) 199.

[52] 1 Sugd. Vend. 265. Seton v. Slade, 7 Ves. 265; Pincke v. Curtiss, 4 Bro. C. C. 329; Webb v. Hughes, L. R., 10 Eq. 281. Riggs v. Pursell, 66 N. Y. 193, 198. Vail v. Nelson, 4 Rand. (Va.) 478; Goddin v Vaughn, 14 Grat. (Va.) 125. Owen v. Pomona L. & W. Co., 131 Cal. 530; 63 Pac. 850; Hawes v. Swanzey, 123 Iowa, 51; 98 N. W. 586. Hazzard v. Morrison (Tex. Civ. App.) 130 S. W. 244. Rader v. Neal, 13 W. Va. 373, where the vendor contracted to convey when he should have procured title from a designated person.

[53] Knatchbull v. Grueber, 1 Madd. 170.

[54] Id. 1 Sugd. Vend. (8th Am. ed.) 347.

[55] Caswell v. Black River Mfg. Co., 14 Johns. (N. Y.) 453. Ayres v. Mitchell, 3 Sm. & M. (Miss.) 683. Webb v. Stephenson, (Wash.) 39 Pac. Rep. 952. Tripp v. Sieler, 38 S. D. 321, 161 N. W. 337; Lewis v. Woodbine Sav. Bank, 182 Iowa, 190, 174 N. W. 19.

[56] Alexander v. Utley, 7 Ired. Eq. (N. C.) 242; McDowell v. McKesson, 6 Ired. Eq. (N. C.) 278. Magennis v. Fallon, 2 Mol. 591. Flight v. Booth, 1 Bing. N. C. 370. Houston v. Henley, 2 Del. Ch. 247, where the purchaser

to deal with the property,[57] or pays part of the purchase money,[58] or accepts a conveyance[59] after knowledge of the fraud, he waives his right to rescind, and must look to his remedy upon the covenants. The same rule prevails where fraudulent misrepresentations have been made in respect to the value, quality and situation of the purchased estate.[60]

It has been held that declarations of the purchaser prior to the tender of a conveyance by the vendor, that he would not insist on

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remained in possession four years after discovering the fraud. Colyer v. Thompson, 2 T. B. Mon. (Ky.) 16. Patten v. Stewart, 24 Ind. 332. Negley v. Lindsay, 67 Pa. St. 226; 5 Am. Rep. 427. Cunningham v. Fithian, 2 Gilm. (Ill.) 650. Lawrence v. Dale, 3 Johns. Ch. (N. Y.) 23; Masson v. Bovet, 1 Den. (N. Y.) 69; 43 Am. Dec. 651. In Booth v. Ryan, 31 Wis. 45, the purchaser, four months after discovery of the fraud, paid a part of the purchase money, and seven months later paid another part of the purchase money, without objecting to the fraud in respect to the title, and did not ask for a rescission of the contract until a suit had been commenced to foreclose the purchase money mortgage eighteen months after the fraud had been discovered. It was held that these facts constituted a waiver of the right to rescind. Where a purchaser died eight months after the sale without discovering the vendor's fraud as to the title, and his heir, within a year after discovery of the fraud, and four years after the sale, filed a bill to rescind the contract, it was held that the right to rescind had not been lost or waived by delay. Foster v. Gressett, 29 Ala. 393. In Smith v. Babcock, 2 Woodb. & M. (U. S.) 246, a delay of one year after discovery of the fraud was held no waiver.

[57] 1 Sugd. Vend. (14th ed.) 252, where it is said: "If a purchaser, instead of repudiating the transaction, deal with the property as his own, he is bound, although he afterwards discovers a new circumstance of fraud, for that can be considered only as strengthening the evidence of the original fraud, and it cannot revive the right of repudiation which has been once waived." Campbell v. Fleming, 1 Ad. & El. 40. Gordon-Tiger & Co. v. Brown, 56 Colo. 301, 138 Pac. 51.

[58] Pollard v. Rogers, 4 Call (Va.) 239. Haldane v. Sweet, 55 Mich. 196. Lockridge v. Foster, 4 Scam. (Ill.) 569. Glasscock v. Minor, 11 Mo. 655. Davis v. Evans, 62 Ala. 401; Garrett v. Lynch, 45 Ala. 204. A sub-purchaser who assumes the payment of the original purchase money, and pays part of it after discovering objections to the original vendor's title, has no remedy against his immediate vendor, though the latter may have fraudulently represented the title to be good. Blanchard v. Stone, 15 Vt. 271.

[59] Vernol v. Vernol, 63 N. Y. 45. In Patton v. England, 15 Ala. 71, it was held that if the purchaser accepts a deed with warranty, he cannot set up fraud as a defense to an action for the purchase money. The inference, however, from the facts stated in the case is that the purchaser accepted the conveyance after knowledge of the fraud.

[60] Marshall v. Gilman, 47 Minn. 131; 49 N. W. Rep. 688.

the removal of an incumbrance, which had come to his knowledge, as a condition upon which he would accept the conveyance, did not necessarily amount to a waiver of his right to require that the incumbrance be removed, unless it should appear that the situation of the vendor had been changed for the worse by reason of such declarations.[61]

§ 85. **WAIVER BY PURCHASING WITH NOTICE OF DEFECT.** It has been seen that if the purchaser take possession with notice of an incumbrance or defect in the title, he will, as a general rule, be deemed to have waived his right to rescind the contract for either of those causes.[62] *A fortiori,* if he *purchase* knowing the title to be defective or the property incumbered, will he be denied the right to rescind,[63] unless the defect or incumbrance was contemplated by both parties at the time of the purchase, and the vendor's agreement that they should be cured or removed remain unperformed.[64] If the purchaser enter into the contract with notice that he cannot get a title beyond a limited period, he will be held to have waived any objection to completion of the contract on that account.[65] And the implication of law, in the absence of any express contract, that a clear title was to be conveyed to the purchaser, may be rebutted by showing that he was aware of the existence of incumbrances on the estate when he purchased.[66]

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[61] Swan v. Drury, 22 Pick. (Mass.) 485.

[62] Ante, § 81, *post,* § 246.

[63] 2 Sugd. Vend. 549; 1 id. 265; 2 Warvelle Vend. 843. See cases cited ante, "Waiver by Taking Possession," § 81 and post, § 247; Anderson v. Lincoln, 5 How. (Miss.) 284; Wiggins v. McGimpsey, 13 Sm. & M. (Miss.) 532. Mayo v. Purcell, 3 Munf. (Va.) 243; Jackson v. Ligon, 3 Leigh (Va.), 161; Goddin v. Vaughn, 14 Grat. (Va.) 102. Mills v. Van Voorhis, 23 Barb. (N. Y.) 125; Keating v. Gunther, 10 N. Y. Supp. 734. Alexander v. Kerr, 2 Rawle (Pa.), 80; 19 Am. Dec. 616; Walker v. Quigg, 6 Watts (Pa.), 90; 31 Am. Dec. 452. Rader v. Neal, 13 W. Va. 373. Bryan v. Osborne, 61 Ga. 51. Horne v. Rogers, 110 Ga. 362; 35 S. E. 715. Gooding v. Decker, (Colo.) 32 Pac. Rep. 832. Craddock v. Shirley, 3 A. K. Marsh. (Ky.) 288. Turner v. Howell, 21 Ky. Law R. 979; 53 S. W. 643. Davenport v. Latimer, 53 S. C. 563; 31 S. E. 630. Marcus v. Clark, 185 Mass. 409; 70 N. E. 433. Canton Co. v. Balto. & Ohio R. Co., (Md.) 29 Atl. Rep. 821. Wilson v. Riddick, 100 Iowa 697; 69 N. W. 1039; Ditchey v. Lee, 167 Ind. 267, 78 N. E. 972; Behr v. Hurwitz, 90 N. J. Eq. 110, 105 Atl. 486. Younie v. Walrod, 104 Iowa, 475; 73 N. W. 1021, where the objection to the title was that no patent for the land had issued. But as it appeared that the purchaser knew that fact when he signed the contract, he was required to take the title. A purchaser at a judicial sale who allows the sale to be confirmed without objection for defects of title of which he had knowledge, must pay the purchase money, and cannot be allowed to rescind, though he acquires no valid title. Young v. McClung, 9 Grat. (Va.) 336. Where an auctioneer told a prospective bidder that the purchase money would be applied to the discharge of incumbrances on the property, but offered the property for sale without an announcement to that effect, it was held that a jury was warranted in finding that the property was sold free of incumbrances, and that such bidder purchased with that understanding. Mayer v. Adrian, 77 N. C. 83. In Louisiana it is held that a purchaser buying with knowledge of defect of title does not waive his right to rescind, unless there was a stipulation in the contract

No waiver of a right to object to the title will be presumed from

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that the vendor would not warrant the title, or that the purchaser bought at his peril. Boyer v. Amet, 47 La. Ann. 721; Hall v. Nevill, 3 La. Ann. 326. See also to the same effect, Wallach v. Riverside Bank, 206 N. Y. 434, 100 N. E. 50; McCulloch v. Bauer, 24 N. D. 109, 139 N. W. 318. It has been held also that if the vendor agreed to convey a fee simple title clear of all incumbrances, it is no defense to an action against him for nonperformance that the purchaser was aware of defects in the title at the time of the contract. Godwin v. Maxwell, 106 Ga. 194, 32 S. E. 114; Foute v. Elder, 100 Ga. 713, 35 S. E. 118; Junk v. Barnard, 90 Ind. 137; Jenkins v. Hamilton, 153 Ky. 163; 154 S. W. 937.

[64] Ante, "Waiver by Taking Possession," § 91. Jackson v. Ligon, supra, was a suit by the vendor to compel specific performance, and the defense was that the title was bad. The vendor replied that the defendant purchased with knowledge of the defective title, and the purchaser admitting that fact, averred that by the contract the vendor was expressly bound to make a good and lawful right. Several opinions were rendered by the judges, all in favor of the defendant on this point. The contract was executory, but the case was treated by two of the judges, BROOKE, J., and TUCKER, P., as if there had been a conveyance with covenants against the defects alleged, the latter judge saying: "The case of Stockton v. Cook, 3 Munf. (Va.) 68; 5 Am. Dec. 504, very clearly shows the understanding of this court that a covenant against incumbrances comprehends known as well as unknown incumbrances, and that the vendee is not precluded by his previous knowledge from claiming the fulfillment of the covenant. Were it otherwise it would be impossible for him to provide for his security." In Newbold v. Peabody Heights Co., 70 Md. 413; 17 Atl. Rep. 372, it was held that a purchase with notice of an easement in or restriction on the use of the premises would not amount to a waiver if, by the express terms of the contract, the purchaser was entitled to an estate clear of all restrictions and incumbrances. See also Snowden v. Derrick, 14 Cal. App. 309, 111 Pac. 757.

[65] 1 Sugd. Vend. 346. Godson v. Turner, 15 Beav. 46; 3 Mer. 64.

[66] Newark Sav. Inst. v. Jones, 37 N. J. Eq. 449.

the fact that the contract of sale contains no provision that the conveyance to be executed shall contain covenants for title.[67]

If the purchaser, with full knowledge of the imperfection of the title, takes a bond to protect himself against possible loss, *i. e.,* a title bond, he of course waives all right to rescission. His remedy in such case is by action on the bond.[68]

As a general rule, the existence of an open, notorious and visible physical incumbrance upon the estate, such as a public highway, forms no objection to the title, because it is presumed that the purchaser was to take subject to such incumbrance. Neither does such an incumbrance entitle the purchaser to compensation, nor to an abatement of the purchase money, nor to a conveyance with a covenant against the incumbrance, because it is presumed that in fixing the purchase price the existence of the incumbrance was taken into consideration. A recent decision of the Supreme Court of Judicature in England thus states the rule: "Where it is obvious that there is a right of way enjoyed by some third person, or by the public in general, the existence of such right of way cannot give rise to any objection to the title, as, for example, if the estate sold is a large one with a public highway running through it, then it is obvious that it was not intended to sell the property free from such right of way, but the purchaser would take subject to the right of way." [69]

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[67] Speakman v. Forepaugh, 44 Pa. St. 363, the court saying that the Pennsylvania rule that it is presumed that a purchaser who, with knowledge of a defect of title, takes a conveyance without covenants, intends to run the risk of the defect, has no application "to a mere executory contract of sale, a contract which is only preparatory. Articles of agreement for the sale of land are not intended to describe minutely the extent of the rights to be assured to the purchaser. They rarely undertake to declare what covenants the vendor shall give. They refer not to the title of the vendor when they are executed, but to an assurance afterwards to be made, it may be, of a right which the vendor is expected to acquire after he has engaged to convey. There is, therefore, no presumption that a vendee by articles has agreed to waive any right which the articles, standing alone, would give him."

[68] See post, § 248. Green v. Finucane, 5 How. (Miss.) 542. Baldridge v. Cook, 27 Tex. 566. Horne v. Rogers, 110 Ga. 362; 35 S. E. 715. Russell v. Handy, 22 Ky. Law R. 933; 59 S. W. 320.

[69] Ashburn v. Sewell, L. R., 3 Ch. Div. (1891) 105. The same case decides that the mere delineation of a road on a map of the premises sold will not raise a presumption that the purchaser was to take subject to an easement

A species of rescission of an executed contract for the sale of lands exists in those cases in which the purchaser, to avoid a circuity of actions, is permitted to detain the unpaid purchase money wherever he has a present right of action against the vendor on the covenants in the conveyance; that is, to set up the defense of failure of title by way of recoupment in an action for the purchase money.[70] It has been held that the purchaser waives this right by purchasing with notice of the defect or incumbrance.[71] There would seem to be no reasonable objection to such a rule in cases where the purchaser could apply the purchase money to the removal of the defect or discharge of the incumbrance, or those in which the objections to the title were not recognized and provided for in the contract; but if the vendor expressly agreed to remove the defect or discharge the incumbrance, it is not easy to perceive why the purchaser should not be allowed to detain the unpaid purchase money, as he is permitted to do in the case of an

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in the road enjoyed by third persons, there being nothing to warn the purchaser that strangers had a right to use the road. See also, post, § 127; Hornbeck v. Smith, 87 Ore. 78; 168 Pac. 633. A railroad is not a public highway within the rule stated in the text. Pryor v. Buffalo, 197 N. Y. 123, 90 N. E. 423.

[70] Post, ch. 26.

[71] Greenleaf v. Cook, 2 Wh. (U. S.) 13. Bradford v. Potts, 9 Pa. St. 37. Findley v. Horner, 9 Neb. 537; 4 N. W. Rep. 86. Busby v. Treadwell, 24 Ark. 457; Worthington v. Curd, 22 Ark. 284, where it was said that knowledge of a defect of title or an incumbrance was no objection to recovery upon the covenants of the deed in a court of law, but was ground for equity to refuse relief out of the unpaid consideration, because it appears that with such knowledge the purchaser chose to rely upon the covenants, and to their legal effect he will be remitted. See also Stone v. Buckner, 20 Miss. 73. Beck v. Simmons, 7 Ala. 76. Twohig v. Brown, (Tex.) 19 S. W. Rep. 768. See also post, § 271. In case of a defect of title as to part of the premises, the purchaser waives any right of rescission he may have by accepting a conveyance of the residue. Harrison v. Deramus, 33 Ala. 463. If a purchaser accepts a warranty deed with full knowledge that an ejectment suit is pending for a small portion of the land, he will be deemed to have waived the right to insist upon being put in possession of the disputed portion, and to have taken the risk of gaining or losing the same, and, therefore, he cannot detain the purchase money to the extent of the value of the land in dispute. Johnson v. Jarrett, 14 W. Va. 230. It is difficult to reconcile this decision with the rule that the purchaser's knowledge of the existence of defects in the title to the premises will not affect his right to recover for a breach of the covenants for title, or to detain the purchase money where he

unexecuted contract;[72] especially when it is remembered that knowledge of the defect or incumbrance does not affect the purchaser's right to recover on the vendor's covenants,[73] and that the detention of the purchase money is no more than the assertion of this right in another form.

It has been held that the purchaser will be charged with notice of the defective title wherever, with common or ordinary diligence, he might have informed himself of the objection,[74] as where it consists of an incumbrance of record [75] or of a fact appearing from the instruments under which the title is derived and which the purchaser is presumed to have examined.[76] The better opinion, however, seems to be that the doctrine of constructive notice from the public records has no application to questions which arise between vendor and purchaser.[77]

§ 85-a. **Contract to convey free of incumbrances.** If the written contract between the parties expressly provide that the vendor shall convey the premises free from incumbrances, it is of course immaterial that the purchaser had notice at the time of the contract that there was an incumbrance on the property. He has a right to insist upon the terms of his contract.[78] It is conceived,

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is entitled to substantial damages for such breach. The very object of covenants for title is to protect him as much against known as unknown defects of title.

[72] Post, ch. 24.

[73] Stockton v. Cook, 3 Munf. (Va.) 68; 5 Am. Dec. 504.

[74] Steele v. Kinkle, 3 Ala. (N. S.) 352.

[75] Steele v. Kinkle, supra. Wiggins v. McGimpsey, 13 Sm. & M. (Miss.) 532.

[76] In Wagner v. Perry, 47 Hun. (N. Y.), 516, it was held that the vendor was not in fault in failing to mention the fact that a map had been filed by the public officials increasing the width of a street which bounded the property.

[77] Post, ch. 11, § 104. Nichol v. Nichol, 4 Baxt. (Tenn.) 145.

[78] Weiss v. Binnian, 178 Ill. 241, 52 N. E. 969. The incumbrance in this case was an easement — an ice cutting privilege previously conveyed by the vendor to a third person. The decision would be more satisfactory if the incumbrance had been one of a kind which the vendor could have removed, as a matter of right. It might then have been plausibly contended that notice of the incumbrance did not affect the purchaser's right to recind, because it was the intent of the parties that the incumbrance should be removed.

however, that such an agreement should be limited to those incumbrances which the vendor has the right to remove, such as a mortgage, judgment, or other pecuniary lien. If the incumbrance be of a kind which the vendor cannot remove as a matter of right, such as an easement, it is not to be presumed that the purchaser, knowing the existence of the easement, intended the insertion of a vain provision in the contract.[79]

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[79] Pryor v. Buffalo, 197 N. Y. 123, 90 N. E. 423; Bacot v. Fessenden, 119 N. Y. Supp. 464, 64 Misc. 422; Goodman v. Schwab, 121 N. Y. Supp. 69, 136 App. Div. 492.

CHAPTER IX.

TENDER OF PERFORMANCE AND DEMAND FOR DEED.

TENDER BY PURCHASER. § 86.
EXCEPTIONS. § 87.
TENDER BY VENDOR. § 88.
PLEADINGS. § 89.

§ 86. **GENERAL RULE.** Few contracts for the sale of lands are completed at the time the vendor agrees to sell and the purchaser agrees to buy. Ordinarily the final execution of the contract is postponed, at the instance of the purchaser, until some day in the future, either that he may have time in which to examine the title or for his convenience and accommodation in respect to the payment of the purchase money. And sometimes performance is postponed at the instance of the vendor, either because he is not ready to deliver possession or because he desires time in which to remove an objection to the title. Under these circumstancés the respective covenants of the parties to pay the purchase money and to execute a conveyance are either mutual, concurrent and dependent, that is, to be performed at one and the same time; or, independent, in which case full performance by one of the parties may be exacted as a condition precedent to performance by the other. Hence, it follows that whenever, by the terms of the contract, the payment of the purchase money and the conveyance of a good title, are dependent and concurrent acts, the purchaser must pay, or offer to pay, the purchase money in full, demanding at the same time that the vendor shall execute and deliver to him a deed conveying an indefeasible estate in the premises.[1] The vendor must be given an opportunity to perform his contract before he can be put in default, and in an action maintained against him for breach of the contract, or to recover back the purchase money, or to compel specific performance of the contract. The covenants being dependent the purchaser must, as a general rule, tender the purchase money, whether he wishes to rescind the contract, or to affirm it by action to recover damages for the breach.[2] Generally these agreements will be construed to be dependent, unless a contrary intention appears. The question whether they are or are not dependent will be determined by the manifest intention of the parties and not from any particular word or phrase which the contract may contain.[3] Parol evidence of the surrounding circumstances will be admitted to show whether, at the time of the execution of a written contract for the sale of lands, it was the intention of the parties that the payment of the purchase money on the one part and the execution of a conveyance on the other

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[1] Post, § 253. Chitty Cont. (10th Am. ed.) 332; 1 Sugd. Vend. (8th Am. ed.) 241; 2 Dart Vend. (4th ed.) 877. Poole v. Hill, 6 M. & W. 835; Baxter v. Lewis, For. Ex. 61; Mattock v. Kinglake, 10 Ad. & El. 50. Clemens v. Loggins, 1 Ala. 622. Smith v. Henry, 2 Eng. (Ark.) 207; 44 Am. Dec. 540; Byers v. Aikin, 5 Ark. 419; Drennere v. Boyer, Ark. 497. Dennis v. Strasburger, 89 Cal. 583; 26 Pac. Rep. 1070. Poheim v. Myers, 9 Cal. App. 81, 98 Pac. 65; Griesemer v. Hammond, 18 Cal. App. 535; 123 Pac. 818; Ishmael v. Parker, 13 Ill. 324; Headley v. Shaw, 39 Ill. 384; Warren v. Richmond, 53 Ill. 52; Cronk v. Trumble, 66 Ill. 428. Sheets v. Andrews, 2 Bl. (Ind.) 274; Browning v. Clymer, 1 Ind. 579; Axtel v. Chase, 77 Ind. 74. Stockton v. George, 5 How. (Miss.) L. 172; Johnston v. Beard, 7 Sm. & M. (Miss.)

217; Standifer v. Davis, 12 Sm. & M. (Miss.) 48; Hudson v. Watson, 26 Miss. 357; Hill v. Samuel, 31 Miss. 307. Hudson v. Swift, 20 Johns. (N. Y.) 23; Raudabaugh v. Hart, 61 Ohio St. 73; 55 N. E. 214. Guthrie v. Thompson, 1 Oreg. 353. Baum v. Dubois, 43 Pa. St. 260; Poulson v. Ellis, 60 Pa. St. 134; Irvin v. Bleakley, 67 Pa. St. 24. Shouse v. Doane, 39 Fla. 95; 21 So. 807. A purchaser seeking to enjoin the collection of the purchase money on the ground of defect of title and non-execution of a conveyance, must aver a tender of the purchase money. Harris v. Bolton, 8 Miss. 167. An abandonment of the possession by the purchaser, without a tender of the purchase money, is no defense to an action for the purchase money. Clemens v. Loggins, 1 Ala. 622. A purchaser rescinding the contract for defect of title should tender payment and demand a conveyance, or take some other step showing an intention to give up his bargain. Hunter v. Goudy, 1 Ohio, 449. Where a vendor has received the purchase money, and no time has been specified in which the deed is to be made, there should be a demand for a deed and a refusal to execute it, before a suit to recover back the purchase money can be maintained. McNamara v. Pengilly, 64 Minn. 543; 59 N. W. Rep. 1055. Kime v. Kime, 41 Ill. 397. Walters v. Miller, 10 Iowa, 427. Where the deed is to be made by executors, no such action can be maintained before the executors have qualified. Hyde v. Keller, 10 Wash. 586; 39 Pac. Rep. 249. The failure of the vendor to tender an abstract of title provided for in the contract, does not excuse the vendee, seeking specific performance of the contract, from the duty of making a tender of the purchase money. Kelsey v. Crowther, 162 U. S. 404; 16 Sup. Ct. Rep. 808.

[2] Irvin v. Bleakley, 57 Pa. St. 24, 28. Thomas v. Walden, 57 Fla. 234, 48 So. 746.

[3] 1 Sugd. Vend. (8th ed.) 362 (239); Dart's Vend. (Waterman's Notes) 449. Noyes v. Brown, (Minn.) 171 N. W. 802.

were to be mutual and concurrent acts.[4] Where neither the contract nor the circumstances of the case show the intention of the parties in this respect, the law implies that payment of the purchase money and delivery of the conveyance shall be concurrent acts.[5] In cases of doubt the agreements will be construed to be dependent.[6] The covenants are not dependent and concurrent where the vendor is not to convey until after the purchase money has been paid.[7] As a general rule, where the contract provides that the vendor will furnish an abstract of title on payment of the balance of the contract price, the tender of the abstract and of the purchase money are dependent and concurrent acts, and both must transpire before either party can be put in default.[8]

The mere failure of the vendor to tender a conveyance and demand payment of the purchase money on the day fixed for completing the contract will not excuse a failure of the purchaser to tender performance on his part, unless it also appear that the vendor had no title and was unable to convey. The mere neglect of the parties to perform the contract at the appointed time cannot, without anything more, amount to a rescission.[9] If the vendor be absent from his residence or usual place of abode when the purchase money becomes due, a tender to some person left in charge there will be sufficient; a personal tender to the vendor is not absolutely necessary.[10] It has also been held that the expression "tender of the purchase money," as used in this connection, does not mean such a tender as is required to stop interest on a debt; it means a readiness, willingness and ability to pay, accompanied by notice thereof to the other party.[11] So, also, tender of performance by the vendor does not mean in every case the actual production and tender of a deed; if the purchaser himself does not tender performance, it is sufficient for the preservation of the rights of the vendor that he be able and willing to execute, and offers to execute and deliver, such a conveyance as the contract requires.[12] If the purchaser tenders the purchase money there is no obligation on him to keep the tender good, where the vendor has failed to furnish an abstract of title showing the property free of incumbrances, required by the contract.[13]

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[4] Sewall v. Wilkins, 14 Me. 168. This was an action by the purchaser on a title bond executed by the vendor. Testimony was admitted, over the objection of the plaintiff, to show that he (the plaintiff, purchaser) knew at the time of the purchase that there was a technical objection to the title which could probably not be removed precisely at the time fixed for completing the contract. "The law," said WESTON, C. J., "is well settled that whether the acts to be performed by the parties respectively in a covenant or agreement are to be regarded as mutual, dependent, concurrent or otherwise, is to be determined by their intention, apparent from the written evidence of what has been agreed, in connection with the subject-matter to which it is to be applied."

[5] Rushton v. Campbell, 94 Neb. 141, 142 N. W. 902.

[6] Ink v. Rohrig, 23 S. D. 548; 122 N. W. 594.

[7] Ward v. James, 84 Oreg. 375, 164 Pac. 370.

[8] Kessler v. Pruitt, 14 Idaho 175, 93 Pac. 965.

[9] Townsend v. Tufts, 95 Cal. 257; 30 Pac. Rep. 528.

[10] Smith v. Smith, 25 Wend. (N. Y.) 404. Here a tender to the son of the vendor at her home, she being absent, was held sufficient.

Tender of the purchase money is not invalidated by being coupled with a demand for performance on the part of the vendor.[14]

§ 87. **EXCEPTIONS.** The rule which requires a tender of the purchase money and demand of a deed on the part of the purchaser does not apply where the vendor's abstract shows a bad title,[15] or where the inability of the vendor to make a good title is so apparent that a tender and demand would be superfluous;[16] as where the premises have been recovered from the purchaser by one claiming under a paramount title,[17] or under an incumbrance created by the vendor,[18] or where the vendor has conveyed away the premises to a third person;[19] or where he has executed a declaration that he holds the premises in trust;[20] or where the sale was by agent and the principal has repudiated the contract.[21] If the contract provide that the vendor shall show a good title as a condition precedent to the payment of the purchase money, the purchaser need not tender the purchase money and demand a conveyance before maintaining his action, unless the good title be shown.[22] An apparent contradiction is involved in the two propositions that the purchaser need not tender the purchase money and demand a deed when the vendor's abstract shows a bad title, and that the vendor is entitled to a reasonable time in which to remove incumbrances and objections to the title, unless the first proposition is strictly limited to those cases in which the defect or incumbrance is incapable of removal, so that a tender would be utterly vain and nugatory.[23] If the purchaser seeks to rescind the contract, or to recover damages against the vendor for non-performance, it seems to be the better opinion that the mere existence of an incumbrance upon the property will not excuse him from performing or tendering performance on his part, if the incumbrance can be discharged out of the purchase money. The vendor should be given an opportunity to remove the incumbrance.[24] But there are cases in which the contrary view has been taken.[25] If, however, in a case in which the estate is incumbered, the purchaser seeks not a rescission, but specific performance of the contract,[26] or if he sues to recover liquidated damages for a breach of the contract, it seems that the purchaser loses no rights by failing to tender performance.[27] No duty devolves upon the purchaser to tender the purchase money and demand a conveyance in a case in which the acts and conduct of the vendor himself show an intent to rescind the contract,[28] *e. g.,* where the vendor has expressly notified the purchaser that he will not execute a conveyance,[29] or receive the purchase money,[30] or has expressly repudiated the contract.[31] But, obviously, this principle does not apply where the vendor, acting in good faith, has declared a forfeiture of the contract by reason of the failure of the purchaser to perform at the appointed time.[32]

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[11] Smith v. Lewis, 26 Conn. 110. Clark v. Weis, 87 Ill. 438; 29 Am. Rep 60. Booth v. Saffold, 46 Ga. 278. Luchitti v. Frost, (Cal.) 65 Pac. 969. It seems that an averment of ability and willingness to pay on tender of a good title is sufficient. Smith v. Robertson, 11 Ala. 840. But see Englander v. Rogers, 41 Cal. 420, where it was said that the purchaser must *produce* and offer to pay the purchase money.

[12] Wells v. Day, 124 Mass. 138. Teal v. Langdale, 78 Ind. 339.

[13] Hutchinson v. Coonley, 209 Ill. 437; 70 N. E. 686.

[14] Alpern v. Farrell, 117 N. Y. Supp. 706; 133 App. Div. 278.

[15] Post, § 194. 1 Sugd. Vend. (8th ed.) 367; 2 id. 212; Dart Vend. (Gould's Am. ed.) 504, 510. Seward v. Willcock, 5 East, 198; Knight v. Crockford, 1 Esp. 189; Wilmot v. Wilkinson, 6 B. & C. 506. Johnson v. Collins, 17 Ala. 318; Garnett v. Yoe, 17 Ala. 74; Bedell v. Smith, 37 Ala. 619. Lawrance v. Taylor, 5 Hill (N. Y.) 107; Holmes v. Holmes, 12 Barb. (N. Y.) 137; Foster v. Herkimer Mfg. Co., 12 Barb. (N. Y.) 352; Spaulding v. Fierle, 86 Hun (N. Y.) 17; Glenn v. Rossler, 88 Hun, (N. Y.) 74; 34 N. Y. Supp. 608; Higgins v. Engleton, 155 N. Y. 466; 50 N. E. 287; Brokaw v. Duffy, 165 N. Y. 391; 59 N. E. 196; Washington v. Mining Co., (Tex. Civ. App.) 67 S. W. 459. Omaha v. Omaha Water Co., 192 Fed. 246, 112 C. C. A. 504. English v. Plaster Co., 192 Fed. 717; Lathrop v. Collieries Co. 70 W. Va. 58, 73 S. E. 299; Wheeling Cr. Gas Co. v. Elder, 54 W. Va. 335, 45 S. E. 357.

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[16] Magee v. McMillan, 30 Ala. 421; Griggs v. Woodruff, 14 Ala. 9; Smith v. Robertson, 23 Ala. 324. Holmes v. Holmes, 12 Barb. (N. Y.) 137. Blann v. Smith, 4 Bl. (Ind.) 517; Bowen v. Jackson, 8 Bl. (Ind.) 203; Carpenter v. Lockhart, 1 Ind. 434. Edmonds v. Cochran, 12 Iowa, 488; Primm v. Wise (Iowa), 102 N. W. 427. Baynes v. Bernhard, 12 Ga. 150. Reed v. Witcher, 23 Cal. App. 136, 137 Pac. 294; Janulewycz v. Quagliano, 88 Conn. 60, 89 Atl. 897; Suthoff v. Marusca, 57 Wash. 102, 106 Pac. 632; Sachs v. Owings, 121 Va. 162, 92 S. E. 997; Russell v. Crowley, 132 N. Y. Supp. 185, 147 App. Div. 361.

[17] Kerst v. Ginder, 1 Pittsb. (Pa.) 314.

[18] Buchanan v. Lorman, 3 Gill (Md.), 51. Delavan v. Duncan, 49 N. Y. 485. So, where the premises have been sold under an incumbrance which the vendor engaged to remove. Way v. Raymond, 16 Vt. 371.

[19] 2 Sugd. Vend. (8th Am. ed.) 212 (516). Post, § 253. Sir Anthony Main's Case, 5 Coke's Rep. 211. Wilhelm v. Fimple, 31 Iowa, 131; 7 Am. Rep. 117. Nesbitt v. Miller, 125 Ind. 106; 25 N. E. Rep. 148. Smith v. Rogers, 42 Hun (N. Y.), 110. Baun v. Dubois, 43 Pa. St. 260; Irvin v. Bleakley, 67 Pa. St. 24; Cash v. Meisenheimer, 53 Wash. 576, 102 Pac. 429. In Sons of Temp. v. Brown, 9 Minn. 157, it was held that a tender of the purchase money might be made to the grantee of the vendor, he having notice of the purchaser's rights. In California it has been held in several cases that a conveyance by the vendor to a third person before the day fixed for performance of the contract of sale, does not entitle the purchaser to treat the contract as abandoned or rescinded before the time of performance arrives, the court saying that one may sell land which he does not own, and yet be able, when the time of performance arrives to convey a good title. Joyce v. Shafer, 97 Cal. 335; Shively v. Land Co., 99 Cal. 259; 33 Pac. 848; Garberino v. Roberts, 109 Cal. 125; 41 Pac. 857.

[20] Seiberling v. Lewis, 93 Ill. App. 549.

[21] Where the sale is by an agent the purchaser is entitled to a conveyance from the principal, and if the principal refuse to convey the purchaser may recover back the purchase money without making a tender or showing readiness to perform the contract. Bell v. Kennedy, 100 Pa. St. 215.

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[22] 1 Sugd. Vend. (8th Am. ed.) 363 (239). In Davis v. Real Estate Co., 163 Mo. App. 328, 143 S. W. 1108, it was held that an offer by the purchaser to perform, without tendering the purchase money, is sufficient where the vendor is unable to convey a clear title.

[23] Read v. Walker, 18 Ala. 323, where it was said that if the vendor has no title, *and cannot procure or cause one to be made*, the law does not impose on the purchaser the useless ceremony of preparing and tendering a deed before he can apply to a court of equity for a rescission of the contract, since he would not be bound under such circumstances to accept the deed, although the vendor should be willing to execute it.

[24] Post, § 308. 2 Sugd. Vend. (8th Am. ed.) 25 (425), where it is said that an incumbrance is no objection to the title if the incumbrancer can be compelled to join in the conveyance. In Snyder v. Betker, 159 Mo. App. 325, 140 S. W. 321, it was held that an incumbrance of $1,000 and tax-bills on the property, did not relieve the purchaser from the obligation to tender the purchase money.

[25] Morange v. Morris, 34 Barb. (N. Y.) 311; affd., 32 How. Pr. (N. Y.) 178, where it was said to be the duty of the vendor to remove incumbrances before the time fixed for completing the contract. The purchaser was permitted to recover his deposit and the costs of examining the title. Hewison v. Hoffman, 4 N. Y. Supp. 621. It has since been held in this State that the existence of an incumbrance does not relieve the purchaser from the obligation to tender the purchase money. Ziehen v. Smith, 148 N. Y. 558; 42 N. E. 1080; Higgins v. Eagleton, 155 N. Y. 466; 50 N. E. 287; Campbell v. Pruyne, 39 N. Y. Supp. 558; 6 App. Div. 554; Keitel v. Zimmerman, 43 N. Y. Supp. 676; 19 Misc. 581; Marshall v. Weninger, 46 N. Y. Supp. 670; 20 Misc. 527; Minor v. Hilton, 44 N. Y. Supp. 155; 15 App. Div. 55; Daly v. Bruen, 84 N. Y. Supp. 971; 88 App. Div. 263.

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[26] Kerr v. Purdy, 50 Barb. (N. Y.) 24.

[27] Karker v. Haverley, 50 Barb. (N. Y.) 79. In this case the purchaser tendered the cash payment, but refused to execute a bond and purchase-money mortgage for the deferred payments upon the ground that the property was incumbered. The vendor then brought an action to recover $600 liquidated damages. Judgment was rendered for the defendant. See also N. Wyo. Land Co. v. Butler, 252 Fed. 971, 164 C. C. A. 479.

[28] Mathison v. Wilson, 87 Ill. 51. Sims v. Boaz, 19 Miss. 318. Drew v. Pedlar, 87 Cal. 443; 25 Pac. Rep. 749. Buchanan v. Lorman, 3 Gill. (Md.), 51. Thus, where the purchaser had paid part of the purchase money, and a conveyance had been executed in escrow, and afterwards the vendor reclaimed the escrow from the holder and denied the validity of the contract with intent to rescind the same, it was held that the purchaser might recover back the purchase money paid without showing a tender of that which remained unpaid, and demand of the deed. Merrill v. Merrill, 95 Cal. 334; 30 Pac. Rep. 542.

[29] Traver v. Halstead, 23 Wend. (N. Y.) 66; Foot v. West, 1 Den. (N. Y.) 544. Remy v. Olds, 88 Cal. 537. Comstock v. Lager, 78 Mo. App. 390; Alpern v. Farrell, 117 N. Y. Supp. 706, 133 App. Div. 278. It has been said that if the vendor denies the obligation of the contract, or places himself in such a position that it appears that if a tender of the price were made it would be refused, the purchaser need make no tender of payment or demand of a conveyance in order to preserve his rights. 2 Warvelle Vend. 774, citing, for the first proposition, Brock v. Hidy, 13 Ohio St. 306, and for the second, Deichman v. Deichman, 49 Mo. 107. Brown v. Eaton, 21 Minn. 409. See, also, Quimby v. Lyon, 63 Cal. 394. So, no tender is necessary when the vendor is proceeding on his legal title against the purchaser. Irvin v. Bleakley, 67 Pa. St. 24, 28, *dictum.*

[30] Stone v. Sprague, 20 Barb. (N. Y.) 509; Maupai v. Jackson, 118 N. Y. Supp. 513.

[31] Cabrera v. Payne, 10 Cal. App. 675, 103 Pac. 176.

[32] Boger v. Bell, 84 Wash. 131, 146 Pac. 179.

Mere inability of the vendor to make a perfect title will not, under all circumstances, relieve the purchaser of the duty of tendering the purchase money and demanding a conveyance, as where the objection to the title is an incumbrance, lien, or charge, that may be removed by application of the purchase money.[33]

The time fixed for performance, having passed without an offer by either party to perform, becomes indefinite, and neither party can thereafter put the other in default without an offer to perform.[34]

§ 88. **DUTY OF THE VENDOR TO TENDER PERFORMANCE.** If, under the contract, the payment of the purchase money and the conveyance of a good title be concurrent and dependent acts, the purchaser may detain the purchase money until such a conveyance is tendered to him, or until the vendor shall show himself ready, able and willing to execute such a conveyance as the purchaser shall devise. The vendor must fully perform or tender performance on his part before he can put the purchaser in default;[35]

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[33] In Hartley v. James, 50 N. Y. 38, the court said: "Mere defect of title in the vendor and a present inability to give such title as the contract calls for, may not, in all cases, and under all circumstances, dispense with a tender of payment and a demand of a conveyance by the vendee in order to entitle the latter to maintain an action for the money already paid, or to defend an action for the purchase money, if the payment becomes due before a deed is to be given by the terms of the contract. Under some circumstances the court will not hold a contract void by reason of the inability of the seller to make a perfect title, but will put the purchaser to a tender of payment and a demand of the deed, to the end that the seller may make his title good." Citing Harrington v. Higgins, 17 W. R. 376; Green v. Green, 9 Cow. (N. Y.) 46; Greenby v. Cheevers, 9 Johns. (N. Y.) 126.

[34] Ready v. Investment Co., 64 Wash. 422, 116 Pac. 1093.

[35] Post, § 253. 1 Sugd. Vend. (8th Am. ed.) 364 (240); Chitty Cont. (10th Am. ed.) 330. Swan v. Drury, 22 Pick. (Mass.) 485. Critchett v. Cooper, 65 N. H. 167; 18 Atl. Rep. 778. McWilliams v. Long, 32 Barb. (N. Y.) 194; 19 How. Pr. 547. Guthrie v. Thompson, 1 Oregan, 353. Pershing v. Canfield, 70 Mo. 140. Pursley v. Good, 94 Mo. App. 382. Overly v. Tipton, 68 Ind. 410; Soule v. Holdridge, 63 Ind. 213; Melton v. Coffelt, 59 Ind. 310; Parker v. McAllister, 14 Ind. 12. Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315; Lemle v. Barry (Cal.) 183 Pac. 148; Booth v. Millikin, 111 N. Y. Supp. 791, 127 App. Div. 522; Echols v. Miller, (Tex. Civ. App.) 218 S. W. 48; Edwards v. Watson, 258 Mo. 631, 167 S. W. 1119; Ogooshevitz v. Wahijas, 203 Mich. 664, 169 N. W. 820; Osborne v. Fairley, (Ark.) 211 S. W. 917; Moss v. King, 186 Ala. 475, 65 So. 180; Robinson v. Yetter, 238 Ill. 320, 87 N. E. 363; Adler v. Kohn, 96 Neb. 346, 147 N. W. 1131; Brown v. Lee, 192 Fed. 817, 113 C. C. A. 141.

his mere readiness, willingness, or ability to perform are insufficient without a tender of performance by him.[36] If the contract provide that the purchase money shall not be paid until the title has been perfected to the satisfaction of the purchaser, the vendor cannot put the latter in default until he is able to execute a deed conveying a perfect title, and has advised him of the fact.[37] Payment by the purchaser and conveyance by the vendor may be dependent and concurrent acts, though the contract provides that "If the purchaser shall first make payment, the vendor will convey," etc.[38] The rule that the vendor must tender performance in order to put the purchaser in default does not apply

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In Stingle v. Hawkins, 8 Blackf. (Ind.) 435, a vendor executed a title bond conditioned to make a deed on the payment of certain notes for the purchase money, payable two years after date, and it was held that a suit on the notes would not lie until the vendor had offered to make a deed, or had shown a sufficient reason for not doing so. Citing Leonard v. Bates, 1 Blackf. (Ind.) 172; Owen v. Norris, 5 id. 479; Burrows v. Yount, 6 id. 458; 39 Am. Dec. 439. It has been held in California that the vendor's tender of the deed of a third party conveying a perfect title to the purchaser, is a sufficient performance by the vendor, unless the purchaser then and there specifically objects that the conveyance is not by the vendor himself. The purchaser must make the specific objection in order that the vendor may have an opportunity to procure a conveyance to himself from the third party. Unless specifically made the objection will be deemed to have been waived. Royal v. Dennison, 109 Cal. 558; 42 Pac. 39.

In Southern Pac. R. Co. v. Allen, 112 Cal. 455; 44 Pac. 796, the contract provided that the purchase money should be paid on or before a certain day, and that the vendor, a railroad company, should convey upon its receipt of a patent for the land, or refund the purchase money in case it should be finally determined that no patent should issue. It was held that the arguments to pay the purchase money and to execute a conveyance were not mutual and that the railroad company might maintain an action for the balance of the purchase money without tendering a conveyance, no patent having yet been issued to the company.

Vendor, being unable to furnish insurance of the title on the "law day" pursuant to agreement, purchaser may rescind. Drake v. Gaffney, 171 N. Y. Supp. 131; 183 App. Div. 577. An agreement by the purchaser to pay the installments of the purchase money at specified times, provided the vendor furnishes him within 90 days an abstract showing a good merchantable title to the premises, is a condition precedent rather than a condition concurrent, and the purchaser is entitled to rescind and recover his deposit, unless the abstract showing such title is furnished in the specified time. Kennedy v. Dennstadt, 31 N. D. 422; 154 N. W. 271.

[36] Rasst v. Morris, (Md.) 108 Atl. 787.

[37] Kirkland v. Little, 41 Tex. 456.

[38] Ink v. Rohrig, 23 S. D. 548, 122 N. W. 594.

if the latter has given notice that he will be unable to pay the purchase money, even though the abstract furnished by the vendor showed an objection to the title. The vendor is under no obligation to remove or offer to remove the objection when the purchaser declares his own inability to complete the contract.[39] Nor where the purchaser declares that he will not carry out the contract.[40] Nor where the contract provides for payment of an installment of the purchase money before the time fixed for the execution and delivery of the deed.[41] Nor where the purchaser has failed to perform on his part what he was required by the contract to do before he could demand performance by the vendor.[42] The general rule is that if either party renounce the contract, tender of performance by the other is unnecessary; but in order to recover damages for the breach such other party must show his ability to perform.[43] If the purchase money is payable in installments, and the purchaser is not to receive a deed until the last installment is paid, the covenants are independent, except as to the last installment,[44] and the weight of authority seems to establish the rule that the purchaser cannot decline to pay one of the intermediate installments upon the ground that the vendor has no title, for *non constat,* but that he may acquire or perfect the title before the last installment becomes due.[45] It has been held that the rule that the vendor must tender a conveyance before he can enforce the payment of the purchase money, does not apply to a proceeding in equity to collect the purchase money. The reason stated for this exception is that the rights of the purchaser may be protected upon final decree in the cause.[46] The vendor is not bound to tender a deed to a sub-purchaser; it is sufficient if he make tender to the original purchaser. He cannot be required to hunt up the assignees of the purchaser.[47]

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[39] Johnston v. Johnston, 43 Minn. 5; 44 N. W. Rep. 668.

[40] Sweitzer v. Hummel, 3 Serg. & R. (Pa.) 228; Hampton v. Specknagle, 9 Serg. & R. (Pa.) 22; 11 Am. Dec. 704. Bucklen v. Hasterlik, 155 Ill. 423; 41 N. E. Rep. 561. Gray v. Mills, 83 Fed. 824; Blanton v. Ky. Distilleries Co. 120 Fed. 318. Bowersock v. Beers, 82 Ill. 396. Armstrong v. Dunn, 163 Mo. App. 701, 147 S. W. 509; Garibaldi Realty Co. v. Santangelo, 149 N. Y. Supp. 669, 164 App. Div. 513; Wolford v. Jackson, 123 Va. 280, 96 S. E. 237; Armstrong v. Palmer, (Tex. Civ. App.) 218 S. W. 627; Milton v. Crawford, 65 Wash. 145; 118 Pac. 32; Boyd v. Hoffman, 241 Pa. 421; 88 Atl. 675.

[41] Strauss v. Yeager, 48 Ind. App. 448, 93 N. E. 877.

[42] Lang v. Hedenberg, 277 Ill. 368, 115 N. E. 566.

[43] Dosch v. Andus, 111 Minn. 287, 126 N. W. 1071.

[44] Post, § 208. Terry v. George, 37 Miss. 539. Kane v. Hood, 13 Pick. (Mass.) 281, the court saying: "Where the whole purchase money is to be paid at once, and the deed is to be then given, the covenants are held to be dependent, because it is unreasonable to presume that the purchaser intended to pay the whole consideration without having the equivalent in a title to the land purchased. The same reason applies to the last installment." McLeod v. Snyder, (Mo.) 19 S. W. Rep. 494. If suit be delayed until all the installments become due, then the covenants to pay and to make title become dependent. Johnson v. Wygant, 11 Wend. (N. Y.) 48. Compare Boger v. Bell, 84 Wash. 131, 146 Pac. 179, where held that the vendor does not waive his right to declare a forfeiture of the contract by extending, for a definite period, the time for payment of an installment of the purchase money and allowing a fair opportunity thereafter to make the payment.

Although the vendor is entitled to a judgment for the purchase money without tender of a deed by him, where, by the contract, payment of the purchase money is made a condition precedent to performance by him, the court should stay the enforcement of the judgment until he deposits in court for delivery to the purchaser, the deed required by the contract.[48]

It has been held that it is not necessary that the vendor shall have the legal title at the time fixed for the performance of the contract if he can control it and have it conveyed to the purchaser on payment of the purchase money.[49] This may be true where the sale was made by an executor or trustee, or other person acting in a representative character, from whom covenants of title cannot be required, who tenders a deed executed by the party whom he represents, containing the proper covenants. But it can hardly be contended that a purchaser from a solvent and responsible party may be compelled to accept a conveyance from a stranger, whose covenants for title may be worthless.[50] Where the contract provided that the vendor, its successors or assigns, would convey by special warranty deed, the tender of such a deed executed by a grantee of the vendor was held to be sufficient.[51]

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[45] Post, § 253. Kane v. Hood, 13 Pick. (Mass.) 281. Duncan v. Charles, 4 Scam. (Ill.) 561; Runkle v. Johnson, 30 Ill. 328; Monson v. Stevens, 56 Ill. 335. Johnson v. Wygant, 11 Wend. (N. Y.) 50, *semble;* Harrington v. Higgins, 17 Wend. (N. Y.) 376. Lockwood v. Hannibal & St. J. R. Co., 65 Mo. 233; Smith v. Busby, 15 Mo. 387; 57 Am. Dec. 207. Oakes v. Buckley, 49 Wis. 592. Loveridge v. Coles, 72 Minn. 57; 74 N. W. 1109. Real Est. Co. v. Walkup, 27 Cal. App. 441, 150 Pac. 385; Hawkins v. Rogers, (Oreg.) 179 Pac. 563; Shepman Mtge. Co. v. Sussman, 131 N. Y. Supp. 645, 147 App. Div. 25. The installment contract should not be so construed as to allow the vendor an unreasonable time in which to tender the deed. Thomas v. Seaman, 275 Ill. 267, 114 N. E. 40.

[46] Rutherford v. Haven, 11 Iowa, 587; Winton v. Sherman, 20 Iowa, 295. The same rule seems to prevail in Texas; Bridge v. Young, 9 Tex. 401; Lawrence v. Simonton, 13 Tex. 220; Taylor v. Johnston, 19 Tex. 351.

[47] Heidenberg v. Jones, 73 Ill. 149.

[48] Noyes v. Brown, (Minn.) 171 N. W. 802.

[49] Hazelton v. Le Duc, 10 App. D. C. 379, citing Dresel v. Jordan, 104 Mass. 415 and Flannigan v. Fox, 23 N. Y. Supp. 344; 26 Id. 48; 6 Misc. 132. In the first two of these cases the sale was made by parties acting in a representative capacity.

In the American States,[52] with but few exceptions,[53] it is the duty of the vendor to prepare and pay for the conveyance and have it in readiness for delivery when demanded by the purchaser. In the English practice, the purchaser prepares the conveyance and tenders it to the vendor with the purchase money.[54] The American rule, as generally expressed, is that, to put the vendor in default, it is necessary that the vendee should demand a deed, wait a reasonable time for the vendor to get it drawn, and then present himself to receive it.[55] Of course, the parties may contract that the purchaser shall prepare and tender the deed for execution.[56] It has been held that a personal representative of an assignee of the vendor, having no connection with the contract and no act to perform in respect to it, need not tender a conveyance as a condition precedent to the enforcement of a vendor's lien on the property.[57] But it was held in the same case that the court would not direct a sale of the land, unless the purchaser put himself in default by declining to pay the purchase money.

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[50] *Ante*, § 18; *post*, § 315.

[51] Herrick Imp. Co. v. Kelly, 65 Wash. 16, 117 Pac. 705, distinguishing Gottschalk v. Meisenheimer, 62 Wash. 299, 113 Pac. 765.

[52] Taylor v. Longworth, 14 Pet. (U. S.) 175. Stone v. Lord, 80 N. Y. 60. Seeley v. Howard, 13 Wis. 336; Dye v. Montague, 10 Wis. 15. Hill v. Hobart, 16 Me. 164. Especially if the contract provides that the vendor shall "make and execute a deed." Walling v. Kinnaird, 10 Tex. 508; 60 Am. Dec. 216. Fairfax v. Lewis, 2 Rand. (Va.) 20. Standifer v. Davis, 13 Sm. & M. (Miss.) 548 Sons of Temp. v. Brown, 9 Minn. 157. Baston v. Clifford, 68 Ill. 67; 18 Am. Rep. 547. The purchaser is not obliged to prepare and tender a deed, unless such an obligation can be fairly inferred from the contract. Buckmaster v. Grundy, 1 Scam. (Ill.) 310; Headley v. Shaw, 39 Ill. 354. It is only necessary that the purchaser shall allege that he demanded a deed; he need not allege that he prepared it and presented it for execution. Standifer v. Davis, 13 Sm. & M. (Miss.) 548.

[53] Byers v. Aiken, 5 Pike (Ark.), 419, 497. But see Arledge v. Brooks, 22 Ark. 427. In Alabama, the English rule that the purchaser must prepare the conveyance and tender it to the vendor to be executed, has been held to prevail. Wade v. Killough, 5 Stew. & P. (Ala.) 450; Chapman v. Lee, 55 Ala. 616.

[54] 1 Sugd. Vend. (8th Am. ed.) 366 (241).

[55] Fuller v. Hubbard, 6 Cow. (N. Y.) 13; 16 Am. Dec. 423; Hackett v. Huson, 3 Wend. (N. Y.) 250. Dye v. Montague, 10 Wis. 15.

There are cases which hold that to put the vendor in default, the purchaser must demand the deed, wait a reasonable time for the vendor to have it drawn, and again present himself and make a second demand; [58] the purchaser being at liberty, however, to obviate the necessity of a second demand, by himself preparing and tendering the deed.[59] But the better opinion seems to be that it is the duty of the vendor to prepare the deed and have it in readiness for delivery at the time appointed for the completion of the contract, and that a demand for the deed at that time is sufficient to put him in default.[60]

Where the contract fixes no time for performance, the vendor is not bound to convey the instant the purchase money is paid; he is entitled to a reasonable time in which to perform.[61]

The purchaser, by demanding execution of a full covenant warranty deed and the production of evidence that the property is free from incumbrances, when he is not entitled by the contract to make such demands, thereby waives the tender of such deed as he is entitled to under the contract.[62]

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[56] Tinney v. Ashley, 14 Pick. (Mass.) 546; 26 Am. Dec. 620. As where the contract provides that the vendor shall execute such conveyances as the purchaser shall devise. Sweitzer v. Hummel, 3 Serg. & R. (Pa.) 228.

[57] Mhoon v. Wilkinson, 47 Miss. 633.

[58] Fuller v. Hubbard, 6 Cow. (N. Y.) 13; 16 Am. Dec. 423; Fuller v. Williams, 7 Cow. (N. Y.) 53; 17 Am. Dec. 498; Hackett v. Huson, 3 Wend. (N. Y.) 250; Connelly v. Pierce, 7 Wend. (N. Y.) 129; Lutweller v. Linnell, 12 Barb. (N. Y.) 512; Pearsoll v. Frazer, 14 Barb. (N. Y.) 564. Johnston v. Beard, 7 Sm. & M. (Miss.) 214; Hudson v. Watson, 26 Miss. 357.

[59] Connolly v. Pierce, 7 Wend. (N. Y.) 129, 132; Wells v. Smith, 2 Edw. (N. Y.) 78; Foote v. West, 1 Den. (N. Y.) 544; Camp v. Morse, 5 Den. (N. Y.) 164.

[60] Carpenter v. Brown, 6 Barb. (N. Y.) 147.

[61] McCloat v. Floral Park Co., 165 N. Y. Supp. 55, 177 App. Div. 865.

[62] Palmer v. Hudson Val. R. R. Co., 118 N. Y. Supp. 710; 134 App. Div. 42.

The tender must be made at the residence of the vendee, or other place specially agreed upon. A tender made to the vendee's attorney is insufficient.[63]

§ 89. **PLEADINGS.** As a general rule, in any case in which the purchaser seeks to avail himself of his right of action against the vendor for non-performance of the contract, when the payment of the purchase money on the one part, and the conveyance of a good title on the other, are dependent and concurrent acts, he must, in his pleadings, aver an actual performance or tender of performance on his own part,[64] or aver a present willingness and ability to perform,[65] or set out facts which excuse his own non-performance, such as absolute want of title in the vendor, or that the vendor had notified him that he would not or could not complete the contract.[66] Wherever it is necessary that the purchaser shall have tendered a conveyance and the purchase money as a condition precedent to his right to rescind the contract, or to recover damages for the breach thereof, he must, in any pleading in which he asserts those rights, aver the performance of such condition, or the pleading will be fatally defective.[67]

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[63] Darrow v. Cornell, 51 N. Y. Supp. 828. The vendor does not tender performance by depositing the deed with a bank not designated in the contract. Tucker v. Thraves, 50 Okl. 691, 151 Pac. 598.

[64] Clark v. Locke, 11 Hump. (Tenn.) 300. Grace v. Regal, 11 S. & R. (Pa.) 351.

[65] Smith v. Robertson, 11 Ala. 840.

[66] Sons of Temp. v. Brown, 9 Minn. 157.

[67] Johnston v. Beard, 15 Miss. 214. In Goodwin v. Morey, 111 Ind. 69, it was held that the vendor, seeking to enforce the contract, must aver the tender of a sufficient warranty deed, and must keep the tender good by bringing the deed into court, or by an averment of readiness and willingness to execute a deed that will vest a perfect title in the purchaser. He must allege and prove that he was able to convey a good title to the purchaser at the time fixed for performance of the contract. Armstrong v. Dunn, 163 Mo. App. 701, 147 S. W. 509.

CHAPTER X.

MEASURE OF DAMAGES FOR INABILITY TO CONVEY A GOOD TITLE.

GENERAL OBSERVATIONS. § 90.
WHERE THE VENDOR ACTS IN GOOD FAITH.
  Flureau v. Thornhill. Hopkins v. Lee. § 91.
  Barter contracts. § 92.
  Expenses of examining the title. § 93.
  Interest. § 94.
  Rents and profits. § 95.
  Improvements. § 96.
WHERE THE VENDOR ACTS IN BAD FAITH. § 97.
WHERE THE VENDOR EXPECTS TO OBTAIN THE TITLE § 98.
WHERE THE VENDOR REFUSES TO PERFECT THE TITLE. § 99.
LIQUIDATED DAMAGES § 100.

§ 90. **GENERAL OBSERVATIONS.** Damages for breach of a contract for the sale of lands by the vendor are either, (1) reimbursement for such part of the purchase money as has been paid, with interest, costs, expenses of examining the title, etc., or (2), reimbursement in these particulars, and, in addition, the difference between the value of the land at the time the contract was made measured by the purchase price, and the fair market value of the land at the time of the breach; in other words, damages to the purchaser for the loss of his bargain.[1] Profits which the purchaser might have made by a resale of the land under a contract existing at the time of his purchase cannot be allowed as damages, unless, perhaps, the vendor had notice of such contract at the time of the sale.[2] Nor can the purchaser include in his estimate of damages profits anticipated from the prosecution of his business on the premises which should have been conveyed to him. Such damages are too remote, and are, besides, speculative and incapable of ascertainment.[3]

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[1] The purchaser's measure of damages for the loss of his bargain will generally be the difference between the contract price and the enhanced value of the land when the conveyance should have been made. 2 Dart. V. & P. (4th Eng. ed.) 872; 3 Sedg. Dam. (8th ed.) § 1018. Engel v. Fitch, L. R., 3 Q. B. 314. Hopkins v. Lee, 6 Wh. (U. S.) 109. Baldwin v. Munn, 2 Wend. (N. Y.) 399; 20 Am. Dec. 627; Driggs v. Dwight, 17 Wend. (N. Y.) 71; 31 Am. Dec. 283; Fletcher v. Button, 6 Barb. (N. Y.) 647; Brinckerhoff v. Phelps, 43 Barb. (N. Y.) 469; Pringle v. Spaulding, 53 Barb. (N. Y.) 17. Bitner v. Brough, 11 Pa. St. 127; Meason v. Kaine, 67 Pa. St. 132.

[2] Sanderlin v. Willis, 94 Ga. 171; 21 S. E. Rep. 291.

The question whether the purchaser is entitled to nominal or substantial damages for breach of the contract usually arises under the one or the other of the following circumstances:

(1) Where the vendor acts in good faith, believing that his title is free from objection.

(2) Where the vendor acts in bad faith knowing that he has no title and no prospect of acquiring it.

(3) Where, having no title, the vendor expects to acquire it in time to complete the contract.

(4) Where the title is defective or the estate incumbered, and the vendor has the power to cure the defect or remove the incumbrance, but neglects or refuses to do so.

It need hardly be said that the purchaser may always recover for the loss of his bargain wherever the vendor, having a good title, perversely and wrongfully refuses to convey,[4] or puts it out of his power to perform the contract by conveying to a stranger without notice of the purchaser's rights.[5] Were the rule otherwise, the vendor might in every case in which the land had enhanced in value before the time fixed for making the conveyance sell to a third person, return the purchase price to the first purchaser, and put in his own pockets the difference between the two values. But if the vendor abandon the contract and the purchaser acquiesces in the vendor's attempt to rescind, instead of demanding a deed and standing upon the contract, he can recover only the purchase money and interest.[6]

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[3] Greene v. Williams, 45 Ill. 206; Hines v. Richter, 51 Ill. 299. These were both cases in which the vendor refused, without sufficient cause, to perform his contract. *A fortiori* would the rule apply where he was prevented from performing the contract by an unsuspected defect of title.

[4] 3 Sedg. Dam. (8th ed.) § 1006. Baldwin v. Munn, 2 Wend. (N. Y.) 399; 20 Am. Dec. 627; Brinckerhoff v. Phelps, 24 Barb. (N. Y.) 100; S. C., 43 Barb. (N. Y.) 469. Rowland v. Dowe, 2 Murph. (N. C.) 347; Lee v. Russell, 8 Ired. Eq. 526. Mullen v. Cook, 69 W. Va. 456, 71 S. E. 566. But if the contract were not in writing, the purchaser can recover only what he has disbursed. He can have nothing under the contract, that being void. Welch v. Lawson, 32 Miss. 170. Rineer v. Collins, 156 Pa. St. 342.

[5] 3 Sedg. Dam. 183. Dustin v. Newcomer, 8 Ohio, 49. Wilson v. Spenser, 11 Leigh (Va.), 261. Gerault v. Anderson, 2 Bibb (Ky.), 543. Sweem v. Steele, 5 Iowa, 352. Case v. Wolcott, 33 Ind. 5. Phillips v. Herndon, 78 Tex. 378.

§ 91. **WHERE THE VENDOR ACTS IN GOOD FAITH. Flureau v. Thornhill. Hopkins v. Lee.** As a general rule a vendor of property, whether real or personal, who, from whatever cause, fails to perform his contract, is bound to place the purchaser, so far as money will do it, in the position he would have been in if the contract had been performed. Ordinarily the motives and purposes of either party in entering into the contract, or the intent of either to abandon or to perform it, are irrelevant to the question of what measure of damages shall be awarded in case of a breach.[7] An exception to this rule has been held to exist wherever the vendor of real property is unable to convey a good title, if he in good faith entered into the contract believing that his title was good.[8] The leading case upon this point in England is Flureau v. Thornhill,[9] Sir William Blackstone being one of the judges who delivered opinions in that case. Some dissatisfaction with this decision has been expressed in several English cases,[10] but it is now regarded there as settled law.[11] In the American States it is believed that the weight of authority inclines to the same rule, namely, that the purchaser can have no damages for the loss of his bargain if the vendor sold in good faith, believing that his title was good,[12] but in many of the States the opposite rule pre-

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[6] Fowler v. Johnson, 19 Ind. 207.

[7] COCKBURN, L. C. J., in Engel v. Fitch, L. R., 4 Q. B. 659. 3 Sedg. Dam. 180, 181.

[8] 1 Sugd. Vend. (8th Am. ed.) 537; Chitty Cont. (10th Am. ed.) 338; 2 Dart V. & P. (4th Eng. ed.) 873; 2 Sutherland Dam. 207, 208; 2 Add. Cont. (8th ed.) 401 (901). Flureau v. Thornhill, 2 W. Bl. 1078 (1776); Clare v. Maynard, 6 Ad. & El. 519; Buckley v. Dawson, 5 Ir. C. L. R. 211; Simons v. Patchett, 7 E. & B. 568. Pounsett v. Fuller, 17 C. B. 660; Lock v. Furze, L. R., 1 C. P. 453, *obiter*. Walker v. Moore, 10 Barn. & C. 416; S. C., 21 E. C. L. R. 179, was a strong case. The vendor acting *bona fide* delivered an abstract showing a good title, and the purchaser, before verifying the abstract, resold the property in several portions to sub-purchasers at a large profit (£1,500). Afterwards, on comparing the abstract with the original deeds, the title was found to be defective, in consequence of which the sub-purchasers refused to complete the contract. The purchaser claimed damages for the profits which he would have realized from the resale, but it was held that he could recover only the expenses incurred by him in examining the title, and nominal damages for the breach of contract.

[9] 2 W. Bl. 1078. Flureau bought at auction a rent of £26, 1, 0. per annum for a term of thirty-two years. It was knocked down to him at £270 and he paid £54 as a deposit. On looking into the title it was found to be bad, and the vendor proposed to the purchaser to take the title, such as it was, or receive back his deposit, with interest and costs; but the purchaser insisted on a further sum for damages in the loss of so good a bargain. The jury, contrary to the direction of the judge, gave a verdict for the deposit and £20 damages. On a motion for a new trial DEGREY, C. J., said: "I think the verdict wrong in point of law. Upon a contract for a purchase, if the

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title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he lost." The new trial was granted.

[10] Engel v. Fitch, 10 B. & S. 738; S. C., L. R., 4 Q. B. 659.

[11] Sikes v. Wild, 1 B. & S. 587; Bain v. Fothergill, L. R., 7 H. L. 158; Rowe v. School Board, 36 Ch. D. 619.

[12] Sutherland Dam. 217. Letcher v. Woodson, 1 Brock. (U. S.) 212, per Marshall, C. J. Blackwell v. Lawrence County, 2 Bl. (Ind.) 143; Sheets v. Andrews, 2 Bl. (Ind.) 274; Adamson v. Rose, 30 Ind. 380; Junk v. Barnard, 99 Ind. 137; Puterbaugh v. Puterbaugh, 7 Ind. App. 280, *obiter;* S. C., 34 N. E. Rep. 611. Sweem v. Steele, 5 Iowa, 352; Foley v. Keegan, 4 Iowa, 1; 66 Am. Dec. 107. Cornell v. Rodabaugh, 117 Iowa, 287; 90 N. W. 599. Lister v. Batson, 6 Kans. 412, *semble.* Rutledge v. Lawrence, 1 A. K. Marsh. (Ky.) 397; Allen v. Anderson, 2 Bibb (Ky.) 415; Cox v. Strode, 2 Bibb (Ky.), 275; 5 Am. Dec. 603; Herndon v. Venable, 7 Dana (Ky.) 371; Combs v. Tarlton, 2 Dana (Ky.) 464; Goff v. Hawkes, 5 J. J. Marsh. (Ky.) 341. (But see Jenkins v. Hamilton, 153 Ky. 163, 154 S. W. 937.) Baltimore P. B. & L. Soc. v. Smith, 54 Md. 187; 39 Am. Rep. 374, distinguishing the early cases of Connell v. McLean, 6 Harr. & J. 297, and Marshall v. Haney, 9 Gill, 251; 59 Am. Dec. 92. The question was left undecided in Rawlings v. Adams, 7 Md. 26, 51. Hammond v. Hannin, 21 Mich. 374; 4 Am. Rep. 490, per Cooley, J. Dunnica v. Sharp, 7 Mo. 71. But see Missouri cases cited *contra*, post, next note. Drake v. Barker, 34 N. J. L. 358. Baldwin v. Munn, 2 Wend. (N. Y.) 299; 20 Am. Dec. 627, leading case; Peter v. McKeon, 4 Den. (N. Y.) 546; Fletcher v. Button, 6 Barb. (N. Y.) 646; Conger v. Weaver, 20 N. Y. 140; Cockroft v. N. Y. & H. R. R. Co., 69 N. Y. 204; Earl, J., in Mack v. Patchin, 40 N. Y. 171, *obiter;* 1 Am. Rep. 506. McLowry v. Croghan, 1 Grant (Pa.) 307; Bitner v. Brough, 11 Pa. St. 139; Dunmars v. Miller, 34 Pa. St. 319; Hertzog v. Hertzog, 34 Pa. St. 418, overruling Jack v. McKie, 9 Barr (Pa.) 235; Graham v. Graham, 34 Pa. St. 475; McNair v. Compton, 35 Pa. St. 23; Ewing v. Thompson, 66 Pa. St. 382; Burk v. Serrill, 80 Pa. St. 413; 21 Am. Rep. 105; Tyson v. Eyrich, 141 Pa. St. 296; 21 Atl. Rep. 635. See, also, Rineer v. Collins, 156 Pa. St. 342. Sutton v. Page, 4 Tex. 142; Wheeler v. Styles, 28 Tex. 240; Hall v. York, 22 Tex. 643. Jackson v. Turner, 5 Leigh (Va.), 119, *obiter;* Wilson v. Spencer, 11 Leigh (Va.), 261; Thompson v. Guthrie, 9 Leigh (Va.) 101; 33 Am. Dec. 225; Click v. Green, 77 Va. 827, *obiter;* Abernathy v. Phillips, 82 Va. 769; 1 S. E. Rep. 113. Saulters v. Victory, 35 Vt. 351. In this case,

vails,[13] and in others it is said that the English rule must be strictly limited to cases in which the vendor sold in entire ignor-

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however, it was said that upon a breach of the covenant of warranty the covenantee would be entitled to damages for the value of the land at the time of the breach. Hall v. Delaplaine, 5 Wis. 206; 68 Am. Dec. 57; Combs v. Scott, 76 Wis. 662, 670, *obiter*. In Cox v. Henry, 32 Pa. St. 18, the purchaser took a bond conditioned to indemnify himself for all costs, charges and damages which he might sustain if the land should be recovered from him under a paramount title, and afterwards took a conveyance of the land with warranty. It was held that the bond was not merged in the conveyance, and that under the former the purchaser was entitled to recover, in addition to the purchase money and interest, court fees, reasonable fees of counsel, and his own expenses and loss of time in defending a suit by an adverse claimant to recover the land. In Texas, the purchaser is allowed to recover, in addition to the paid purchase price with interest, any special damages which he may have incurred by having been induced to enter into the contract. Yzaguirre v. Garcia, (Tex. Civ. App.) 172 S. W. 139.

Recent cases. Horner v. Beaseley, 105 Md. 193, 65 Atl. 820; Smith v. Bangham, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522; Haney v. Hatfield, 241 Pa. 413, 88 Atl. 680; Mullen v. Cook, 69 W. Va. 456, 71 S. E. 566; Babcock v. Urquhart, 53 Wash. 168, 101 Pac. 713; Crosby v. Wynkoop, 56 Wash. 475, 106 Pac. 175; Seymour v. Jaffe, 78 Wash. 1, 138 Pac. 276; Rosenberg v. Haggerty, 125 N. Y. Supp. 979, 141 App. Div. 73; Willard v. Smith, 34 Mont. 494, 87 Pac. 613; Hahl & Co. v. West, (Tex. Civ. App.) 129 S. W. 876; Vaughn v. Bank, 59 Tex. Civ. App. 380, 126 S. W. 690; Garcia v. Yzaguirre, (Tex. Civ. App.) 213 S. W. 236. Compare Runnells v. Pruitt, (Tex. Civ. App.) 204 S. W. 1017.

[13] Mr. Sedgwick takes this view. 3 Sedg. Dam. 196. Hopkins v. Lee, 6 Wh. (U. S.) 109, *semble*. Whitesides v. Jennings, 19 Ala. 784, *dictum*. Kempner v. Cohn, 47 Ark. 519; 58 Am. Rep. 775. Wells v. Abernathy, 5 Conn. 222. Bryant v. Hambrick, 9 Ga. 133; Newsom v. Harris, Dudley (Ga.), 180; Gibson v. Carreker, 82 Ga. 46; Ga. Code, § 2949; Irvin v. Askew, 74 Ga. 581. Buckmaster v. Grundy, 1 Scam. (Ill.) 310; McKee v. Brandon, 2 Scam. (Ill.) 339; Gale v. Dean, 20 Ill. 320; Plummer v. Rigdon, 78 Ill. 222; 20 Am. Rep. 261. Lewis v. Lee, 15 Ind. 499. But see the Indiana cases, supra, following Flureau v. Thornhill. Sutton v. Page, 13 La. Ann. 143, where, however, it was held that the purchaser could recover only for such increase in value as the parties may have had in contemplation at the time of the sale, and not for any enormous increase produced by unforeseen or fortuitous circumstances. Dorincourt v. La Croix, 29 La Ann. 286. Robinson v. Heard, 15 Me. 296; Hill v. Hobart, 16 Me. 164; Warren v. Wheeler, 21 Me. 484; Lawrence v. Chase, 54 Me. 196; Russell v. Copeland, 30 Me. 332; Doherty v. Dolan, 65 Me. 87; 20 Am. Rep. 677. Trask v. Vinson, 20 Pick. (Mass.) 110, *obiter*. The rule could scarcely be otherwise in Massachusetts, for in that State it is settled that the measure of damages for a breach of the covenant of warranty is the value of the land at the time of the breach. So, also, in Maine. Post, § 165. Loomis v. Wadhams, 8 Gray

ance of his inability to perform the contract.[14] The reasons for the rule established in Flureau v. Thornhill, and the cases which follow that decision, are principally and briefly these:

1. A perfect title depends for its existence upon such an infinite variety of circumstances, and the law of real property is, in many respects, so artificial and complex, that few vendors can be certain that there is no latent and unsuspected defect in their titles, hence a kind of implied contract arises that the vendor shall only refund the purchase money, interest and expenses, if a defect in the title should be discovered, and the vendor acting in good faith be unable to complete the contract.[15]

2. It frequently happens that, from unexpected causes, the value of the lands sold greatly increases before the time fixed for the conveyance, sometimes doubling and sometimes quadrupling the purchase price. In such a case it has been considered inequitable to visit upon an innocent vendor the ruinous consequences of the increase. No prudent man would venture to sell his property,

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(Mass.) 557; Brigham v. Evans, 113 Mass. 538. Skaaraas v. Finnegan, 31 Minn. 48, *obiter*, the action being against one who had falsely assumed authority to sell. Kirkpatrick v. Downing, 58 Mo. 32; 17 Am. Rep. 678; Hartzell v. Crumb, 90 Mo. 629. Nichols v. Freeman, 11 Ired. (N. C.) 99. Barbour v. Nichols, 3 R. I. 187. Cocke v. Taylor, 2 Tenn. 50; Perkins v. Hadley, 4 Hayw. (Tenn.) 143; Crittenden v. Posey, 1 Head (Tenn.) 320, *obiter;* Hopkins v. Yowell, 5 Yerg. (Tenn.) 305; Clarke v. Locke, 11 Humph. (Tenn.) 302; Shaw v. Wilkins, 8 Humph. (Tenn.) 647; 49 Am. Dec. 692. An early Tennessee case held that the purchaser was not entitled to damages for the loss of his bargain. Wilson v. Robertson, 1 Tenn. 464. Dunghee v. Geoghegan, (Utah) 25 Pac. Rep. 731.

Recent Cases. White v. Harvey, 175 Iowa 213, 157 N. W. 152; Jenkins v. Hamilton, 153 Ky. 163; 154 S. W. 937; Crandall v. Kirk, 185 Ill. App. 460; Wilder v. Tatum (Ala.) 73 So. 833; Bugajski v. Sikwa, 200 Mich. 415, 166 S. W. 863; Beck v. Staats, 80 Neb. 482; 114 N. W. 633, 16 L. R. A. (N. S.) 768; Beetem v. Follmer, 87 Neb. 514, 127 S. W. 858. The purchaser cannot have damages for the loss of his bargain where the contract provided that the purchase money should be refunded if the title was found to be bad. Crosby v. Wynkoop, 56 Wash. 475, 106 Pac. 175.

[14] Pumpelly v. Phelps, 40 N. Y. 59; 100 Am. Dec. 468.

[15] Sir WILLIAM BLACKSTONE in Flureau v. Thornhill, 2 W. Bl. 1078; COCKBURN, C. J., in Sikes v. Wild, 1 B. & S. 596. "When a contract for the sale of lands is made, each party cannot but know that the title may prove defective, and must be taken to proceed upon that knowledge." LITTLEDALE, J., in Walker v. Moore, 10 Barn. & Cres. 422; S. C., 21 E. C. 181.

if by law he might be bankrupted by his inability, from unforeseen causes, to make title under such circumstances.[16]

3. The rule prevails everywhere, except in several of the New England States, that upon a breach of the covenants of seisin and of warranty, the covenantee's damages shall be measured by the consideration money, interest and expenses, and not by the value of the premises at the time of the eviction of the covenantee.[17]. It has been held that, in this respect, an executory contract is not distinguishable from one that has been executed, and that in either case the measure of damages is the same. It would be an anomaly if the vendor could relieve himself from liability for the increased value of the premises by simply executing a conveyance to the purchaser with a covenant of warranty.[18] The fact that the land has

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[16] SUTHERLAND, J., in Baldwin v. Munn, 2 Wend. (N. Y.) 399; 20 Am. Dec. 627, adopting the reasoning of KENT, Ch., in Staats v. TenEyck, 3 Caines (N. Y.), 115; 2 Am. Dec. 254, where the contract had been executed by a conveyance, with covenants for title.

[17] Post, § 164.

[18] Peters v. McKeon, 4 Den. (N. Y.) 546. Drake v. Baker, 34 N. J. L. 358, 360. Dumars v. Miller, 34 Pa. St. 319. Allen v. Anderson, 2 Bibb (Ky.), 415. Blackwell v. Laurence County, 2 Bl. (Ind.) 143; Sheets v. Andrews, 2 Bl. (Ind.) 274. Threlkeld v. Fitzhugh, 3 Leigh (Va.), 459; 44 Am. Dec. 384; Stout v. Jackson, 2 Rand. (Va.) 132. Baker v. Corbett, 28 Iowa, 317. Hammond v. Hannin, 21 Mich. 373, 388; 4 Am. Rep. 490, COOLEY, J., saying: "One very strong reason for limiting the recovery to the consideration money and interest in cases free from bad faith is, that the measure of damages is thus made to conform to the rule where the party assumes to convey land which he does not own, and an action is brought against him on the covenants of title contained in his deed. This reason is made specially prominent in many of the cases, and it cannot be denied that it is an anomaly, if the vendee is restricted to the recovery of one sum when an ineffectual deed is given, but allowed to recover a larger compensation in case the vendor, when he discovers the defect in his title, has the manliness to inform the vendee of the fact, and to decline to execute worthless papers. Had H. (the vendor) executed and delivered a deed when it was called for, the present controversy could not have arisen, and his failure to do so, which worked no additional wrong to the vendee, is the only ground upon which the plaintiff can claim to retain the large damages which were awarded her in the present case. So long as the rule stands which thus limits the damages in suits upon the covenants of title, so long ought we, also, I think, to adhere to the decisions which restrict the recovery, as above stated, in actions upon contracts to convey." In Connell v. McLean, 6 Harr. & J. (Md.) 297, 301, there is an attempt to show that the rule should be different where the contract is executory. It will be found, on examination of the American cases fixing

greatly depreciated in value before the time fixed for completing the contract will not affect the right of the purchaser to recover back the purchase money as damages.[19] The case of Hopkins v. Lee [20] has been frequently cited in support of the proposition that a purchaser of lands is entitled to damages for the loss of his bargain, without regard to the ability or inability of the vendor to make a title. But the facts in that case clearly distinguish it from one in which an innocent vendor sells in the belief that his title is good. The vendor refused to convey on the ground that the purchaser had not discharged an incumbrance on certain premises which had been taken by the vendor in exchange for those which he was to convey but the evidence showed that the incumbrance had been discharged, so that the real question in the case was, what measure of damages shall be awarded against a vendor who refuses to convey, leaving untouched the question of

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the plaintiff's measure of damages, for a breach of the covenant of warranty, that many of them are rested on the case of Flureau v. Thornhill, 2 W. Bl. 1078, which, as we have seen, was an action for the breach of an executory contract to convey a good title, and on cases which follow that decision, thus assuming that whether the contract be executory or executed, the measure of damages, in case of a breach, is the same.

It is a curious fact that in one State, where the damages for a breach of the covenant of warranty are measured by the value of the premises at the time of the breach, damages for the breach of an executory contract from want of title are fixed at the consideration money and interest (Saulters v. Victory, 35 Vt. 351), while in another State, where the consideration money and interest is the measure of damages for the breach of a covenant of warranty, the purchaser is held entitled to damages for the loss of his bargain on failure of the title where the contract is executory. Connell v. McLean, 6 Harr. & J. (Md.) 297. In either case, a distinction is drawn between executed and executory contracts as respects the rule of damages, but with directly opposite results. Apparently, the only practical difference between the two species of contract with respect to the rule of damages, is that executory contracts have usually only a short time to run, while a covenant of warranty is of indefinite duration, and the vendor might fairly be presumed to take the risk of an increase in value during a short period, where he would perhaps be unwilling to assume the risk of a great increase in value during a period of twenty or thirty years or more. Pumpelly v. Phelps, 40 N. Y. 59, 65; 100 Am. Dec. 468.

[19] Shryer v. Morgan, 77 Ind. 479.

[20] 6 Wh. (U. S.) 109.

his *bona fides* or innocence of intent at the time the contract was made, or that of his ability or inability to perform the contract.[21]

The principal objections to the rule that the purchaser can have no damages for the loss of his bargain where the vendor, acting in good faith, is unable to make title, are (1) that it is a departure from the general rule that the seller of property who neglects, refuses, or is unable to perform his contract, must place the purchaser in as good a condition as if the contract had been performed, and that the motives or purposes of the parties with respect to the performance of the contract are irrelevant to the question of damages, and (2) that such a rule tempts the seller to violate his contract and obtain, himself, the benefit of the increase in value. With respect to the first objection, it must suffice to say that contracts for the sale of real estate would seem distinguishable from contracts for the sale of goods and merchandise or other personalty, in that inability to perform the contract in respect to these latter seldom arises from want of title in the vendor, but usually grows out of his want of skill, diligence or means of performance, or out of some other default on his part, so that no ground is presented for the implication of a contract that only the purchase price shall be returned if the title fails. The objection that the rule denying the purchaser damages for the loss of his bargain tempts the vendor to violate his contract and avail himself of the increase in value of the premises would seem to be without force for two reasons: First, because the purchaser is not restricted to nominal damages where the vendor refuses to perform, or disables himself from performing the contract, but may recover damages for the full value of the property;[22] and, second, because, should the vendor ferret out a defect in his title as an excuse for non-performance, the purchaser may always elect to take the title, such as it is, and compel specific performance by the vendor.[23] Against the rule it has been further urged that it is inequitable, in that it holds the purchaser to a bad bargain and deprives him of the benefits of a good one. But this is true only to a limited extent, for the vendor, having a good title, cannot escape his obligation to perform the contract, no matter how greatly the property may have increased in value. The purchaser may go into a court of equity and compel the vendor to convey.

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[21] See the remarks of the court in Drake v. Baker, 34 N. J. L. 362, and Baldwin v. Munn, 2 Wend. (N. Y.) 399, 407; 20 Am. Dec. 627.

[22] Ante, § 90.

[23] Post, § 197.

§ 92. **Barter contracts.** Upon the breach of a contract to exchange lands of equal value, the measure of damages would be, where the vendor acts in good faith, in those jurisdictions in which the rule in Flureau v. Thornhill is followed, the value of the land to be given in exchange at the time the contract was made.[24] But in those jurisdictions in which the purchaser from an innocent vendor is allowed damages for the loss of his bargain,[25] or wherever the vendor has acted in bad faith,[26] the purchaser will be entitled to damages for the present value of the land which should have been conveyed to him in exchange. The fact that the consideration passing from the purchaser consists of the conveyance of land in exchange, or the performance of services, or the delivery of a commodity, instead of the payment of money, does not, of course, affect the rule of damages for breach of contract in either case. If the parties agree to exchange one tract of land for another, and the tract which the plaintiff agreed to convey appears to be less valuable than that which he was to receive, the measure of his damages will be the difference in value between the two tracts, with the expenses of examining the title.[27] It has been held that if the consideration of a contract to convey land be the performance of a certain act by the purchaser, but before such performance the vendor give notice of his inability to convey and his intent to rescind, the purchaser cannot, upon full performance on his part thereafter, recover the value of the land as damages. He can recover only whatever actual damages he has sustained.[28]

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[24] 3 Sedg. Dam. (8th ed.) § 1020; 2 Sutherland Dam. 228. Obviously there is no difference in principle between a case in which a vendor receives land and one in which he receives money in consideration of the conveyance which he is to make. In Combs v. Scott, 76 Wis. 670, there is, however, a *dictum* that in cases of barter contracts, the value of the land (which should have been conveyed) at the time of the breach is from necessity the measure of damages. Citing Brigham v. Evans, 113 Mass. 538, a case which, it seems, decides no more than that the plaintiff shall not lose the benefit of his bargain because the property he was to give in even exchange was, at the time of the contract, much less in value than that which he was to receive. There had been no appreciable change in the values of the respective pieces of property at the time of the breach.

[25] Wells v. Abernethy, 5 Conn. 222.

[26] Devin v. Himer, 29 Iowa, 297. Bierer v. Fretz, 32 Kans. 329. Greenwood v. Hoyt, 41 Minn. 381.

[27] Fagen v. Davison, 2 Duer (N. Y.), 153. It is to be observed that in this case the difference in value between the two pieces of property existed at the time of the contract. No question was raised as to any increase in value at the time of the breach of the contract.

§ 93. **Expenses of examining the title. Other expenses.** As a general rule the purchaser, on failure of the title, may recover as damages, in addition to such part of the purchase money as has been paid, the expenses incurred by him in examining the title.[29] If the vendor is innocently mistaken as to the goodness of his title, and the contract contains no warranty of ownership, express or implied, it has been held that the purchaser cannot recover such expenses.[30] But the mere fact that the parties were aware, at the time of the contract, that the vendor did not have the title, will not deprive the purchaser of the right to recover the expenses of examining the title, if the parties believed that the vendor would acquire title before the time stipulated for the conveyance.[31] Of course, if the purchaser agreed to take the title, such as it might be, he could not recover the expenses of an examination. Where the purchaser resold the property before he had examined the title, the court refused to include in his damages, on failure of the title, the sums in which he was liable to his vendees for expenses incurred by them in examining the title.[32] Nor can he recover the costs of other litigation between himself and the vendor growing out of the contract, such as an unsuccessful suit by the latter for specific performance. By analogy to the rule which prevails in an action for breach of a covenant of warranty, it would seem that the purchaser could recover costs and expenses incurred by him in defending the title against an adverse claimant, provided the vendor had notice to appear and defend the suit.[34]

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[28] Rohr v. Kindt, 3 W. & S. (Pa.) 563; 39 Am. Dec. 53. Here the consideration of the contract of sale was that the purchaser should withdraw a *caveat* against the probate of a certain will in which the vendor was the principal devisee. The vendor refused to convey on the ground, among others, that she had only a life estate, and the court held that the purchaser was not entitled to the fee simple value of the land (ten acres) as damages, but only such damages as he had actually sustained.

[29] Post, § 243. 1 Sugd. Vend. (8th Am. ed.) 547; 2 Sutherland Dam. 22; 3 Sedg. Dam. (8th ed.) § 1017. Canfield v. Gilbert, 4 Esp. 221; Kirtland v. Pounsett, 2 Taunt. 145. (But see Wilder v. Fort, 4 Taunt. 334.) Bigler v. Morgan, 77 N. Y. 312; Cockroft v. N. Y. & Hud. R. R. Co., 69 N. Y. 201. Drake v. Gaffney, 171 N. Y. Supp. 131, 183 App Div. 577. Lee v. Dean, 3 Whart. (Pa.) 316. Bitner v. Brough, 11 Pa. St. 127. Northridge v. Moore, 118 N. Y. 422; 23 N. E. Rep. 570, where BRADLEY, J., delivering the opinion of the court, said: "The vendee is not required to take anything less than a good marketable title, and the precautionary means of ascertaining about it by examination before parting with the purchase money and accepting a conveyance, are properly made available by way of protection, and unless an understanding in some manner appear to the contrary, the examination of the title by the vendee and the reasonable expense of making it, may be regarded as in the contemplation of the parties, and treated as properly incidental to the contractual situation, and, consequently, the amount of such expense may, in the event of failure of the vendor to convey, be deemed special damages resulting from the breach, and recoverable as such.

[30] Day v. Nason, 100 N. Y. 166; 2 N. E. Rep. 382.

§ 94. **Interest as an element of damages.** In those jurisdictions in which Flureau v. Thornhill is followed, the purchaser will, as a general rule, be entitled to recover, as an element of his damages on failure of the title, interest on such of the purchase money as he may have paid,[35] on money kept idle by him with which to pay the purchase money, and also on money borrowed by him for that purpose.[36] It seems, however, that the purchaser cannot recover interest if there is no liability for rents and profits on his part to the true owner.[37] If the purchaser sell stocks or bonds to raise a fund with which to pay the purchase money, and the title fails, he cannot recover compensation for loss occasioned by a rise in value of the stocks, since the sale would have protected him from loss if the value had depreciated.[38] In Tennessee, a State in which the purchaser is allowed damages for the loss of his bargain, without regard to good faith on the part of the vendor, it has been held that interest, as such, cannot be allowed on the damages awarded from the time of the breach, but that the jury might, in their discretion, under all the circumstances of the case, allow interest by way of enhancing the damages, and that it was no error in the court to *direct* the jury to compute interest from the time of the breach.[39]

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[31] Northridge v. Moore, 118 N. Y. 420; 23 N. E. Rep. 570.

[32] Walker v. Moore, 10 B. & C. 416.

[33] Hodges v. Litchfield, 1 Bing. N. C. 492.

[34] Post, §§ 173, 175. A bond to indemnify against all claims and incumbrances, etc., and to "pay all costs, charges, or expenses necessary to defend the premises" against adverse claims, embraces fees paid counsel, and other necessary expenses incurred in defending ejectment for the premises. Robinson v. Brakewell, 25 Pa. St. 424.

[35] 1 Sugd. Vend. (8th Am. ed.) 360; 2 Sugd. Vend. (8th Am. ed.) 329; 2 Sutherland Dam. 221. Gates v. Parmly, 93 Wis. 294, 66 N. W. 253. Davis v. Lee, 52 Wash. 330, 100 Pac. 752, 132 Am. St. Rep. 973. See, generally, the cases cited throughout this chapter.

[36] 1 Sugd. Vend. (8th Am. ed.) 360.

[37] Post, next section, "Rents and Profits."

§ 95. **Rents and profits.** It seems that rents and profits enjoyed by a purchaser in possession cannot be set off against damages in an action by him against the vendor for failing to make a title. If the vendor neither owned the premises nor had a right to occupy them nor to suffer the purchaser to occupy them, he cannot have the benefit of possession by the purchaser. The purchaser is liable to the true owner for the mesne profits.[40] The rule may be different where the purchaser seeks to rescind the contract and recover back the purchase money. Such an action cannot be maintained except upon the theory that the premises have been restored to the vendor, who, being in possession, would be bound to answer to the real owner for the mesne profits, and who for that reason is generally allowed to set off the rents and profits against interest on the purchase money which he is called upon to restore.[41] But if the real owner acquits the purchaser of all demand for mesne profits, it has been held that the latter cannot recover interest on the consideration money awarded as damages.[42] And as a general rule the purchaser can only recover interest for such time as he himself is liable to the real owner for the mesne profits; [43] hence, it has been held that for such time as the claims of the real owner are barred by the statute of limitations, the enjoyment of the rents and profits will be a set-off against the purchaser's demand for interest on the consideration money. If the purchaser in possession has not been and cannot be compelled to account to the true owner for the mesne profits, it has been held that he cannot recover interest on the purchase money against the vendor.[44]

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[38] 1 Sugd. Vend. (7th Am. ed.) 302 (258).

[39] Shaw v. Wilkins, 8 Humph. (Tenn.) 646; 49 Am. Dec. 692.

[40] Fletcher v. Button, 6 Barb. (N. Y.) 646. Dunnica v. Sharp, 7 Mo. 71.

[41] Post, ch. 24. Taylor v. Porter, 1 Dana (Ky.), 585; 25 Am. Dec. 155, where a head note, which is sustained by the opinion, says: "So long as the parties abide by the contract the vendee in possession is not chargeable with rents nor entitled to interest on the purchase money he has paid; *after disaffirmance* he is chargeable with rents until he surrenders possession, and is entitled to interest until his money is refunded. If his payment was partial only, there should be an equitable adjustment of rent and interest." See also Crocker v. Ingersoll Eng. Co., 249 Fed. 31, 161 C. C. A. 91. In Combs v. Tarlton, 2 Dana (Ky.), 464, it was held that in an action at law by the purchaser to recover damages for the vendor's failure to make title, the pernancy of the rents and profits by the purchaser in possession could not go in reduction of the damages, but that the vendor might go into equity and have an account of the rents and profits, and have them applied to the interest on the purchase money awarded as damages. Herndon v. Venable, 7 Dana (Ky.), 371; Lowry v. Cox, 2 Dana (Ky.), 470.

§ 96. **Improvements.** If the title fail the purchaser cannot recover against a vendor acting in good faith the value of improvements placed by him on the premises. If he expends money in improvements when he is uncertain about the title, he does so at his own risk.[45] Besides, in most of the States there are statutory provisions which entitle the purchaser to an allowance for such expenditures in proceedings against him by the true owner.[46] Of course the purchaser cannot recover for improvements made by him after discovering the vendor's inability to convey,[47] unless, it is apprehended, he was induced to lay out money on the vendor's engagement to perfect the title.[48] If the purchaser has recovered against the real owner the value of improvements put on the land by the *vendor* before the sale, the vendor, when sued for breach of contract to make title, must have credit for the amount of such recovery.[49]

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[42] Post, § 280. White v. Tucker, 52 Miss. 147.

[43] Thompson v. Guthrie, 9 Leigh (Va.), 101; 33 Am. Dec. 225.

[44] Post, § 172. Cogwell v. Lyons, 3 J. J. Marsh. (Ky.) 41, which, however, was a suit in equity for specific performance and damages.

[45] 2 Sugd. Vend. (8th Am. ed.) 515 (748). But the rule is otherwise in equity. Id. 514. Walton v. Meeks, 120 N. Y. 79; 23 N. E. Rep. 1115, distinguishing Gilbert v. Petelder, 38 N. Y. 135, where the contract obliged the purchasers to expend a certain amount in improvements before they should be entitled to a deed. Peters v. McKeon, 4 Den. (N. Y.) 546, 550. Hertzog v. Hertzog, 34 Pa. St. 418, 420, *obiter*. Worthington v. Warrington, 8 C. B. 134; 65 E. C. L. 134, where it was said by COLEMAN, J.: "I think it would be extremely hard if it were held that the plaintiff (purchaser) was at liberty at once to make alterations and then to throw the expense of them upon the defendant in the event of his not being able to make a good title. Every one who purchases land knows that difficulties may exist as to the making a title, which were not anticipated at the time of entering into the contract. But, if the purchaser thinks proper to enter into possession and to incur expenses in alterations before the title is ascertained, he does so at his own risk." In Sedgwick Damages (8th ed), section 1017, it is said: "Where the plaintiff was let into possession under the contract, he may recover the reasonable value of the improvements, less the value of the use of the land (Bellamy v. Ragsdale, 14 B. Mon. (Ky.) 293; Sheard v. Welburn, 67 Mich. 387), probably in all cases, but certainly when the defendant knew he had no title. Erickson v. Bennett, 39 Minn. 326." The case first cited was one in which the vendor refused to convey; no question of title was raised. The second case was one in which the parties mutually agreed to rescind on

Where the vendor fraudulently conceals or misrepresents the state of his title, the purchaser may recover for improvements.[50] It would seem that if the purchaser, instead of affirming the contract by action for damages, seeks to rescind,[51] which implies a restoration of the premises with the improvements thereon to the vendor, he would in an action to recover back the purchase money be entitled also to recover the value of the improvements as money expended for the use and benefit of the vendor. Inasmuch as the occupant of the premises would generally be entitled to an allowance for improvements against the true owner, it would be inequitable to relieve him from the purchaser's claim.

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grounds other than failure of title. In Tyson v. Eyrick, 141 Pa. St. 296; 21 Atl. Rep. 635, the purchaser was under the contract entitled to a lot fifty feet wide, but it was discovered, after he had built on the lot, that the vendor had no title to a strip one foot in width. It was held that he could not recover damages for the misplacement of his building and the expense of contracting his walls. "It was his duty before expending his money on valuable improvements to ascertain and know his lines and to locate his buildings accordingly."

[46] It seems, also, that without the aid of positive enactment the purchaser will, in equity, be entitled to an allowance against the real owner for improvements made in good faith. 2 Story Eq. Jur. 1237. Bright v. Boyd, 1 Story (C. C.) 478; Benedict v. Gilman, 4 Paige (N. Y.), 58. Green v. Biddle, 8 Wh. (U. S.) 1. There can be no doubt of his right to the allowance if the real owner stood by and saw the improvements going on without asserting his title. Southall v. McKeand, 1 Wash. (Va.) 336. Green v. Biddle, 8 Wh. (U. S.) 1, 77, 88.

[47] Lindley v. Lukin, 1 Bl. (Ind.) 266.

[48] As in Martin v. Atkinson, 7 Ga. 228; 50 Am. Dec. 403.

[49] McKinney v. Watts, 3 A. K. Marsh. (Ky.) 268.

[50] Erickson v. Burnet, 39 Minn. 326.

[51] Taylor v. Porter, 1 Dana (Ky.), 421; 25 Am. Dec. 155. But see Wilhelm v. Fimple, 31 Iowa, 137; 7 Am. Rep. 117.

The purchaser will not be allowed for repairs made after he has been informed of a defect in the title, except such as may be necessary to keep the premises in common condition.[52]

§ 96*a*. **Failure of title to part.** The measure of damages for failure of title to part only of the lands included in the contract, is such proportion of the whole consideration agreed to be paid, as the value, at the time of the purchase, of the part to which the title is found defective bears to the value of the whole quantity purchased.[53] The rule is the same in an action for breach of a covenant of warranty.[54]

§ 97. **WHERE THE VENDOR ACTS IN BAD FAITH.** If the vendor fraudulently misrepresent or conceal the state of his title the purchaser will, as a general rule, be entitled to require the vendor to place him in as good a position as if the contract had been performed; in other words, he may have damages for the loss of his bargain.[55] So, also, if he wilfully misrepresents the state of his title.[56]

In England, however, it is held that such fraud cannot aggravate the purchaser's damages in an action for breach of the contract; he must resort to his action for deceit, in which he will recover damages for all that he has lost through the vendor's non-performance of the contract. The reason given for this distinction is that the good or bad faith with which a party enters into a contract is immaterial to the quantum of damages resulting from a non-performance.[57] The distinction does not appear to have been observed in America. It seems that if the purchaser proceed in equity for a rescission of the contract on the ground of fraud, instead of at law for damages, he can have a decree only for the purchase money paid, with interest, and the value of his improvements, after deducting the mesne profits of the land while in his possession.[58] In Pennsylvania it is held that if the acts of the vendor in selling without title amount to a fraud, the purchaser will be entitled to damages sufficient to compensate him for all expenses accruing from the want of title, but not, it seems, to damages for the loss of his bargain.[59] In Texas the rule is that the purchaser cannot, in a case of fraudulent representations as to the title, recover for the loss of his bargain or the increased value of the land, unless such increase is the result of his labor and expenses, that is, unless he has put improvements on the premises.[60] What constitutes fraud by the vendor in respect to the title will be elsewhere considered in this work.[61] It will suffice to say here that, as a general rule, a vendor who enters into the contract knowing that his title is not good, and fails to disclose that fact to the purchaser, is guilty of fraud. It has been held, however, that there is no obligation upon the vendor to disclose defects of title which could be discovered upon such ordinary investigation as a prudent man should make.[62] But inasmuch as it is settled that a vendor is liable to the purchaser in substantial damages when he knows that the title is not complete, even though he had a reasonable expectation of completing it by the time fixed for performing the contract, there would seem to be no great hardship in imposing the same consequences upon a vendor who not only knows that his title is defective, but fails to disclose that fact in his negotiations with the purchaser. Whether the vendor has been guilty of fraud in respect to the title, is a question of fact to be determined by the jury. Instructions to the jury should not be so drawn as to assume the existence of fraud in the vendor.[63] Accordingly it has been held error in the court, or an inquiry of damages, to instruct the jury that the failure of the vendor to perform his contract raises a presumption of fraud, and authorizes them to award the purchaser damages for the loss of his bargain.[64]

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[52] 1 Sugd. Vend. (8th Am. ed.) 391. Thompson v. Kilcrease, 14 La. Ann. 340.

[53] Gates v. Parmly, 93 Wis. 294; 66 N. W. 253; 67 N. W. 739.

[54] Post, § 170.

[55] 1 Sugd. Vend. ch. 9, § 3; 3 Sedg. Dam. (8th. ed.) § 1010. Krumm v. Beach, 96 N. Y. 398; Peters v. McKeon, 4 Den. (N. Y.) 546; Northridge v. Moore, 118 N. Y. 419; 23 N. E. Rep. 570. In a case of fraud by the vendor the measure of damages is full indemnity to the purchaser. Cross v. Devine, 46 Hun (N. Y.), 421. Sweem v. Steele, 5 Iowa, 352. Tracy v. Gunn, 29 Kans. 508. Goff v. Hawks, 5 J. J. Marsh. (Ky.) 342. Erickson v. Bennett, 39 Minn. 326. Lancoure v. Dupre, (Minn.) 55 N. W. Rep. 129. Horner v. Beaseley, 105 Md. 193, 65 Atl. 820; Hahl & Co. v. West, (Tex. Civ. App.) 129 S. W. 876; Clifton v. Charles, 53 Tex. Civ. App. 448, 116 S. W. 120.

[56] Bugajski v. Sikwa, 200 Mich. 415, 166 N. W. 863.

[57] 2 Add. Cont. (8th ed.) 410 (901); 3 Sedg. Dam. (8th ed.) § 1010. Sikes v. Wild, 1 Best & S. 587; Bain v. Fothergill, 7 H. L. 158.

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[58] Bryan v. Boothe, 30 Ala. 311.

[59] Good v. Good, 9 Watts (Pa.), 567; Lee v. Dean, 3 Whart. (Pa.) 316; Hertzog v. Hertzog, 34 Pa. St. 418; Meason v. Kaine, 67 Pa. St. 126; Burk v. Serrill, 80 Pa. 413; 21 Am. Rep. 105. But see King v. Pyle, 8 S. & R. (Pa.) 166; Bitner v. Brough, 11 Pa. St. 127.

[60] Haddock v. Taylor, 74 Tex. 216; 11 S. W. Rep. 1093.

[61] Post, ch. 11.

[62] McConnell v. Dunlop, Hard. (Ky.) 44; 3 Am. Dec. 723; Stephenson v. Harrison, 3 Litt. (Ky.) 170.

It is also error in the court to assume the non-existence of fraud on the part of the vendor from his inability to convey, and, upon a motion for judgment by default, to assess the damages at the consideration money and interest without directing an inquiry by a jury, even though the declaration contained no express averment of fraud.[65] It has been held that if the title has been made so doubtful by reason of the vendor's unauthorized dealings with the property that the purchaser cannot be compelled to take it, the latter may have damages for the loss of his bargain.[66]

The purchaser is not entitled to substantial damages where the vendor's fraud is of a kind, or is perpetrated under circumstances, that can operate him no injury.[67]

In New York it is held, in case of fraudulent misrepresentations as to the title, that it is not necessary for the plaintiff to allege nor prove actual damages.[68]

§ 98. **WHERE THE VENDOR SELLS EXPECTING TO OBTAIN THE TITLE.** It may happen that a vendor, without legal or equitable title, sells lands with the *bona fide* intention or expectation of acquiring the complete legal title by the time fixed for completing the contract. And it frequently happens that, having the equitable title, he sells expecting to get in the legal title and to be able to convey at the appointed time. In the former case, the contract being a mere speculation on his part, it is apprehended that the vendor would be liable to the purchaser for the loss of his bargain. It has been so held in the latter case with less reason. The leading case on this point is Hopkins v. Grazebrook.[69] Here the purchaser of an estate put it up at auction before he himself had received a conveyance, and afterwards his vendor refused to convey, and it was held that the purchaser at auction was entitled to damages for the loss of his bargain. This case has been criticised upon the ground that equitable titles are as much the subject of valid sale as other property.[70] The decision seems, however, to have proceeded largely upon the idea that it was a fraud in the vendor to hold out the estate as his own, when he knew he had not the legal title. Of course, the sale of an equitable title, as such, is valid and enforcible. But the sale of an estate without disclosing the fact that the vendor's title is merely equitable presents a very different question. With stronger reason it has been held that one who falsely or wrongfully assumes authority to sell as agent or auctioneer, will be liable to the purchaser for the loss of his bargain, if the owner refuse to ratify and perform the contract.[71] Upon a principle similar to that which makes the vendor liable for the loss of the purchaser's bargain, where the title turns out to be equitable only, and the holder of the legal title refuses to convey, it has been held that if the vendor enter into the contract knowing that his ability to convey a perfect title depends upon a contingency, and that contingency do not transpire, the purchaser will be entitled to damages for the loss of his bargain.[72] The leading American case upon this point is Pumpelly v. Phelps.[73] There, a trustee having power to convey only upon the written consent of the *cestui que trust,* sold the estate but was unable to obtain such consent, and it was held that the purchaser might recover as damages the difference between the contract price and the value of the land at the time of the breach, though the vendor entered into the contract in good faith, believing that the consent of the *cestui que trust* would be given. But if the purchaser knows at the time of the contract that the ability of the vendor to convey depends upon a contingency, the better opinion seems to be that he can recover only nominal damages, if the vendor be unable to complete the contract,[74] unless, indeed, having in view that contingency, the vendor nevertheless undertakes to perfect the title by a specified time.[75] Of course, if the purchaser knows that the title of the vendor is merely equitable, but agrees to accept it, such as it is, he cannot recover either nominal or substantial damages, if the vendor be unable to convey.[76] For the same reasons it has been frequently held that a vendor in good faith who is unable to procure his wife to join in the conveyance, and relinquish her contingent right of dower, must answer in damages to the purchaser for the loss of his bargain.[77] It cannot be denied that this rule would produce a hardship in a case in which the vendor had been induced by his wife to believe that she would relinquish her rights in the premises. At the same time it must be remembered that if the vendor desires to escape from the contract, he would, if liable for nominal damages only, have a strong temptation to collude with his wife and induce her to withhold her consent. In Pennsylvania it has been held that if the wife refuse to join in the conveyance, the purchaser can recover nominal damages only, for the reason that the law will not indirectly coerce specific performance on the part of the wife by awarding punitive damages against the husband.[78]

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[63] Davis v. Lewis, 4 Bibb (Ky.), 456.

[64] Rutledge v. Laurence, 1 A. K. Marsh. (Ky.) 396.

[65] Goff v. Hawks, 5 J. J. Marsh. (Ky.) 342.

[66] Wohlfarth v. Chamberlain, 14 Daly (N. Y.), 180. In this case, the vendor derived title through a sale previously made by himself as an assignee for the benefit of creditors, the circumstances of which strongly tended to show fraud on his part, and rendered the title doubtful.

[67] Post, ch. 11.

[68] Blumenfeld v. Stine, 87 N. Y. Supp. 81; 42 Misc. 411.

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[69] 6 B. & C. 31.

[70] 1 Sugd. Vend. (8th Am. ed.) 540.

[71] Bush v. Cole, 28 N. Y. 261; 84 Am. Dec. 343, where an auctioneer sold the premises for less than the sum at which he was authorized to sell by his principal. But see Key v. Key, 3 Head (Tenn.), 448, 451, where it was said: "Where a man, without authority, sells the land of another and enters into no covenants, but receives the consideration, the measure of damages would be the money received, and interest.

[72] Chitty Cont. (9th Eng. ed.) 289; 3 Sedg. Dam. (8th ed.) § 1011. Contra, Dobson v. Zimmerman, 55 Tex. Civ. App. 394, 118 S. W. 236.

[73] 40 N. Y. 59; 100 Am. Dec. 468; S. C. *nom.* Brinkerhoff v. Phelps, 43 Barb. (N. Y.) 469. Kiger v. McCarthy Co., 10 Cal. App. 308, 101 Pac. 928.

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[74] Margraf v. Muir, 57 N. Y. 155, where the vendor had only a dower right in the premises, and the purchaser knew that an order of court authorizing a conveyance would have to be obtained, the rights of infants being involved, and, also, that under the peculiar circumstances of the case, such an order could not be obtained without deceiving the court as to the true value of the premises. Distinguishing Pumpelly v. Phelps, 40 N. Y. 59; 100 Am. Dec. 468.

[75] Thus, in Shaw v. Wilkins, 8 Humph. (Tenn.) 646, the vendor informed the purchaser at the time of the contract that the title was outstanding in third parties, and that he expected to obtain it by the time fixed for completing the contract. The vendor being unable to get in the title, it was held that the purchaser might recover damages for the value of the land at the time of the breach.

[76] Ante, § 11. 2 Sutherland Dam. 221.

[77] Post, ch. 19. Drake v. Baker, 34 N. J. L. 358. Tirmbey v. Kinsey, 18 Hun (N. Y.), 255; Heimburg v. Ismay, 35 N. Y. Super. Ct. 35, 40. Martin v. Merritt, 57 Ind. 34; 26 Am. Rep. 45; Puterbaugh v. Puterbaugh, 7 Ind. App. 280; S. C. 34 N. E. Rep. 611.

If the vendor contract that a third person shall convey a title to the land, the measure of damages will be the value of the land at the time of the breach.[79]

§ 99. **WHERE THE VENDOR REFUSES TO CURE A DEFECT OR REMOVE INCUMBRANCES.** Where the title is defective or the estate incumbered, and the vendor has the power to cure the defect or remove the incumbrance, but neglects or refuses so to do, the purchaser may recover as damages the value of the premises at the time of the breach.[80] Upon the same principle it has been held that if a vendor expressly agree to perfect the title, or to do some act necessary to save the purchaser harmless from the claims or demands of third persons, and fails to perform his contract in those respects, whereby the estate is lost to the purchaser, the rule limiting the damages to the consideration money does not apply, and the purchaser may recover full damages for whatever loss he has sustained.[81] If the purchaser himself lay out money in removing incumbrances, or in perfecting the title, he can recover as damages only the amount expended for those purposes.[82] If he expends in perfecting the title a sum greater than the purchase money, it seems that he cannot recover the excess unless the case be one in which he would be entitled to damages for the loss of his bargain.[83]

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[78] Burk v. Serrill, 80 Pa. St. 413; 21 Am. Rep. 105. See, also, Donner v. Redenbaugh, 61 Iowa, 269; 16 N. W. Rep. 127, and post, ch. 18, § 199, and notes.

[79] 3 Sedg. Dam. (8th ed.) § 1007. Pinkston v. Huie, 9 Ala. 252; Gibbs v. Jemison, 12 Ala. 820. Dyer v. Dorsey, 1 Gill & J. (Md.) 440. In Beard v. Delaney, 35 Iowa, 16, the vendor having received $400 for the land, executed a bond in the penalty of $400, to procure title from a third person, and it was held that the purchaser might recover that sum as "liquidated damages," though he had received a conveyance of the land and had not been disturbed in the possession. In Yokum v. McBride, 56 Iowa, 139, the vendor agreed to perfect the title by procuring a patent to the purchaser from the State, and the court held that if the vendor was unable to procure the patent without fault on his part, the purchaser could recover only nominal damages.

[80] 1 Chitty Cont. (9th ed.) 289; 3 Sedg. Dam. 182. Williams v. Glenton, L. R., 1 Ch. App. 200; Simons v. Patchett, 7 El. & Bl. 568; Goodwin v. Francis, L. R., 5 C. P. 295; Robinson v. Hardman, 1 Exch. 850; Engel v. Fitch, 4 Q. B. 659. Kirkpatrick v. Downing, 58 Mo. 32; 17 Am. Rep. 678.

[81] Taylor v. Barnes, 69 N. Y. 430. Where the premises sold were subject to a species of vendor's lien in favor of the State, against which lien the vendor

§ 100. **LIQUIDATED DAMAGES.** The parties may always agree upon an amount to be paid as liquidated damages in case the vendor fails to make title at the specified time, and the purchaser will be entitled to recover that amount as damages, though it be equivalent to damages for the present value of the land.[84] But the amount agreed upon must be reasonable; otherwise it will be regarded as a penalty,[85] in which case, it is presumed, the actual value of the

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agreed to protect the purchaser, the court, after observing that the rule limiting the measure of damages to the purchase money paid, with interest, does not apply where the vendor has sold lands to which he has not a perfect title, but which he undertakes to complete and perfect, and neglects so to do, continued: "In this case there is an expressed agreement for indemnity, and a recovery which does not give the vendee the benefit of his bargain, and the value of his purchase does not indemnify him against loss. The true rule of damages as a measure of indemnity in such case is the value of the land at the time of the eviction or other breach of the contract, with interest from that time. The plaintiff lost the benefit of her purchase by the omission of the defendants to perform their agreement by paying for the lands to perfect her title. The loss was occasioned by the act of the defendants, against which they covenanted to indemnify the plaintiff, not merely by restoring the consideration of the purchase, but by paying her the equivalent of the lands to which she was entitled. This alone would adequately indemnify her against loss."

If the vendor contracts to convey free of all incumbrances, and the property is destroyed by fire before he is able to remove an incumbrance, the loss must fall on him. Eppstein v. Kuhn, 225 Ill. 115, 80 N. E. 80. See also, Sutton v. Davis, 143 N. C. 474, 55 S. E. 844.

[82] 2 Sutherland Dam. 228. The same rule prevails in an action for breach of the covenant of warranty or against incumbrances. Post, §§ 129, 164.

[83] 2 Sutherland Dam. 228. With the exception of Cox v. Henry, 32 Pa. St. 18, all the cases cited by this author to the proposition in the text were actions for breach of covenants for title. See post, § 131. In Chartier v. Marshall, 56 N. H. 478, where the vendor refused to convey, damages were allowed the purchaser for an excess over the consideration money paid by him to get in the outstanding title.

[84] 1 Sedg. Dam. (8th ed.) § 405; Lyons v. Woman's League, 124 La. 222; 50 So. 18.

[85] Gates v. Parmly, 93 Wis. 294; 66 N. W. 253. Runnells v. Pruitt, (Tex. Civ. App.) 204; S. W. 1017.

land at the time of the breach of the contract would be allowed as damages.[86] The penalty of a title bond is usually double the purchase money, and when that is the case, is, of course, as it purports to be, merely a penalty and not liquidated damages.[87] But if a purchaser bring covenant on a title bond, and the case be one in which he is entitled to damages for loss of his bargain, it has been held that his recovery cannot be limited by the penalty of the bond.[88] And, generally, it may be said, that the whole agreement may be looked to for the purpose of determining whether the sum mentioned in a title bond as a "penalty" is in fact a penalty or liquidated damages.[89] If the agreement contain various stipulations of different degrees of importance, besides the stipulation to make a good title, and the damages for the breach of some of the stipulations would be certain, and of others uncertain, and a large sum is expressed in the agreement as payable on the breach of any of the stipulations, such sum will be regarded as a penalty, and not as liquidated damages.[90] In a case in Illinois the following rule was announced: "Where the parties to the agreement have expressly declared the sum to be intended as a forfeiture or penalty, and no other intent is to be collected from the instrument, it will generally be so treated, and the recovery will be limited to the damages sustained by the breach of the covenant it was to secure. On the other hand, it will be inferred that the parties intended the sum named as liquidated damages, where the damages arising from the breach are uncertain and are not capable of being ascertained by any satisfactory and known rule." Accordingly, a written contract in that case for the exchange of farms having provided that in case either party failed to convey at the appointed time such party would "forfeit and pay as damages" to the other the sum of $1,500, it was held, in view of the difficulty of proving the actual damages sustained by the plaintiff, that the sum named should be treated as liquidated damages.[91]

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[86] 1 Sedg. Dam. (8th ed.) § 405. where the rule was thus stated: "Wherever the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages. Holmes v. Holmes, 12 Barb. (N. Y.) 137, where it was said by the court: "When the damages to be recovered are liquidated in advance by the terms of the contract it is a mistake to assume that the party claiming is alone benefited. Such a stipulation may be as beneficial to the party who pays as to him who receives. Both enter into the contract with a full knowledge of all their rights and liabilities. The amount to be paid is not to be diminished, neither is it to be enlarged. Each may estimate the consequences of a breach with certainty and precision, and deport himself accordingly." In Leggett v. Mut. Ins. Co., 53 N. Y. 394, it was held that an agreement to pay $5,000 liquidated damages in case of the vendor's refusal or failure to execute and deliver a proper deed applied only to the agreement to execute the deed, and not to the warranty of title implied from the agreement to sell.

[87] Burr v. Todd, 41 Pa. St. 206. Stewart v. Noble, 1 Green (Iowa), 28. See, also, Dyer v. Dorsey, 1 Gill & J. (Md.) 440. But the penalty of a title bond is not necessarily double the purchase price, and it is not evidence that one-half of it was the value of the land or the amount of the purchase price, and it is error for the court so to instruct the jury. Duncan v. Tanner, 2 J. J. Marsh. (Ky.) 399.

[88] Noyes v. Phillips, 60 N. Y. 408. Sweem v. Steele, 5 Iowa, 352. But see Spruill v. Davenport, 5 Ired. L. (N. C.) 145. If the action be debt instead of covenant the plaintiff's recovery would of course be limited by the penalty. In Beard v. Delany, 35 Iowa, 16, where the vendor entered into a bond in the "penalty" of $500 to perfect the title, that sum having been paid to him as consideration money, it was held that the $500 should be treated as liquidated damages, and the purchaser was permitted to recover that amount.

[89] Genner v. Hammond, 36 Wis. 277.

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[90] Carpenter v. Lockhart, 1 Ind. 434. Gates v. Parmly, 93 Wis. 294, 66 N. W. 253.

[91] Gobble v. Linden, 76 Ill. 157. See, also, 2 Greenl. Ev. §§ 258, 259.

CHAPTER XI.

ACTION AGAINST VENDOR FOR DECEIT.

GENERAL PRINCIPLES. § 101.
WHAT CONSTITUTES FRAUD WITH RESPECT TO THE TITLE.
- **Concealment of defects.** § 102.
- **Wilful or careless assertions.** § 103.
- **Defects which appear of record.** § 104.
- **Existence of fraudulent intent.** § 105.
- **Statements of opinion.** § 106.
- **Pleading.** § 107.

§ 101. **GENERAL PRINCIPLES.** Fraud on the part of a vendor of real estate in misrepresenting or concealing the state of his title materially enlarges the scope of the purchaser's remedies in several particulars, the principal of which may be thus classified: (1) It gives the purchaser the right to hold the vendor liable for defects of title, though the contract has been executed by the acceptance of a conveyance without covenants for title;[1] (2) it entitles the purchaser to the rescission of an executed contract of sale;[2] (3) it entitles the purchaser, on rescission of the contract, whether executed or executory, to retain possession of the premises until he is reimbursed for any loss, injury or expense he may have incurred;[3] (4) it entitles the purchaser to recover, in an action for deceit, damages for the loss of his bargain, over and above the consideration money, and any sum expended by him for improvements;[4] (5) it gives the purchaser the right to recover back or detain the purchase money, whether the contract has been executed by a conveyance, whether that conveyance was with or without covenants for title,[5] and, if with covenants, whether they have or have not been broken;[6] (6) it absolves the purchaser from his obligation to tender the purchase money and demand a conveyance as a condition precedent to an action against the vendor;[7] and (7) it deprives the vendor of the right to cure defects or remove incumbrances, and to require the purchaser to take the perfected title.[8] Several of the remedies here mentioned are concurrent; the right to rescind the contract in equity; the right to recover back or to detain the purchase money at law, and the right to recover damages at law for the deceit. He may, of course, elect between these several remedies;[9] but inasmuch as he may recover damages in excess of the consideration money in an action for the deceit, that remedy is generally to be preferred to *assumpsit* for money had and received to the plaintiff's use, in which he would only recover the purchase money and interest, and nothing for the loss of his bargain. The purchaser cannot be compelled to take one of those remedies instead of another; he can never be required to accept damages in lieu of rescission;[10] nor can the vendor insist upon rescinding the contract and returning the consideration where the purchaser is entitled to damages. The purchaser may, of course, waive his right of damages, and sue to recover so much of the purchase money as he may have paid.[11] If the purchaser desires to recover damages at law against the vendor guilty of fraud in respect to the title, his appropriate remedy at common law is an action on the case in the nature of a writ of deceit.[12] He cannot, if his action be for breach of covenant, increase his damages by showing fraud on the part of the vendor.[13] It is true that the action of covenant sounds in damages, but, as has been already seen, the purchaser's recovery is limited to the consideration money and costs of eviction.[14] If the contract be under seal, the purchaser may elect between the action of covenant and the action on the case for deceit; if he chooses the latter remedy, the objection cannot be made that the contract is under seal, and that covenant should have been brought.[15] The purchaser does not waive his right to recover damages, in a case of fraud, by paying the purchase money.[16] He waives his right to *rescind* the contract by remaining in possession and paying the purchase money after discovering the fraud.[17] But the action to recover damages is an affirmance of the contract, and it is always his privilege to complete the contract without impairing his right to reimbursement for any loss which he may have incurred through the vendor's fraud.[18] If the purchaser should choose to keep the premises and bring an action for damages grounded on the fraud, his possession of the premises, if it be probable that he would never be disturbed therein, would, it is apprehended, be considered in mitigation of damages.

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[1] 1 Sugd. Vend. 7, 247.

[2] 2 Sugd. Vend. 553.

[3] Young v. Harris, 2 Ala. 108; Garner v. Leverett, 32 Ala. 413. Kiefer v. Rogers, 19 Minn. 38.

[4] Rawle Covt. ch. 9; 1 Sugd. Vend. 358.

[5] 2 Sugd. Vend. 553; Rawle Covt. § 322. Diggs v. Kirby, 40 Ark. 420. McDonald v. Beall, 55 Ga. 288. Haight v. Hayt, 19 N. Y. 474. Edwards v. McLeay, Coop. 308.

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[6] 1 Sugd. Vend. 247, where it is said that if a purchaser is entitled to relief in a case of fraud in respect to the title, "it is not important that he has not been evicted; if the rightful owner is not barred by adverse possession, the purchaser cannot be compelled to remain during the time to run in a state of uncertainty whether, on any day during that period, he may have his title impeached. A court of equity is bound to relieve a purchaser from that state of hazard into which the misrepresentation of the seller has brought him." Whitlock v. Denlinger, 59 Ill. 96.

[7] Thomas v. Coultas, 76 Ill. 493.

[8] Green v. Chandler, 25 Tex. 148. But see Whitney v. Crouch, 172 N. Y. Supp. 729.

[9] Krumm v. Beach, 96 N. Y. 398.

[10] 1 Sugd. Vend. (8th ed.) 376. Corbett v. McGregor (Tex. Civ. App.) 84 S. W. 278.

[11] Pearsoll v. Chapin, 44 Pa. St. 9.

The purchaser is not entitled to relief in a case of fraud which cannot operate him an injury,[19] as where the vendor had previously conveyed the premises to a stranger, and the conveyance failed to take effect as against the purchaser, for want of timely acknowledgment and registry.[20] Nor where the vendor fraudulently acquired the title, if it appear that the person defrauded made no objection, after reasonable opportunity and full knowledge of the facts.[21] Nor where an incumbrance, not disclosed by the vendor, is released by the incumbrancer, and the purchaser suffers no actual injury.[22] Nor where an incumbrance, fraudulently, concealed, has been removed by the vendor before decree in a suit by the purchaser for rescission.[23] Nor, generally, in any case in which the purchaser is not damnified by the alleged fraud.[24]

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[12] 2 Bl. Com. 166; 1 Sugd. Vend. 236; Kerr on Fraud (Bump's ed.), p. 324. Carvill v. Jacks, 43 Ark. 439.

[13] Rawle Covt. § 159.

[14] Ante, § 90, and post, § 164.

[15] Parham v. Randolph, 4 How. (Miss.) 435; 35 Am. Dec. 403; English v. Benedict, 25 Miss. 167. Munroe v. Pritchett, 16 Ala. 785; 50 Am. Dec. 203; Foster v. Kennedy, 38 Ala. 359; 81 Am. Dec. 56. Clark v. Baird, 5 Seld. (N. Y.) 183. See, also, Rawle Covts. (5th ed.) § 167; Kerr on Fraud (Am. ed.), 326.

[16] White v. Sutherland, 64 Ill. 181.

[17] Strong v. Strong, 102 N. Y. 69; 5 N. E. Rep. 799; Schiffer v. Dietz, 83 N. Y. 300.

[18] 2 Kent Com. 480. Owens v. Rector, 44 Mo. 389. Smyth v. Merc. Tr. Co., 18 Fed. Rep. 486.

[19] Crittenden v. Craig, 2 Bibb (Ky.), 474. Whitney v. Crouch, 172 N. Y. Supp. 729. Wuesthoff v. Seymour, 22 N. J. Eq. 66, where it was held that falsely representing an alley to be a private right of way, instead of a public alley, is not fraud entitling a purchaser to relief, the loss or injury result-

The contract may, of course, be rescinded if the fraud, in respect to the title, was perpetrated by an agent. An agent or attorney of the vendor conducting the negotiations on his behalf, having knowledge of an incumbrance on the estate, must disclose it.[25] But it seems that the principal will not be liable to an *action for damages* in a case of deceit by the agent, unless the deceit was impliedly authorized by the principal.[26] An action in such case

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ing from the alley being in either case substantially the same. The same principle was declared in Morrison v. Lods, 39 Cal. 38, but was disapproved in Kelly v. R. Co., 74 Cal. 557.

[20] Meeks v. Garner, 93 Ala. 17; 8 So. Rep. 378. And where land has been conveyed and the deed recorded, a subsequent contract by the grantor to sell the same land to a stranger, does not place a cloud on the title of the grantee, nor furnish a ground of objection to the title by the vendee. Goodkind v. Bartlett, 153 Ill. 419; 38 N. E. Rep. 1045.

[21] Comstock v. Ames, 1 Abb. App. Dec. (N. Y.) 411.

[22] Campbell v. Whittingham, 5 J. J. Marsh. (Ky.) 46; 20 Am. Dec. 241. Whitney v. Crouch, 172 N. Y. Supp. 729.

[23] Davidson v. Moss, 5 How. (Miss.) L. 673. But see post, as to right of vendor to remove objections where he has been guilty of fraud, § 314.

[24] Halls v. Thompson, 1 Sm. & M. (Miss.) 489. Board of Commrs. v. Younger, 29 Cal. 172. Walsh v. Hall, 66 N. C. 233.

[25] 1 Sugd. Vend. (8th Am. ed.) 9. Evans v. Bicknell, 6 Ves. 174, 193, *semble;* Burrowes v. Locke, 10 Ves. 470; Bowles v. Stewart, 1 Sch. & Lef. 227. Gill v. Corbin, 4 J. J. Marsh. (Ky.) 392. Concord Bank v. Gregg, 14 N. H. 331.

[26] Kerr on Fraud (Am. ed.), 326; citing New Brunswick R. Co. v. Conybeare, 9 H. L. Cas. 1; Henderson v. Lacon, L. R., 5 Eq. 262. In Law v. Grant, 37 Wis. 548, it was held that if an agent effected a sale of the principal's land by false representations or other fraud, without the authority or knowledge of the principal, the latter is chargeable with such fraud in the same manner as if he had known or authorized it. The representations in this case were made with respect to the value of the land, and not with respect to the title, but there would seem to be no difference in principle between the two. The

may be maintained against the agent himself; it is no defense that he was acting for another.[27] Where a husband sold the lands of his wife, and fraudulently misrepresented the title, and the wife received the benefit of the sale, it was held that she was bound by his acts and liable in damages, though the contract was made in the name of the husband, and without her knowledge.[28] An agent fraudulently misrepresenting the title may, of course, be held personally liable for damages.[29] A trustee who makes false representations as to incumbrances on the property sold by him, will be personally liable to the purchaser.[30] In England, and in some of the American States, a vendor or his agent, fraudulently misrepresenting the title, or fraudulently concealing defects of title, for the purpose of making a sale, is, by statute, made liable to fine and imprisonment, in addition to a civil action for damages.[31]

The grounds upon which the purchaser is entitled to damages at law, or to relief in equity, where fraud has been practiced upon him respecting the title, are in most cases the same;[32] consequently,

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purchaser set up the agent's fraud, by way of counterclaim for damages, as a defense to a foreclosure proceeding. It may be doubted whether the principal could be held liable for his agent's fraud in an action for damages, unless the fraud was authorized by him. New Brunswick R. Co. v. Conybeare, 9 H. L. Cas. 1.

[27] Riley v. Bell, 120 Iowa, 618; 95 N. W. 170.

[28] Krumm v. Beach, 96 N. Y. 398. But where the vendor did not disclose the fact that the title was in his wife, and the wife's deed was tendered to the purchaser, it was held that there was no fraud, and that the purchaser must take the title. Crump v. Schneider, 246 Fed. 225, 158 C. C. A. 385.

[29] Norris v. Kipp, (Iowa) 38 N. W. Rep. 152.

[30] 1 Sugd. Vend. (8th Am. ed.) 12.

[31] 24 Vict. chap. 96, § 28. Pub. Stat. Mass. 1882, p. 1147. Gen. Stat. Minn. 1881, p. 539.

[32] Sugd. Vend. 243, where it is said that, in case of fraud by the vendor in the sale of real estate, "a foundation is laid for maintaining an action to recover damages for the deceit so practiced; and in a court of equity, a foundation is laid for setting aside the contract which was founded upon a fraudulent basis." While the proposition stated in the text is true in a general sense, it will perhaps admit of some qualification. A court of equity might freely decree the rescission of a contract upon evidence of fraud which a court of law would deem insufficient to warrant a judgment against the vendor for damages. And, on the other hand, in the case of an executed contract, the court might be influenced in refusing a rescission by the consideration that the purchaser still had his remedy on the covenants contained in his deed.

it has not been deemed necessary in the following pages to distinguish the cases in which damages were sought or rescission of the contract demanded by the purchaser, or to consider the subject separately with respect to the particular form of relief or redress to which he may be entitled.

Where the sale is by parol and the terms of the contract between the parties are afterwards reduced to writing, fraudulent representations of the vendor at the sale will not be merged in the written contract.[33]

§ 102. **WHAT CONSTITUTES FRAUD WITH RESPECT TO THE TITLE. Concealment of defects.** The following propositions may be stated as embodying the principal features of the decisions as to what acts or conduct of the vendor amount to fraud in respect to the title which he undertakes to convey:

(1) The vendor is guilty of fraud if he conceals a fact material to the validity of the title, lying peculiarly within his own knowledge, and which it is his duty to disclose.[34] It is as much a fraud

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[33] Shanks v. Whitney, 66 Vt. 405.

[34] Story Eq. § 207; Sugd. Vend. 271; Sugd. Law of Prop., etc., 653. Early v. Garrett, 9 Barn. & Cres. 928. Laidlaw v. Organ, 2 Wh. (U. S.) 195. Saltonstall v. Gordon, 33 Ala. 151. State v. Holloway, 3 Blackf. (Ind.) 47. Emmons v. Moore, 85 Ill. 304; Strong v. Lord, 107 Ill. 26. Crutchfield v. Danilly, 16 Ga. 434. Young v. Bumpass, 1 Freem. Ch. (Miss.) 241. Roseman v. Conovan, 43 Cal. 110. Brown v. Montgomery, 20 N. Y. 287; 75 Am. Dec. 404. Bank v. Baxter, 31 Vt. 101. Carr v. Callaghan, 3 Litt. (Ky.) 365, 375. Corbett v. McGregor, (Tex. Civ. App.) 84. This is the *suppressio veri* of the text writers, and is substantially the rule established by the leading case of Edwards v. McLeay, Coop. 308, Sir WM. GRANT delivering the opinion. To this Lord ELDON added on appeal, that if one party make a representation which he knows to be false, but the falsehood of which the other party has no means of discovering, he is guilty of fraud. Sugd. Vend. 246. In the case of Brown v. Manning, 3 Minn. 35; 74 Am. Dec. 736, it was held that the mere execution and delivery of a deed, with general warranty conveying land which the grantor had previously conveyed to a third person, does not of itself amount to fraud, and that there must be some false representation of fact, with intent to deceive, accompanying the act, in order to entitle the grantee to relief. It is exceedingly difficult to reconcile this decision with the general rule that the vendor is guilty of fraud if he suppresses any fact material to the validity of the title. The court cites no authority, and gives no reason for the decision other than that "there may have been, and frequently does exist, a condition of things which would make it perfectly safe for the purchaser to take a deed of land under such circumstances, and

to suppress the truth as it is to utter a falsehood.[35] The question, what facts the seller must disclose, is capable of much refinement. Obviously it cannot be determined by any precise rule. In every case that arises the question is one of fact to be solved by all the circumstances which surround the transaction,[36] among which, perhaps, the most important are the relations of trust and confidence which the parties bear to each other, and the inequalities in their respective business capacities, or opportunities for information respecting the title. Thus, it has been held, that if the vendor is a resident of the locality where the sale is made, and is aware that certain existing facts render the title invalid under the laws there in force, he is bound to disclose those facts to the purchaser if he is a stranger, though they might be discovered by an examination of the records.[37] On the other hand, it has been held that the vendor is under no obligation to disclose

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rely upon his covenants for his security against the outstanding title, and such a transaction could take place in perfect good faith." In Maxfield v. Bierbauer, 8 Minn. 413, this case was cited approvingly, but it appeared that the purchaser was aware of the prior conveyance. A contrary decision upon similar facts will be found in Banks v. Ammon, 27 Pa. St. 172. Of course, the mere conveyance with covenants of warranty, in the absence of concealment or misrepresentation of the state of the title, is not of itself a sufficient fraudulent representation to vitiate the transaction. Merriman v. Norman, 9 Heisk. (Tenn.) 270, criticising Gwinther v. Gerding, 3 Head (Tenn.), 198. If the vendor suppresses the fact that his wife is living, so as to induce the purchaser to accept a conveyance without a release of her contingent right of dower, he is guilty of fraud. Shiffer v. Dietz, 83 N. Y. 300; S. C., 53 How. Pr. (N. Y.) 372. So also, where he alters the abstract of title so as to conceal an incumbrance on the land. Knowlton v. Amy, 47 Mich. 204. The fact that the seller fails to deny, in conversation with the purchaser, the charge that he has concealed an incumbrance on the property, is not sufficient evidence of fraud on his part. Halls v. Thompson, 1 Sm. & M. (Miss.) 443. The encroachment of an adjoining lot upon that sold, known to the vendor but not mentioned in the particulars of sale, is a suppression of a material fact entitling the purchaser to relief. King v. Knapp, 59 N. Y. 462. It is fraud in the vendor to execute a title bond knowing that he has no title, legal or equitable. Mullins v. Jones, 1 Head (Tenn.) 517. It is fraud in an executor to sell land belonging to the estate, if the will confers no authority for that purpose. Woods v. North, 6 Humph. (Tenn.) 308; 44 Am. Dec. 312.

[35] Lockridge v. Foster, 4 Scam. (Ill.) 569.

[36] Bean v. Herrick, 12 Me. 262; 28 Am. Dec. 176.

[37] Babcock v. Case, 61 Pa. St. 427; 100 Am. Dec. 654. Moreland v. Atchison, 19 Tex. 303, 311.

the existence of unopened streets and such like easements affecting the premises sold, when the facts respecting them appear from the plats and records in the public offices, and he has reason to believe that the purchaser has equal knowledge with himself upon the subject,[38] nor to disclose the fact that his title is equitable only, the legal title being outstanding in another, if he be in a situation to compel a conveyance of the legal title; or if the circumstances of the case be such that he is entitled to time in which to perfect the title.[39] As a general rule it may be said that the vendor is bound to disclose all facts material to the title of which he is informed.[40] A title which upon the face of the vendor's title deeds, or the public records, appears complete and perfect, may in fact be utterly worthless, as where the estate is held *pur autre vie,* and, at the time of the contract between the vendor and purchaser, the *cestui que vie* is dead, or in any case in which the vendor's title is liable to be defeated upon the happening of a particular event. In all such cases the vendor is guilty of fraud if he conceals from the purchaser a fact which defeats or lessens the value of his title.[41] It has been said that if the purchaser accepts the estate subject to all faults, and the vendor knows of a latent defect which the purchaser could not discover, there is a question as to whether or not he is bound to disclose the defect. This observation was made in respect to faults in the quality of the estate, but it would apply as well, it would seem, to defects in the title.[42] It seems scarcely fair to apply to a case of alleged fraud with respect to the title the rule which prevails in a case of fraudulent representations as to the quality of the estate, namely, that the vendor is not bound to disclose defects which lie open to the observation of the purchaser. It is true that all defects of title which would appear upon a thorough examination of the title may be said to be, in a certain sense, open to the observation of the purchaser. But it is well known that an examination of the title is a serious matter, involving much labor and delay, and is frequently dispensed with upon the assurances of the vendor that his title is perfect. Whether the estate consists of fertile lands or sterile lands, uplands or meadows, productive or non-productive mines, can be determined by any man of ordinary capacity; but whether the record shows a clear title, is a fact that few purchasers can ascertain without professional assistance and much expense. Whether the vendor is bound to disclose that his title has been questioned or doubted does not appear. But it has been held that if the validity of the title depends upon a particular fact, and the vendor knows that such fact exists, no duty devolves upon him to disclose to the purchaser that the existence of such fact had ever been questioned. Thus, where a son placed money in the hands of his father with which to buy lands for him (the son), and the father died before a conveyance was executed, and the vendor required indemnity against any future claim by the heirs of the father before he would convey the land to the son, it was held that the son was not obliged to disclose to his vendee the fact that such indemnity had been required and given.[43] This case, however, scarcely goes the length of deciding that the vendor is under no obligation to disclose facts which render the title merely doubtful, and not absolutely bad.

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[38] Wagner v. Perry, 47 Hun (N. Y.) 516.

[39] Provident L. &. Tr. Co. v. McIntosh, (Kans.) 75 Pac. 498.

[40] Evans v. Marsh, 38 App. D. C. 341.

[41] Sugd. Vend. (8th Am. ed.) 9. Edwards v. McLeay, Coop. 312.

[42] 1 Sugd. Vend. (8th Am. ed.) 2, 9. Jones v. Keen, 2 Moo. & R. 348. Ward v. Wiman, 17 Wend. (N. Y.) 193, a case in which the land supposed to have been sold did not exist.

§ 103. **Willful or careless assertions,** The vendor is guilty of fraud if he makes an assertion of fact in regard to the title which he knows to be false, or which he has no reason to believe to be true, and which is in fact untrue.[44] It is a sufficient proof of fraud, as a general rule, to show that the vendor's representations are false, and that he had knowledge of facts contrary to his representations.[45] There are cases which hold that the representations of the vendor as to title may not be fraudulent in law, though exceptionable in point of morals, as where he makes untrue statements in regard to a fact concerning which the purchaser has the same opportunity and means of information as he.[46] It must be admitted that these decisions stand upon very debatable ground, and that the courts should be slow to condone fraud on the part of the vendor under any circumstances, especially where it consists of a positive averment, and not a mere suppression of the truth. A mere covenant that the grantor is seized in fee is not of itself a fraudulent representation if he has no title.[47]

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[43] Farrell v. Lloyd, 69 Pa. St. 239, 248. The vendor, assuming to tell the defects in his title, is guilty of fraud in suppressing a material defect. Cont'l Coal & Co. v. Kilpatrick, 158 N. Y. Supp. 1056, 172 App. Div. 541.

[44] Hinkle v. Margerum, 50 Ind. 242; Strong v. Downing, 34 Ind. 300; Wiley v. Howard, 15 Ind. 169; Warren v. Carey, 5 Ind. 319; Fitch v. Polke, 7 Blackf. (Ind.) 564. Herman v. Hall, 140 Mo. 270; 41 S. W. 733. Prestwood v. Carlton, 162 Ala. 327; 50 S. 254. If the vendor positively affirm, as of his own knowledge, that the title is good, without knowing whether it is in fact good, he will be deemed guilty of fraud if the title is in fact bad. Barnes v. Union Pac. R. Co., 54 Fed. Rep. 87; 12 U. S. App. 1.

§ 104. **Defects which appear of record.** The vendor is not necessarily guilty of fraud in failing to call the attention of the purchaser to a defect of title or an incumbrance which appears of record, or which appears on the face of the instruments evidencing the vendor's title.[48] This is analogous to the rule that the vendor need not call the attention of the purchaser to defects in the quality of the estate which are fully open to his observation. But the vendor will be guilty of fraud if he induce the purchaser to forego an examination of the title in order that his attention may not be brought to such defects;[49] or if he occupies such a confidential relation to the purchaser that by reason of such relation the latter is induced to forego an examination of the title.[50] In

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[45] 1 Sugd. Vend. (8th Am. ed.) 5. Burrowes v. Locke, 10 Ves. 470; Lake v. Brutton, 8 De G., M. & G. 449. Buchanan v. Burnett, 102 Tex. 492; 119 S. W. 1141.

[46] Yeates v. Pryor, 11 Ark. 66, the court, by WALKER, J., saying: "It is not every representation of the vendor in regard to the property sold which will amount to fraud, be it ever so exceptionable in point of morals. The misrepresentation, in order to affect the validity of the contract, must relate to some matter of inducement to the making of the contract in which, from the relative position of the parties and their means of information, the one must necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other on account of his superior information and knowledge in regard to the subject of the contract; for if the means of information are alike accessible to both, so that with ordinary prudence or vigilance the parties might respectively rely upon their own judgment, they must have been presumed to have done so; or, if they have not so informed themselves, must abide the consequences of their own inattention and carelessness." In this case fraud on the part of the vendor was alleged, both in respect to the value of the property and state of the title.

[47] Decker v. Schulze, (Wash.) 39 Pac. Rep. 261. Ante, § 102, n.

[48] Turner v. Harvey, Jac. 178. Ward v. Packard, 18 Cal. 391. Richardson v. Boright, 9 Vt. 368. The cases which hold that the vendor is not guilty of fraud in failing to disclose an incumbrance apparent of record proceed largely upon the hypothesis that the purchaser has himself examined the record, is aware of the incumbrance, and tacitly purchases subject thereto and that he has taken the incumbrance into consideration in determining the price he will pay for the property. Ward v. Packard, supra, citing Story Eq. § 208. It is hardly to be supposed that a business man, knowing of an incumbrance,

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would purchase without mentioning the fact for the purpose of obtaining the property at the lowest figure. The other principal ground of such decisions, namely, that the purchaser is guilty of laches in failing to examine the title and must suffer the consequences would seem better founded in reason, though it has not passed without attack. Cullum v. Branch Bank, 4 Ala. 21; 37 Am. Dec. 325; Burwell v. Jackson, 5 Seld. (N. Y.) 545. Keifer v. Rogers, 19 Minn. 32; Pryse v. McGuire, 81 Ky. 608. "It would be the grossest injustice to infer fraud upon the mere silence of a vendor as to the existence of an incumbrance where the abstract of title is sufficient to put the purchaser on inquiry." Steele v. Kinkle, 3 Ala. 352. The case of Griffith v. Kempshall, Clarke Ch. (N. Y.) 571, has gone as far, perhaps, as any other in support of the proposition that in a case of fraud by the vendor the purchaser is chargeable with laches in failing to examine the records, where such examination would have disclosed the fraud. The sale was at auction, the vendor declaring with knowledge to the contrary that there were no incumbrances on the property. A most important element of this decision, however, was that after time given for examining the title the purchaser had accepted a conveyance with general warranty, and that the vendor's fraud had been merged in the conveyance. It is not easy to reconcile this decision with the rule that the contract will be vitiated if the vendor make definite statements for the purpose of preventing inquiries by the purchaser which would disclose the fraud. In Tallman v. Green, 3 Sandf. (N. Y.) 437, it was held that false representations as to the title are no ground for rescission when the record shows the true state of the title, since the facts falsely represented must be such as the grantee could not know to be untrue. It does not appear that the vendor in this case knew that his representations were false. The purchaser was left to his remedy at law on the vendor's covenants. In Andrus v. St. Louis, 130 U. S. 643, it was held that a purchaser was guilty of laches in failing to inspect the premises, by which he would have discovered an adverse claimant in possession.

[49] 2 Warvelle Vend. 844. Richardson v. Boright, 9 Vt. 368. Corbett v. McGregor, (Tex. Civ. App.) 84 S. W. 278. If the purchaser refrains from examining the title by reason of the vendor's representation that the title is good, he will be relieved if the title is bad. Bailey v. Smock, 61 Mo. 213. But if he is not influenced by the vendor in failing to examine the title, he will not be relieved on the ground of fraud. Patten v. Stewart, 24 Ind. 332, 342, *semble.*

[50] Babcock v. Case, 61 Pa. St. 430; 100 Am. Dec. 454. Hunt v. Moore, 2 Pa. St. 107, where the vendor was an executor and man of affairs, and the vendee

either case the same principle is applied as that upon which the vendor is held guilty of fraud in actively concealing latent defects in the quality of the estate. In every sale of lands there is an implied contract that the vendor has an indefeasible title, unless the contrary is expressed;[51] hence, in every case in which the purchaser enters into the contract without making an examination or requiring an abstract of the title, it would seem fair to assume that he did so relying upon the obligation of the vendor to disclose any defect in his title. Where the vendor knows there is a defect in the title, and knows also that the purchaser intends to dispense with an abstract or examination of the title, it is no more than fair to give to the silence of the vendor under such circumstances the effect of an express representation that the title is unimpeachable. Of course a misrepresentation as to a fact affect-

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a devisee of the vendor's testator, and a woman of weak intellect much under the executor's influence. Rimer v. Dugan, 39 Miss. 477; 77 Am. Dec. 687. In Babcock v. Case, 61 Pa. St. 427; 100 Am. Dec. 454, it appeared that the vendor held a tax deed, and represented to the purchaser that he had examined the title and found it good. The purchaser, saying that he would take the vendor's word for it, bought the land without examining the title. It did not affirmatively appear that the vendor was aware of the facts vitiating the title, but the court held that there was a relation of trust and confidence between the parties, and that, having undertaken to state the facts truly, his ignorance of them would not redeem a falsehood in regard to them, in any material respect, from being a fraud which would avoid the contract. If the vendor prevents the vendee from examining the records by assurances that the title is perfect and the property free from incumbrances, a case of special confidence is established and the vendee is not chargeable with neglect in failing to examine the title. Bailey v. Smock, 61 Mo. 217. That a vendor is not bound to inform the purchaser of the existence of a judgment lien or other incumbrance on the premises which may be easily discovered by an examination of the public records, is doubtless true if the parties are dealing at arm's length, but it is believed that a court of equity would lay hold on slight circumstances to establish a relation of trust and confidence between the buyer and seller, and to charge the latter with an abuse of that confidence.

[51] Burwell v. Jackson, 5 Seld. (N. Y.) 535. In Crawford v. Keebler, 5 Lea (Tenn.), 547, where the vendor failed to inform the purchaser of a suit to enforce a prior vendor's lien upon the land, it was said that the mere fact of a want of title known to the vendor and not communicated to the vendee, is a fraud upon him, for which he may resist the payment of the purchase money. See, also, Prout v. Roberts, 32 Ala. 427. Crutchfield v. Danilly, 16 Ga. 432.

ing the title not apparent of record, such as the fact of inheritance or the like, will fix the vendor with fraud.[52]

There is undoubtedly a conflict of authority as to the duty of the vendor to disclose defects of title which the purchaser might discover by an examination of the records. There are cases which hold that the vendor is liable, if, knowing of a defect or incumbrance, he fails to disclose it,[53] others, that he is liable if he assert that the title is good, when he knows that the records show it to be defective;[54] and lastly, cases which hold that the purchaser has no right to rely on the vendor's representation that the title is good, in any case, but should satisfy himself by an examination of the records.[55] Both upon principle and authority it would seem that the second class of cases establishes the true rule. It is inconceivable that the vendor, knowing his title to be bad, should declare it to be good for any purpose other than to induce the purchaser to accept it without examination. There can be no doubt that in morals the vendor is guilty of fraud. And when it is sought in law to visit upon him the consequences of his fraud, the vendor should not be allowed to answer, that if due diligence had been exercised, his fraud would have been discovered and

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[52] Hammers v. Hanrick, 69 Tex. 412; 7 S. W. Rep. 345.

[53] Cullum v. Branch Bank, 4 Ala. 21; 37 Am. Dec. 725. Burwell v. Jackson, 5 Seld. (N. Y.) 535. Here there was no representation whatever by the vendor as to the sufficiency of his title, unless the agreement to make "a good and sufficient conveyance" could be considered such. In Prout v. Roberts, 32 Ala. 427, the rule was thus broadly stated by STONE, J.: "A vendor who conceals from his vendee a known and material defect in or incumbrance on his title, and thereby induces him to purchase, is guilty of a fraud for which the vendee may claim a rescission of the contract," citing Cullum v. Br. Bank, supra. Harris v. Carter, 3 Stew. (Ala.) 233; Greenlee v. Gaines, 13 Ala. 198; 48 Am. Dec. 49; Bonham v. Walton, 24 Ala. 513; Foster v. Gressett, 29 Ala. 393; Lanier v. Hill, 24 Ala. 554; McLemore v. Mabson, 20 Ala. 137. To the same effect see Johnson v. Pryor, 5 Hayw. (Tenn.) 243; Crawford v. Keebler, 5 Lea (Tenn.), 547; Nicol v. Nicol, 4 Baxt. (Tenn.) 145; Napier v. Elam, 6 Yerg. (Tenn.) 108. Norris v. Hay, 87 Pac. 380; 149 Cal. 695. In Cullum v. Branch Bank, supra, the court said: "It cannot be denied that the (purchaser) was in error in not making an examination of the register, and also in not ascertaining from the previous vendor whether he pretended to any lien. But this does not exculpate the vendor. * * * By offering to sell the estate, the vendor virtually represents it as not incumbered by himself, or if incumbered that he will free it before the sale is executed; and if he wishes to discharge himself from the consequences of this implied representation, it lies with him to show that the purchaser was informed, or otherwise knew of the incumbrance." Citing Harding v. Nelthorpe, Nelson, 118. Cater v. Pembroke, 2 Bro. C. C. 281. In Kennedy v. Johnson, 2 Bibb (Ky.), 12; 4 Am. Dec. 666, a case in which the vendor failed to disclose the priority of his grant to a purchaser who believed he was acquiring the elder legal title, the contract was rescinded at the suit of the purchaser, though the land records showed the defect.

[54] The rule that the purchaser is chargeable with laches in failing to examine the title does not apply where the vendor, knowing the title to be defective, represents that it is good. It does not lie in the mouth of the vendor to say that his falsehoods respecting the title might have been discovered by the purchaser if he had used due diligence and caution in examining the public records. Pryse v. McGuire, 81 Ky. 608; Young v. Hopkins, 6 Mon. (Ky.) 23; Campbell v. Whittingham, 5 J. J. Marsh. (Ky.) 96; 20

Am. Dec. 241. Kiefer v. Rogers. 19 Minn. 32. Topp v. White, 12 Heisk. (Tenn.) 165; Napier v. Elam, 6 Yerg. (Tenn.) 108; Ingram v. Morgan, 4 Humph. (Tenn.) 66; 40 Am. Dec. 626. Riley v. Bell, 120 Iowa, 618; 95 N. W. 170; Muller v. Palmer, 144 Cal. 305; 77 Pac. 954. Buchanan v. Burnett, 52 Tex. Civ. App. 68, 114 S. W. 406; Clarke v. Thorpe, 117 Minn. 202, 135 N. W. 387; Kevil v. Wilford, 31 Ky. L. Rep'r. 1000; 104 S. W. 348. The vendor is estopped from asserting that the purchaser might have ascertained the truth by examining the public records. Wilson v. Higbee, 62 Fed. Rep. 723. (Contra, Williams v. Thomas, 7 Kulp. (Pa. Com. Pl.) 371.)

[55] Griffith v. Kempshall, Clarke Ch. (N, Y.) 571. See notice of this case p. 257. It is believed that, in most of the instances in which the purchaser has been denied relief in cases of fraud on the ground that due diligence in examining the records would have shown the true state of the title, there was no attempt on the part of the vendor to fraudulently conceal the facts. To State, with knowledge to the contrary, that the record showed no defects would, of course, be such an attempt. Pryse v. McGuire, 81 Ky. 608. In Kerr v. Kitchen, 7 Pa. St. 486, the head note states that "fraudulent concealment of defects cannot be imputed when they appear from deeds on record." The case does not support the head note. There was no evidence that any concealment of the state of the title was attempted. The parties acted under a mistake as to the legal effect of an instrument affecting the title. In Wagner v. Perry, 47 Hun (N. Y.), 516, it was held that the purchaser is not guilty of fraud in failing to state facts affecting the title disclosed by the records, so long as he makes no effort to conceal those facts. The rule stated in Sugden on Vendors, 246, that if the false statement could not be discovered from the abstract, the purchaser will be relieved, can scarcely be considered authority for denying relief to a purchaser who might have discovered the vendor's fraud (not mistake) by examining the title, there being obviously a wide difference between a case in which the vendor furnishes an obstract which shows a defect in his title, and one in which he induces the purchaser to forego an examination of the title by assuring him that is is clear and unincumbered.

avoided.[56] If the rights of a stranger should be impaired by such want of diligence, the purchaser might be precluded in his behalf, but as between vendor and vendee, the doctrine of notice from the record can have no application in a case of positive fraud on the part of the former with respect to the title.[57]

If the vendor make a false statement as to any specific fact affecting the title, for example, if he knowingly and falsely states that there is no incumbrance on the property, the mere fact that the purchaser might have found the incumbrance by examining the public records, will not relieve the vendor from the consequences of his fraud.[58]

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[56] "No man can complain that another has relied too implicitly on the truth of what he himself stated." Kerr on Fraud, 80. Brown v. Rice, 26 Grat. (Va.) 473. "When once it is established that there has been any fraudulent misrepresentations or willful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector. 'You, at least, who have stated what is untrue, or have concealed the truth for the purpose of drawing me into a contract, cannot accuse me of want of caution, because I relied implicitly on your fairness and honesty.'" Language of Lord CHELMSFORD cited in Hull v. Field, 76 Va. 607. In Upshaw v. Debow, 7 Bush (Ky.), 447, it was held that the purchaser was not bound to examine the vendor's title papers, and might rely on his statements as to the title. And in Young v. Hopkins, 6 T. & B. Mon. (Ky.) 23 it was declared a bad defense to say that the purchaser might have discovered the vendor's falsehoods by using due diligence. Dupree v. Savage, (Tex. Civ. App.) 154 S. W. 701. In Buchanan v. Burnett, 102 Tex. 492; 119 S. W. 1141; 132 Am. St. Rep. 900, it was held, in a case of false representations as to the title by the vendor, that the purchaser was entitled to rescind though he had in his possession an abstract showing the vendor's title.

[57] Parham v. Randolph, 4 How. (Miss.) 451; 35 Am. Dec. 403. Hunt v. Moore, 2 Pa. St. 107. Campbell v. Whittingham, 5 J. J. Marsh. (Ky.) 96; 20 Am. Dec. 241. But see Richardson v. Boright, 9 Vt. 368, and the intimation of BREWER, J., in Clagett v. Crall, 12 Kans. 397. The reasons for this proposition were forcibly stated by the court in Burwell v. Jackson, 5 Seld. (N. Y.) 545, as follows: "A vendee can never be bound, as between him and the vendor, to search the record for defects of title. The protection of vendors from the consequences of agreeing to sell that which they do not own constitutes no part of the object of the recording acts; nor is it any answer to a warranty, either express or implied, that the purchaser might by inquiry have ascertained it to be false. The reason why the implied warranty ceases upon the consummation of the contract of sale by the execution of a deed is not that the vendee is presumed to have investigated the title and discovered the defects, if any there be, but that it is reasonable to require the vendee in taking a deed, which is a more solemn and deliberate act than entering into a preliminary agreement for the purchase, to protect himself by an express warranty." A purchaser is not charged with notice of facts which come to the knowledge of his attorney in the examination, nor

It has been held that a purchaser is not guilty of laches in relying upon innocent misrepresentations of the vendor as to the title, and that as a general rule, evidence which is sufficient to establish innocence of intentional misrepresentation on the part of the vendor will relieve the purchaser of the imputation of laches in failing to examine the title.[59] The English rule upon this question has been thus stated: "If the vendor sells with knowledge of a defect in the title to part of the estate material to the enjoyment of the rest, and does not disclose the fact to the purchaser, *and it cannot be collected from the abstract,* the purchaser will be entitled to have the contract rescinded.[60] The same rule would apply in America, it is apprehended, in all cases in which an abstract of the title is furnished by the vendor.[61] He would not be deemed guilty of fraud in failing to call the attention of the purchaser to a defect of title plainly disclosed by the abstract. But in the application of the English rule to American cases care should be taken to distinguish between the abstract of title and the public registry of conveyances, incumbrances, etc., generally existing in American States. It would seem scarcely just to the purchaser to give to the public registry the effect of an abstract of title, a document usually submitted to the scrutiny of counsel, and so prepared that a defect thence appearing could hardly escape the attention of the purchaser or his counsel, except in a case of gross negligence or incompetence. It is convenient to note here the differences between the English and American sources of information respecting the title. In England there is no general regis-

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put upon inquiry by the contents of a deed in his chain of title, as between himself and the vendor. The doctrine of constructive notice from these sources is only applied for the protection of third persons against the claims of subsequent purchasers. Champlin v. Laytin, 6 Paige Ch. (N. Y.) 189; 31 Am. Dec. 382.

[58] Blumenfeld v. Stine, 87 N. Y. Supp. 81; 42 Misc. 411.

[59] Baptiste v. Peters, 51 Ala. 158.

[60] 1 Sugd. Vend. (8th Am. ed.) 375 (246).

[61] Bryant v. Boothe, 30 Ala. 311; 68 Am. Dec. 117.

try of title deeds such as exists in America; consequently, when a title is examined there, the vendor must produce all the deeds or other documents in his possession relating to the title, and submit them to the inspection of the purchaser, or furnish the purchaser with an epitome or abstract of their essential parts. This is sometimes done in America, but the abstract, owing to the expense attending its preparation, is frequently dispensed with, especially in rural communities, and the purchaser contents himself with an examination of the registered copies of the vendor's title deeds, either in person or by counsel. The facility with which this may be done has led to the disuse of abstracts in some sections, and given rise to a disposition on the part of the purchaser in many cases to rely upon lay opinions as to the title, and to accept without question the vendor's representation that his title is good.

§ 105. **Existence of fraudulent intent. Innocent misrepresentations.** Representations by the vendor, to be fraudulent, must have been, first untrue; and, secondly, the vendor must have known them to be untrue, or have had no reason to believe them true; and the contract must have been entered into in consequence of such fraudulent representations in order to entitle the purchaser to relief.[62] He must have relied upon such representations,[63] and the representations themselves must have been in respect to some material thing unknown to him.[64] But if a statement be in fact false, and be uttered for a fraudulent purpose, which is in fact accomplished, it has the whole effect of a fraud in annulling the contract, although the vendor did not know the statement to be false, but believed it to be true.[65]

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[62] Taylor v. Leith, 26 Ohio St. 428. Owen v. Pomona L. & W. Co., 131 Cal. 530; 63 Pac. 850; Hoffman v. Kirby, 136 Cal. 26; 68 Pac. 321. Fraud on the part of the vendor with respect to the title cannot exist, unless there be an intent to deceive. Fox v. Haughton, 85 N. C. 168. This was the rule, with the exception of the qualification of the second clause, declared by Lord BROUGHAM in the great case of Small v. Atwood, 6 Cl. & Fin. 531. It is true the alleged fraud in that case consisted of certain representations as to the value or productiveness of the estate, and not as to the sufficiency of the title, but it seems that the rules by which the presence of fraud in the transaction is to be determined are the same in either case. If the vendor state that the title is free from incumbrances " to the best of his knowledge and belief," and there are in fact incumbrances on the property, he will not be charged with fraud unless he knew of their existence. Barton v. Long, (N. J.) 14 Atl. Rep. 568.

[63] Bond v. Ramsey, 89 Ill. 29. Luckie v. McGlasson, 22 Tex. 282. It is error for the court to exclude the purchaser's statement that he relied on the vendor's representations as to the title. Continental Coal & Co. v. Kilpatrick, 158 N. Y. Supp. 1056; 172 App. Div. 541.

While the vendor may in some cases be deemed guilty of fraud in making statements which he does not know to be true, the mere fact that he does not know them to be true is not, as a general rule, sufficient to fix him with fraud. There must be something to show that the statements were fraudulently made, in order to distinguish them from mere mistake.[66] It has been held, however, that a false representation founded on a mistake resulting from gross negligence is a fraud,[67] as where the land sold had been included in a mortgage of other lands executed by the vendor, but of which, from careless reading, he was ignorant.[68] It is to be observed that the cases which decide that a vendor is not necessarily guilty of fraud in failing to disclose apparent defects of title or in making representations in regard to the title not true in fact, merely relieve the vendor from the imputation of fraud, but do not deny the purchaser relief if entitled thereto upon other grounds. A false representation by the vendor, however innocently made, if injury follows, gives the purchaser a right to compensation [69] or rescission.[70]

§ 106. **Statement of opinion.** Mere expression of opinion as to the sufficiency of the title, when the means of information are equally accessible to both parties, and when no confidential relations exist between them, do not constitute fraud on the part of the vendor.[71] A purchaser has no right to rely on the statement of the vendor that his title is good, where all the facts are laid before him, for this is no more than the statement of an opinion. To constitute fraud the vendor must falsely state, or fraudulently conceal, some fact material to the title.[72]

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[64] Holland v. Anderson, 38 Mo. 55.

[65] Bethell v. Bethell, 92 Ind. 318; Brooks v. Riding, 46 Ind. 15; Krewson v. Cloud, 45 Ind. 273; Booher v. Goldsborough, 44 Ind. 490; Frenzel v. Miller, 37 Ind. 1; 10 Am. Rep. 62.

[66] Rawle Covt. (5th ed.) 541 n., and cases cited, few of which, however, involved any question of fraudulent representations of the vendor as to his title. See ante, § 103, as to effect of statements by the vendor which he did not know to be true.

[67] Smith v. Richards, 13 Pet. (U. S.) 38.

[68] Kiefer v. Rogers, 19 Minn. 32.

[69] 1 Sugd. Vend. (14th ed.) 28; Bigelow on Fraud, 415. Gunby v. Sluter, 44 Md. 237. Shackelford v. Hundly, 1 A. K. Marsh. (Ky.) 495; 10 Am. Dec. 753. Watson v. Baker, 71 Tex. 739; 9 S. W. Rep. 867.

[70] Vaughn v. Smith, 34 Oreg. 54; 55 Pac. 99.

It has been held that statements of what is the law bearing upon the sufficiency of the title, are to be treated as statements of opinion only, and even though fraudulently made, afford the purchaser no grounds for relief; all persons being presumed to know the law.[73] It is easy to see, however, that the universal application of such a rule would in many cases lead to gross injustice. If the parties stand upon equal ground, and are dealing at arm's length, the rule might be salutary; but if there be such a disparity in their respective positions as to give the vendor an undue advantage; *e. g.*, if the vendor were a conveyancer, and the purchaser an ignorant man, the latter would seem entitled to relief.

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[71] Hume v. Pocock, 1 L. R., Ch. App. 379. Smith v. Richards, 13 Pet. (U. S.) 26. Maney v. Porter, 3 Humph. (Tenn.) 309. Glasscock v. Minor, 11 Mo. 655. Conwell v. Clifford, 45 Ind. 395. Bond v. Ramsey, 89 Ill. 29. People v. Mitchell, 129 Cal. 580; 62 Pac. 118. Melicharek v. Colkins, (Cal. App.) 183 Pac. 457. Where the purchaser declared that he would not buy a tax title, and the vendor answered that he had the best kind of title, it was held that if the vendor made such declaration knowing that he had only a tax title, he was guilty of fraud. Updike v. Abel, 60 Barb. (N. Y.) 15. In a case of conflicting claims to property in which one claimant employed counsel to investigate his title, and offered as a compromise to sell that title to the other claimant, it was held that the assertions of the latter (who purchased) as to the validity of his title could not amount to a fraud on the vendor. Saltonstall v. Gordon, 33 Ala. 149. Statement by vendor that his title was good, held not to be a mere expression of opinion on his part. Buchanan v. Burnett, 102 Tex. 492; 119 S. W. 1141; 132 Am. St. Rep. 900.

[72] Conwell v. Clifford, 45 Ind. 393. Fellows v. Evans, 33 Oreg. 30; 53 Pac. 491. Morse v. Duryea, 174 Ky. 234; 192 S. W. 477. The mere expression of an opinion by the vendor as to the goodness of his title, in the course of trade, when all the facts in relation to the title are fully and fairly disclosed, and when the vendee agrees to take the title at his own risk without recourse on the vendor, is no fraud or ground of relief to the purchaser if the title should prove bad. The statement that an adverse claim against the property cannot be maintained, is, of course, a statement of opinion only. Jasper v. Hamilton, 3 Dana (Ky.), 284. But to state that there are *no adverse claims against the property* would obviously be a most important statement of fact, and if made with knowledge of its falsehood, would, it is apprehended, entitle the purchaser to relief.

[73] Fish v. Cleland, 33 Ill. 243, where it was said: "A representation of what the law will or will not permit to be done is one on which the party to

If the validity of the title depends upon a question of law, of course the statement of the vendor as to the goodness of the title would be a mere matter of opinion on his part. But a statement that there are no incumbrances on the property would be a statement of fact, and if falsely made would entitle the purchaser to relief.[74] So, also, if the vendor assert that the title is good when he knows of a paramount title outstanding in a third person.[75] If the vendor states material fact as of his own knowledge and not as a mere matter of opinion, but of which he has no knowledge whatever, he is guilty of fraud.[76] It seems, however, that there must

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whom it is made has no right to rely; and if he does so it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law and is always understood as such." This case was a suit by the vendor to rescind the contract on account of the purchaser's fraud, but it is apprehended that the principle declared would be fully as applicable to a case of representation affecting the title. See, also, Upton v. Tribilcock, 91 U. S. 50; approving Fish v. Cleland, supra, and citing further Star v. Bennett, 5 Hill (N. Y.), 303; Lewis v. Jones, 4 B. & C. 506; Rashall v. Ford, L. R., 2 Eq. 750, to the general proposition that a statement of what the law is by any person, is a statement of opinion only.

[74] Glasscock v. Minor, 71 Mo. 655. Loucks v. Taylor, 23 Ind. App. 245; 55 N. E. 238. In Jasper v. Hamilton, 3 Dana (Ky.), 284, the court said: "We cannot admit that the expression of an opinion by the vendor as to the goodness of his title in the course of trade, when the vendee agrees to take it at his own risk without recourse or responsibility on the vendor, is such fraud as to justify a rescission of the contract, if the title should prove inferior to an adverse interfering claim. If all the *facts* in relation to his title are fairly and fully disclosed, the vendee is furnished with the means to form his own opinion or to obtain the opinion of others, and if he fails to do so and purchases without recourse, it is his own folly and he has no just ground to complain. Whether a title is paramount and superior to an adverse conflicting claim is a question of *law* often of the most abstruse and critical import, and which, the facts being fairly developed, is placed as much within the competency of the vendee to solve, or to procure others to do so, as within that of the vendor."

[75] Spence v. Durein, 3 Ala. 251.

[76] Kerr on Fraud (Bump), 53, and cases cited; Rawle Covt. § 322. Adams v. Jarvis, 4 Bing. 66, BEST, C. J., saying: "He who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his

be some evidence of fraudulent intent on the part of the vendor other than the mere want of knowledge of the truth of his assertions.[77]

If the vendor make definite statements for the purpose of preventing the purchaser from making inquiries which would have shown his representations to be false, he is guilty of fraud, and the contract may be rescinded, or an action for damages maintained by the purchaser,[78] as, where the vendor falsely states the amount of liens on his property.[79] This rule, carried to its furthest extent, must neutralize those decisions which hold that the purchaser is not entitled to relief where he has the "means of knowing," or "sufficient means of knowing," the falsity of the vendor's representations at the time they were made, since it is inconceivable that a vendor would make a false statement respecting the title for any purpose other than to prevent an examination of the title by the purchaser, the only "means of knowing" the fraud of the vendor.[80] There can be, of course, no fraud in an innocent misrepresentation by mistake, though the vendor may be deemed guilty of constructive fraud and subjected to an action at law for damages if he declare that to be true of which in fact he has no knowledge.[81] In equity the contract may always be rescinded if there be a mutual mistake as to the title.[82]

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own gain, is both in morality and law guilty of falsehood and must answer in damages." See, also, Munroe v. Pritchett, 16 Ala. 787; 50 Am. Dec. 203. Shackelford v. Hundley, 1 A. K. Marsh. (Ky.) 500; 10 Am. Dec. 753. Davis v. Heard, 44 Miss. 51; Halls v. Thompson, 1 Sm. & M. (Miss.) 485; Rimer v. Dugan, 39 Miss. 477; 77 Am. Dec. 687.

[77] Ante, § 105; Rawle Covts. (5th ed.) § 232; Kerr on Fraud 19, and cases cited.

[78] Campbell v. Whittingham, 5 J. J. Marsh. (Ky.) 96; 20 Am. Dec. 241, where the purchaser was induced to omit an examination of the title by the assertion of the vendor that the title was good. See, also, Parham v. Randolph, 4 How. (Miss.) 451; 35 Am. Dec. 403. Burwell v. Jackson, 5 Seld. (N. Y.) 545.

[79] Thomas v. Coultas, 76 Ill. 423. Kenny v. Hoffman, 31 Va. 442. Brown v. Herrick, 99 Pa. St. 220.

[80] Ante, § 104.

[81] Munroe v. Pritchett, 16 Ala. 787; 50 Am. Dec. 203.

[82] 1 Story Eq. § 142. Hitchcock v. Giddings, 4 Price, 135. Wood v. Johnson, 3 Conn. 597. Davis v. Heard, 44 Miss. 51. Bradley v. Chase, 22 Me. 511. Armistead v. Hundley, 7 Grat. (Va.) 64. Sanford v. Justice, 9 Mo. 865.

Certain acts and conduct of the vendor other than misrepresentation or non-disclosure of facts respecting the title may amount to fraud; *e. g.*, it is a fraud in the vendor knowingly to deliver a conveyance without covenants for title when the contract provides for covenants;[83] or to threaten to resell the premises together with the purchaser's improvements unless the purchaser would accept a conveyance with special warranty, he being entitled to general covenants.[84] The right of action, however, in these cases does not necessarily grow out of an inability on the part of the vendor to convey a good title.

§ 107. **PLEADING AND PROOF.** In every pleading by the purchaser, the *gravamen* of which is the vendor's fraud, the facts constituting the fraud must be expressly alleged. A general allegation of fraud is insufficient.[85] The purchaser must also aver that he relied on and was deceived by the vendor's fraudulent representation.[86] If facts showing fraud are alleged it is not necessary to allege fraud in express terms; the law implies the fraudulent intent.[87] Nor in an action on the case for fraud and deceit is it necessary to allege a *scienter* on the part of the vendor, for if the vendee be injured by a representation which is not true in fact, his right of action is complete, whether the vendor was or was not aware of the falsity of his statement. The vendor is constructively guilty of fraud if he allege a thing to be true of which he has in fact no knowledge.[88] It has been held that the plaintiff must allege that the matters in respect to which the false representations were made by the defendant, were such as lay peculiarly within his knowledge; otherwise no cause of action would appear in consequence of the rule maintained by some cases, that the purchaser has no right to rely upon the representations of the vendor in regard to matters upon which he might have obtained information from other sources, such as the public records.[89]

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[83] Bethell v. Bethell, 92 Ind. 318.

[84] Denston v. Morris, 2 Edw. Ch. (N. Y.) 37.

[85] Marsh v. Sheriff, (Md.) 14 Atl. Rep. 664.

[86] Luckie v. McGlasson, 22 Tex. 282.

[87] Pryse v. McGuire, 81 Ky. 611. Lanier v. Hill, 25 Ala. 559. Josselyn v. Edwards, 57 Ind. 212.

[88] Saund. Pl. 527. Munroe v. Pritchett, 16 Ala. 787; 50 Am. Dec. 203. Britt v. Marks, (Oreg.) 25 Pac. Rep. 636; Rolfes v. Russell, 5 Oreg. 400; Denning v. Cresson, 6 Oreg. 241.

The burden is on the vendee to prove the fraud which he alleges.[90] Fraud is never presumed, though of course a *prima facie* case of fraud may be established, that is, a state of facts may be shown which, unexplained, will be held to amount to fraud.[91] The mere existence of defects in the title is not sufficient, however, to raise a presumption of fraud on the part of the vendor.[92]

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[89] Bianconi v. Smith, (Ariz) 28 Pac. Rep. 880, where it was also held that a purchaser failing to examine the title cannot complain of the vendor's false and fraudulent representations — a rule that may well excite question. See ante, p. 260.

[90] Story Eq. Jur. 200. Holland v. Anderson, 38 Mo. 55. Williams v. Thomas, 7 Kulp (Pa. Co. Ct. Rep.) 371.

[91] Green v. Chandler, 25 Tex. 148.

[92] Harland v. Eastland, Hard. (Ky.) 590, *semble.*

OF AFFIRMANCE BY PROCEEDINGS AT LAW AFTER THE CONTRACT HAS BEEN EXECUTED.

ACTION FOR COVENANT BROKEN.

CHAPTER XII.

OF THE COVENANT FOR SEISIN.

FORM AND EFFECT. § 108.
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- **In general.** § 110.
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§ 108. **FORM AND EFFECT.** A covenant for seisin is usually expressed by the formula "that he, the said (vendor), is lawfully seised of the said premises,"[1] but, as a matter of prudence in some of the States, and of necessity in others, it is customary for the grantee to require a covenant that the grantor "is seised of an absolute, perfect and indefeasible estate in fee simple." This is to avoid the rule established by those cases which hold that a covenant that the grantor is "lawfully seised" is satisfied by a mere seisin in fact, whether with or without right.[2]

In every case in which the grantee is entitled to require a conveyance with full covenants for title, he should, under no circumstances, omit the insertion of a covenant for seisin. The principal reason for inserting that covenant is to afford the grantee relief in those cases in which there has been a failure of the title, but in which the rights of the adverse claimant have never been asserted, and in which there has been no eviction of the grantee from the premises.[3] Thus, the rule is general that a grantee who has accepted a conveyance with covenants for life, cannot detain the unpaid purchase money in case of a total failure of the title, unless he has a present right of action upon the covenants in question, and the mere failure of title gives him no right of action upon those covenants, except that of seisin, unless there has been an actual or constructive eviction from the premises. The rule generally prevailing in the United States is that a covenant that the grantor is "lawfully seised" is the same as if he had covenanted that he was rightfully seised of an indefeasible estate in fee simple,[4] and is to be treated as "an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey."[5] Hence, it follows that there need be no eviction or disturbance of the grantee's possession to constitute a breach of the covenant of seisin. The covenant is broken as soon as made if the title be not such as the covenant describes.[6]

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[1] Rawle Covts. (5th ed.) § 21, n. 3. Where the grantor covenanted that he was "signed" of a good estate, etc., it was held that a court of law could not read "seised" for "signed," so as to make the sentence operative as a covenant of seisin. It was intimated that relief might be had in equity. Hagler v. Simpson, 1 Busbee (N. Car.), 384.

[2] Post, § 109, this chapter. A covenant that the grantor "is seised in fee of all said premises" is sufficient as a covenant of seisin. Ackley & Co. v. Hunter & Co., 154 Ala. 416; 45 So. 909.

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[3] Wilder v. Ireland, 8 Jones (N. C.) L. 90, where the action was for breach of the covenant for quiet enjoyment, and the breach alleged was that the grantor had only a life estate instead of a fee in the premises. There was a judgment for the defendant, the court saying that it was the misfortune of the grantee that he did not have the deed drawn by a lawyer, who would have inserted a covenant of seisin.

[4] Parker v. Brown, 15 N. H. 176, disapproving Willard v. Twitchell, 1 N. H. 175. Gilbert v. Bulkley, 5 Conn. 262; 13 Am. Dec. 57. Catlin v. Hurlburt, 3 Vt. 403; Richardson v. Dorr, 5 Vt. 20; Mills v. Catlin, 22 Vt. 106. Kincaid v. Brittain, 5 Sneed (Tenn.), 119. Joiner v. Trust Co., 33 Okl. 266; 124 Pac. 1073. In Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 429; 19 Am. Dec. 139, it was said that the covenant of seisin was broken if the vendor had not the possession, the right of possession and the legal title. This being so, the covenant would be broken if the grantor had only an equitable title, though he was in possession, had paid the purchase money in full and was entitled to call for a conveyance. A covenant that the grantor is seised in fee simple implies that he has the whole estate in the premises and not merely a good right or title to such interest or estate as he has therein. Mills v. Catlin, 22 Vt. 98.

[5] Platt Covts. 306; Howell v. Richards, 11 East, 641, language of Lord ELLENBOROUGH. Mills v. Catlin, 22 Vt. 106. Recohs v. Younglove, 8 Baxt. (Tenn.) 385. Mercantile Trust Co. v. So. Park Residence Co., 94 Ky. 271.

[6] Post, § 109.

It is a rule of property in several of the States that a covenant that the grantor is "lawfully seised" does not require that the grantor should have an indefeasible estate, and is satisfied by an actual though tortious seisin,[7] provided it be under claim of title.[8] The rule thus announced applies in but few of the States and has been distinctly repudiated in others.[9] The principal reason assigned for the rule is that the true interpretation of such a covenant according to the intent of the parties, is merely that the grantor is in possession within the meaning of the champerty acts, or those which prohibit the conveyance of pretensed titles.[10] This reasoning is by no means satisfactory, in view of those cases which hold that a champertous deed is void as between the parties themselves,[11] and of course it has no application in those States in which the conveyance of pretensed titles is not forbidden. Nor would that reasoning seem less objectionable in those jurisdictions in which a champertous deed is held valid as between the parties; for it is hardly to be conceived that a grantee would require a covenant in effect merely that the grantor was in possession, when in most instances he could without delay or trouble inform himself as to that fact, and that he should be satisfied with such a covenant instead of requiring one that would protect him against latent defects in the title. In those States, however, in which the rule in question has become firmly established and recognized as a rule of property, the reasons which have led thereto, and even the fact that the rule itself flows from an arbitrary construction of the covenant, are comparatively unimportant, so long as that rule remains stable and fixed, and with reference to which the parties may safely contract. But in those States, if any, in which the question has not been settled by judicial decision or statutory enactment, it is apprehended that the courts will be slow to give the covenant of seisin the interpretation established by that rule.

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[7] Marston v. Hobbs, 2 Mass. 433; 3 Am. Dec. 61; Bickford v. Page, 2 Mass. 455; Twambly v. Henley, 4 Mass. 442; Bearce v. Jackson, 4 Mass. 410; Slater v. Rawson, 6 Met. (Mass.) 444; Raymond v. Raymond, 10 Cush. (Mass.) 140; Follett v. Grant, 5 Allen (Mass.), 174. Griffin v. Fairbrother, 1 Fairf. (Me.) 95; Boothley v. Hathaway, 20 Me. 251; Baxter v. Bradbury, 20 Me. 260; 37 Am. Dec. 49; Wilson v. Widenham, 51 Me. 567. Watts v. Parker, 27 Ind. 228. Scott v. Twiss, 4 Neb. 133. Backus v. McCoy, 3 Ohio, 211; 17 Am. Dec. 585; Wetzel v. Richcreek, (Ohio) 40 N. E. Rep. 1004.

[8] Wheeler v. Hatch, 3 Fairf. (Me.) 389. The grantor was in possession in this case, but did not claim title, and it was held that the covenant of seisin was broken.

[9] See Parker v. Brown, supra, p. 254, and cases cited in same note. Also, Abbott v. Allen, 14 Johns. (N. Y.) 253; 7 Am. Dec. 554; Fowler v. Poling, 2 Barb. (N. Y.) 303; Hamilton v. Wilson, 4 Johns. (N. Y.) 72; 4 Am. Dec. 253. Furniss v. Williams, 11 Ill. 229; Brady v. Spurck, 27 Ill. 481; Baker v. Hunt, 40 Ill. 264; King v. Gilson, 32 Ill. 348; 83 Am. Dec. 269; Christy v. Ogle, 33 Ill. 295; Frazer v. Supervisors, 74 Ill. 291. Kincaid v. Brittain, 5 Sneed (Tenn.), 119. Downer v. Smith, 38 Vt. 464; 76 Am. Dec. 148. Brandt v. Foster, 5 Clarke (Ia.), 295; Zent v. Picken, 54 Iowa, 535. Lockwood v. Sturtevant, 6 Conn. 385; Davis v. Lyman, 6 Conn. 249, and notes. Lot v. Thomas, 1 Penn. (N. J. L.) 297; 2 Am. Dec. 354. Pollard v. Dwight, 4 Cranch (U. S. S. C.), 421. Dale v. Shively, 8 Kans. 276. Mercantile Trust Co. v. So. Park Residence Co., 94 Ky. 271. Clapp v. Herdmann, 25 Ill. App. 509.

[10] Cases cited, note 7 above.

[11] Williams v. Hogan, Meigs (Tenn.), 189.

It seems that the rule under consideration is limited strictly in its application to those cases in which the grantor covenants that he is "lawfully seised." Thus it was held that a covenant that he was seised of a "perfect, absolute and indefeasible estate of inheritance" was not satisfied by an actual seisin, the grantor in fact having no title.[12]

Covenants of seisin are by statute in some of the States implied from the operative words "grant, bargain and sell" in a conveyance.[13] But in other States no such implication is made,[14] and none existed at common law. The question whether a deed made in another State contains a covenant of seisin must be determined by the law of that State.[15]

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[12] Strong v. Smith, 14 Pick. (Mass.) 132, the court saying: "The defendant covenanted that he was seised of a perfect, absolute and indefeasible estate of inheritance in fee simple, and he clearly had no such title; so that his covenant was broken on the delivery of the deed. He undertook to convey, and the grantee agreed to purchase, an indefeasible estate; and the defendant had no such estate to convey. The intended purchase, therefore, has wholly failed. Indeed, it may well be doubted whether the defendant had any title sufficient to sustain a *common covenant of seisin.*" See, also, Price v. Johnson, 4 Vt. 253. Prescott v. Trueman, 4 Mass. 631; 3 Am. Dec. 249. Garfield v. Williams, 2 Vt. 328.

[13] Memmert v. McKeen, 112 Pa. St. 315; so in Missouri, Schnelle Lumber Co. v. Barlow, 34 Fed. Rep. 853. Jones v. Gallagher, 54 Okl. 611, 154 Pac. 552. Munford v. Kent, 154 Mo. 36. 55 S. W. 271. A covenant of seisin will be implied from the words "bargained, sold and granted" in the granting part of a deed, under a statute giving that effect to the words "grant,

The right of action for a breach of the covenant of seisin is personal and passes to the personal representative and not to the heir.[16] But if no actual damage was sustained by the ancestor, though the breach transpired in his lifetime, the right of action goes with the land to the heir, provided the actual damage falls upon him, by loss of the land.[17]

§ 109. **WHAT CONSTITUTES A BREACH OF THE COVENANT OF SEISIN.** The covenant of seisin is broken by any lessening of the *corpus* or physical extent of the property conveyed,[18] or by any diminution of the quantity of estate therein, as if the interest conveyed turn out to be a life estate instead of a fee simple.[19] It has been held that the covenant was not broken by the conveyance

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bargain and sell." Foote v. Clark, 102 Mo. 394; 14 S. W. Rep. 98. The *habendum* clause does not qualify nor restrict the covenant of seisin implied from the use of the words "grant, bargain, and sell." Coleman v. Clark, 80 Mo. App. 339. In Alabama, the covenant of seisin implied from the words "grant" etc., is limited to the acts of the grantor and those claiming under him. Mackintosh v. Stewart, 181 Ala. 328, 61 So. 956.

[14] Frost v. Raymond, 2 Caines (N. Y.), 188; 2 Am. Dec. 228. Aiken v. Franklin, (Minn.) 43 N. W. 839.

[15] Jackson v. Green, 112 Ind. 341; 14 N. E. Rep. 89.

[16] Com. Dig. Admr. B. 13; Butler N. P. 158. Lucy v. Levington, 1 Vent. 175; S. C., 2 Lev. 26. Hamilton v. Wilson, 4 Johns. (N. Y.) 72; 4 Am. Dec. 253.

[17] 2 Sugd. Vend. 577. Kingdon v. Nottle, 1 M. & S. 355. King v. Jones, 5 Taunt. 418; Orme v. Broughton, 10 Bing. 353. Lowrey v. Tilleny, 31 Minn. 500; 18 N. W. Rep. 452.

[18] Wilson v. Forbes, 2 Dev. (N. C.) 30, holding that the covenant of seisin is broken if the grantor has no right to sell all the land embraced within the boundaries mentioned in his deed. So, also if the grantor of a mill-site have no right to raise the dam to the height specified in the deed. Walker v. Wilson, 13 Wis. 522. So, also, if the covenator have not all the shares of a water-right that his deed purports to convey. Seyfried v. Knobluch, 44 Colo. 86, 96 Pac. 993.

[19] Frazer v. Supervisors, 74 Ill. 291. Mixon v. Burleson, (Ala.) 82 So. 98. Lockwood v. Sturdevant, 6 Conn. 373. A covenant that the grantor is seised of an *undivided* moiety of an estate is broken if there has been a judicial partition of the premises, though without the knowledge of the grantor, and though he conveyed only his share of the land. Morrison v. McArthur, 43 Me. 567. The covenant of seisin is broken if the grantor has neither the possession, the right of possession, nor the right to the legal title at the time

of an estate merely defeasible upon the happening or non-happening of some future event,[20] such as the disaffirmance of a conveyance executed during the minority of the grantor,[21] but the better opinion seems to be that the covenant of seisin is satisfied only by the transfer of an indefeasible title, and that it is technically broken as soon as made, if the title be from any cause defeasible;[22]

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of the conveyance. Coleman v. Clark, 80 Mo. App. 339; or if the title be in a trustee instead of the grantor. Jones v. Haseltine, 124 Mo. App. 674, 102 S. W. 40.

[20] Pollard v. Dwight, 4 Cranch (U. S. S. C.), 421. Van Nostrand v. Wright, Lalor's Supp. (N. Y.) 260; Coit v. McReynolds, 2 Rob. (N. Y.) 658. Wait v. Maxwell, 5 Pick. (Mass.) 217; 16 Am. Dec. 391, where the grantor derived title under a conveyance by a person *non compos mentis.* The fact that the title of the grantor was acquired under forclosure proceedings in which the mortgagor, a non-resident, was served by publication, and that the title may be attacked by heirs of the mortgagor within the statutory period for showing cause against the decree is no breach of the covenant of seisin where the existence of such heirs is not certain. Zarkowski v. Schroeder, 75 N. Y. Supp. 1021; 71 App. Div. 526.

[21] Bool v. Mix, 17 Wend. (N. Y.) 132; 31 Am. Dec. 285.

[22] Shep. Touchstone, 170; 2 Sugd. Vend. (8th Am. ed.) 286 (610); 2 Washb. Real Prop. (4th ed.) 457 (657); 4 Kent Com. (11th ed.) 555 (471); Rawle Covts. (5th ed.) § 58. See, generally, also, cases cited supra this chapter and "Covenant against Incumbrances," subd. "What Constitutes Breach." Abbott v. Allen, 14 Johns. (N. Y.) 253; 7 Am. Dec. 554; Adams v. Conover, 87 N. Y. 422; 41 Am. Dec. 381. Downer v. Smith, 38 Vt. 464; 76 Am. Dec. 148; Clark v. Conroe, 38 Vt. 471; Clement v. Bank, 61 Vt. 298; 17 Atl. Rep. 717. Brandt v. Foster, 5 Cl. (Iowa) 295; Van Wagner v. Van Nostrand, 19 Iowa, 427; Zent v. Picken, 54 Iowa, 535. Bottorf v. Smith, 7 Ind. 673. Frazer v. Board of Supervisors, 74 Ill. 282; Brady v. Spurck, 27 Ill. 481; Christy v. Ogle, 33 Ill. 295. West v. Stewart, 7 Pa. St. 122. Hall v. Gale, 20 Wis. 293. Wilder v. Ireland, 8 Jones L. (N. C.) 90. Kincaid v. Brittain, 5 Sneed (Tenn.), 119. Lamb v. Danforth, 59 Me. 322; 8 Am. Dec. 426; Montgomery v. Reed, 69 Me. 510. Pollard v. Dwight, 4 Cranch (U. S.), 421. Lot v. Thomas, 1 Penn. (N. J. L.) 297. Davis v. Lyman, 6 Conn. 249. Cent. Appalachian Co. v. Buchanan, 90 Fed. 454; Bolinger v. Brake, 4 Kan. App. 180; 45 Pac. 950. Jewett v. Fisher, (Kan. App.) 58 Pac. 1023.

Recent cases. Hayden v. Patterson, 39 Colo. 15, 88 Pac. 437; Seyfried v. Knoblauch, 44 Colo. 86; 96 Pac. 993; Rennie v. Gibson, (Okl.) 183 Pac. 483; Riddle v. Hudson, (Okl.) 172 Pac. 921; Faller v. Davis, 30 Okl. 56; 118 Pac. 382; Eames v. Armstrong, 142 N. C. 506; 55 S. E. 405; Crowell v. Jones, 167 N. C. 386, 83 S. E. 551; Brown v. Carpenter, 99 Wash. 227; 169 Pac. 331; Hilliker v. Rueger, 228 N. Y. 11; 126 N. E. 266; Veit v. McCauslan, 142 N. Y. Supp. 281; 157 App. Div. 335; Jeffords v. Dreisbach, 168 Mo. App. 577; 153 S. W. 274. A covenant in a deed that "I hold said premises by good and perfect title" is broken as soon as made if the grantor's title is not perfect. Webb v. Wheeler, 80 Neb. 438; 114 N. W. 636.

leaving the fact that the title may never be defeated, to be considered only with reference to the damages to be awarded to the grantee. It is not necessary to show an eviction, or disturbance of the possession, of the covenantee.[23]

The covenant of seisin, according to the weight of authority, is broken if at the time of the conveyance the premises be in the possession of one claiming adversely to the grantor. The statutes prohibiting the sale of pretensed titles, and declaring all such conveyances to be champertous, do not affect the validity of the conveyance as between the grantor and grantee.[24] The covenant of seisin is broken if there be no such land in existence as the grantor undertakes to convey.[25] So also, if at the time of the conveyance the grantor does not own such things fixed to the freehold as would pass by a conveyance of the land if he owned them.[26]

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[23] Hilliker v. Rueger, 228 N. Y. 11; 126 N. E. 266.

[24] Harvey v. Doe, 23 Ala. 637; Abernathy v. Boazman, 24 Ala. 189; 60 Am. Dec. 459, citing Jackson v. Demont, 9 Johns. (N. Y.) 55; 6 Am. Dec. 259; Livingston v. Iron Works, 9 Wend. (N. Y.) 510; Van Hoesen v. Benham, 15 Wend. (N. Y.) 164. Den v. Geiger, 4 Halst. (N. J.) 225. Edwards v. Roys, 18 Vt. 473. Adkins v. Tomlinson, 121 Mo. 487. Stearns v. Jewel, 27 Colo. App. 390, 140 Pac. 846. A covenant of seisin is broken by railway occupation of part of the premises as a right of way. Wadhams v. Swan, 109 Ill. 46. The proposition stated in the text is not without opposing authority. Thus in Thomas v. Perry, Pet. (C. C. U. S.) 39, it was held that a deed did not convey lands which were out of the possession of the grantor at the time the deed was made, and that consequently a covenant of seisin contained in the deed was not broken as to those lands. See, also, Williams v. Hogan, Meigs (Tenn.), 189. In Tennessee, under a statute providing that " no person shall agree to buy, or to bargain or sell, any pretended right or title in lands * * * where the seller, etc., has not * * * been in actual possession,' it was held that such a sale was void even as between the parties, the court saying that to give a contrary construction to the statute would be to permit the buyer of dormant claims securely to take a deed or covenant from the claimant, and if he failed to recover by a devise in the name of such claimant to indemnify himself by a suit against his vendor, and that the effect would be to encourage and not to suppress the spirit and practice of champerty. Williams v. Hogan, Meigs (Tenn.), 189. See, also, Whittaker v. Kone, 2 Johns. Cas. (N. Y.) 58, and note. A covenant for title is not broken by allowing the adverse possession of a stranger to ripen into title under the statute of limitations. Schwartz v. Jones, 57 Tex. Civ. App. 603; 122 S. W. 956. But see Mackintosh v. Stewart, 181 Ala. 328; 61 So. 956.

[25] Basford v. Pearson, 9 Allen (Mass.), 389; 85 Am. Dec. 764, reversing the court below, which had held that there could be no breach of the covenant when there was no land to which the covenant could attach.

Neither a judgment nor a mortgage,[27] nor a mere incumbrance,[28] such as an outstanding term of years,[29] nor an easement in the premises,[30] nor a prior void and unenforcible conveyance of the land,[31] would amount to a breach of the covenant of seisin, since none of these operate a divestiture of the grantor's technical seisin. A right of dower, contingent [32] or consummate,[33] is an incumbrance within the foregoing rule. Nor is this covenant broken by the existence of a highway over the land granted,[34] since the freehold still remains in the owner of the soil. Neither is the covenant broken by condemnation proceedings,[35] nor by an unlawful intrusion or encroachment on the land;[36] nor by the unlawful removal of fixtures by a tenant after the expiration of his term.[37] But the right of a third person to remove fixtures from the property conveyed, is a breach of the covenant of seisin.[38] Nor is the covenant broken where lands which the vendor did not own were by mistake included in the deed.[39] If the grantor were lawfully seised of the estate and had the legal title at the time of the covenant, no subsequent event could amount to a breach thereof.[40] Whatever subsequently occurs to defeat the title cannot affect the covenant of seisin.[41] Of course there is little occasion for the application of this principle, except in the case of a tortious disseisin of the covenantee, or the enforcement of a prior lien or incumbrance upon the premises. The covenant of seisin secures the grantee only against any title existing in a third person. The fact that the grantee himself was seised of the premises is not a breach.[42] He would be estopped from setting up his title against the grantor.[43] The fact that the covenantee knew of a defect in the title when he took the conveyance, is immaterial. The object of the covenant is to protect against known as well as unknown defects in the title.[44]

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[26] Mott v. Palmer, 1 Comst. (N. Y.) 564, where the fixtures consisted of a rail fence placed there by a tenant under an agreement by which he might remove them at pleasure. The proposition stated in the text follows from the technical definition of the word "land," which includes the soil, everything within it, and all buildings, trees, fences and fixtures upon it.

[27] Reasoner v. Edmundson, 5 Ind. 394. Sedgwick v. Hollenbeck, 7 Johns. (N. Y.) 376; Stanard v. Eldridge, 16 Johns. (N. Y.) 254. The reason of this rule is that the mortgagor is regarded as the real owner, and the mortgagee as having a chattel interest only. Runyan v. Mesereau, 11 Johns. (N. Y.) 538; 6 Am. Dec. 393, and cases cited in note. The rule above stated applies, though the prior mortgage be foreclosed and the property lost to the covenantee. Coit v. McReynolds, 2 Rob. (N. Y.) 655.

[28] Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 439; 19 Am. Dec. 139; Hebler v. Brown, 41 N. Y. Supp. 441. Kuntzman v. Smith, 77 N. J. Eq. 30; 75 Atl. 1009.

[29] Under a statute providing that a conveyance of lands shall be effectual without the attornment of a tenant of the grantor, it was held that the continued occupancy by the tenant after the grant, did not constitute a breach of the covenant of seisin. Kellum v. Insurance Co., 101 Ind. 455. See, also, Lindley v. Dakin, 13 Ind. 388; Hebler v. Brown, 41 N. Y. Supp. 441, where the incumbrance was a lease of the mines on the premises for 99 years with an option to purchase the mineral interest.

[30] Blondeau v. Sheridan, 81 Mo. 545.

[31] Reed v. Stevens, (Conn.) 107 Atl. 495.

[32] Massie v. Craine, 1 McC. (S. C.) L. 489; Building Co. v. Fray, 96 Va. 559, 32 S. E. 58.

[33] Tuite v. Miller, 10 Ohio, 382, the court saying there was no breach though the purchaser was obliged to pay a sum in commutation of the widow's right. The purchaser should have protected himself by a covenant against incumbrances. Fishel v. Browning, 145 N. C. 71; 58 S. E. 759.

[34] Boone Real Prop. § 311; Tiedeman Real Prop. § 851; 4 Am. & Eng. Encyc. of L. 479. Whitbeck v. Cook, 15 Johns. (N. Y.) 483; 8 Am. Dec. 272. Vaughan v. Stuzaker, 16 Ind. 338. Moore v. Johnston, 87 Ala. 220; 6 So. Rep. 50.

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[35] Smith v. Hughes, 50 Wis. 620; Merser v. Oestrich, 52 Wis. 693.

[36] Smith v. Hughes, 50 Wis. 620. Fehlaber v. Fehlaber, 140 N. Y. Supp. 973; 80 Misc. Rep. 149; but, held also, that the encroachment of the covenantor's building on the lot of an adjoining owner, is a breach of the covenant of seisin.

[37] Loughran v. Ross, 45 N. Y. 792.

[38] Herzog v. Marx, 202 N. Y. 1; 94 N. E. 1063; 35 L. R. A. (N. S.) 976.

[39] Maxwell v. Bank, 175 N. C. 180; 95 S. E. 147; Pinckard v. Mortgage Co., 143 Ala. 571; 39 So. 350; Prestwood v. Carlton, 162 Ala. 327; 50 So. 254.

[40] Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 439; 19 Am. Dec. 139, citing 2 Saund. 171 c. Morris v. Phelps, 5 Johns. (N. Y.) 53; 4 Am. Dec. 323. Jones v. Warner, 81 Ill. 343.

[41] Coit v. McReynolds, 2 Rob. (N. Y.) 655. This was an action for breach of a covenant of seisin. The covenantor derived title under a sheriff's deed executed in pursuance of a judgment of foreclosure. The judgment was opened while the property was in the plaintiff's hands, and a prior mortgage was foreclosed, whereby the plaintiff lost the property.

[42] Bigelow Estoppel, 346. Furness v. Williams, 11 Ill. 229; Beebe v. Swartwout, 3 Gil. (Ill.) 162. Fitch v. Baldwin, 17 Johns. (N. Y.) 161. Horrigan v. Rice, 39 Minn. 49; 38 N. W. Rep. 765. Holt v. Ruleau, 83 Vt. 151; 74 Atl. 1005; Eames v. v. Armstrong, 146 N. C. 1; 59 S. E. 165, 125 Am. St. Rep. 436.

[43] Fitch v. Baldwin, 17 Johns. (N. Y.) 161, the court saying: "It can never be permitted to a person to accept a deed with covenants of seisin, and then

§ 110. **ASSIGNABILITY OF THE COVENANT OF SEISIN. In general.** A covenant for title is said to run with the land when the right to recover damages for a breach thereof passes with the land to the covenantee's grantee, or to the heir of the covenantee, instead of remaining with the covenantee in the first instance, or passing to his personal representative in the second. In either case the person thus succeeding to the rights of the covenantee is styled "assignee;" there is, in strictness, however, no assignment; the rights of the so-called assignee being cognizable by a court of law, he being permitted to sue in his own name for a breach of the covenant. His rights spring rather from a privity of estate between himself and the covenanting parties than from any formal assignment on the part of the covenantee,[45] though of course he cannot claim those rights except under an instrument sufficient to convey the land.[46] All covenants for title run with the land until they are broken.[47] They then become a species of personal property, a chose in action, which, like any other personal property, passes to the personal representative of the covenantee. It is sometimes said that the covenants cease to run with the land after breach because then they are turned into mere rights of action, incapable of assignment at common law. But as the running of the covenants with the land is an incident flowing from privity of estate between the parties, and in no wise dependent upon any assignment of rights accrued on the part of the covenantee to his grantee, the better reason would seem to be that the covenants no longer run with the land simply because their purposes have been accomplished, and nothing remains of

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turn round upon his grantor and allege that his covenant is broken, for that at the time he accepted the deed he himself was seised of the premises. If there had been fraud in the case, and the grantee could have shown that he had been induced by undue means and in ignorance of his rights to take a deed for his own land, there might be relief in a court of equity."

[44] Post, §§ 127, 135; Knapp v. Foley, 140 Minn. 423; 168 N. W. 183.

[45] Rawle Covts. (5th ed.) § 232.

[46] Beardsley v. Knight, 4 Vt. 471; 33 Am. Dec. 193.

[47] Rawle Covts. (5th ed.) § 204.

them except a right of action for the breach, which would no more pass by an alienation on the part of the owner of the land than would a right to recover damages for a trespass committed upon the property. In those States, however, in which a remote grantee is held entitled to the benefits of the covenant of seisin and the covenant against incumbrances, he is properly described as "assignee," the conveyance of the land being construed in equity to amount to an assignment of the grantor's right of action for a breach of those covenants.[48]

§ 111. **Covenant of seisin does not run with land.** In most of the American States the rule is established that a covenant of seisin does not run with the land.[49] The principal reasons assigned

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[48] Roberts v. Levy, 3 Abb. Pr. (N. Y.) 311.

[49] 4 Kent Com. (11th ed.) 471; 2 Sugd. Vend. (8th Am. ed.) 240 (577), notes; Rawle Covts. (5th ed.) § 205. Pate v. Mitchell, 23 Ark. 590; 79 Am. Dec. 114. Hendricks v. Kesee, 32 Ark. 714. Salmon v. Vallejo, 41 Cal. 481. See the cases cited to the proposition that the covenant of seisin is broken as soon as made, if the covenantor have no title; ante, § 109. Greenby v. Willcocks, 2 Johns. (N. Y.) 1, LIVINGSTON, J., dissenting; 3 Am. Dec. 379.

This was the leading case in New York prior to the adoption of the Code of Civil Procedure in that State, a provision of which that every action shall be prosecuted by and in the name of the real party in interest, has been construed to give to a remote assignee the right to maintain an action in his own name for breach of a covenant of seisin made with one through whom he claims title. See infra, § 112. Other cases in that State following the decision in Greenby v. Willcocks, supra, are as follows: Tillotson v. Boyd, 4 Sandf. (N. Y.) 521; Blydenburgh v. Cotheal, 1 Duer (N. Y.), 176; Hamilton v. Wilson, 4 Johns. (N. Y.) 72; 4 Am. Dec. 253; McCarty v. Leggett, 3 Hill (N. Y.), 134; Beddoe v. Wadsworth, 21 Wend. (N. Y.) 120; Mygatt v. Coe, 124 N. Y. 212; N. E. Rep. 611. In other states; Bickford v. Page, 2 Mass. 455; Marston v. Hobbs, 2 Mass. 433; 3 Am. Dec. 61, *obiter;* Slater v. Rawson, 1 Met. (Mass.) 455; Tufts v. Adams, 8 Pick. (Mass.) 549; Whitney v. Dinsmore, 6 Cush. (Mass.) 128; Sprague v. Baker, 17 Mass. 586; Bartholomew v. Candee, 14 Pick. (Mass.) 167; Bynes v. Rich, 3 Gray (Mass.) 518; Ladd v. Noyes, 137 Mass. 151. It is difficult to reconcile these decisions with those of the same State declaring that the covenant of seisin is satisfied by a seisin in fact though without right; for to reach the conclusion that the covenant in question does not run with the land, it seems absolutely necessary to decide that the covenant is broken as soon as made if the covenantor was not at that time seised of an indefeasible estate. Mitchell v. Warner, 5 Conn. 497. This case contains an elaborate exposition of the rule that the covenant of seisin does not run with the land, and has been frequently cited as a leading case. Lockwood v. Sturdevant, 6 Conn. 373; Davis v. Lyman, 6 Conn. 256; Hartford Co. v. Miller, 41 Conn. 112;

for this position are: (1) That the covenant in question is broken as soon as made if the covenantor have no title, and that a present right of action immediately accrues thereupon to the covenantee, which, being a mere chose in action, is both at com-

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Gilbert v. Bulkley, 5 Conn. 262; 13 Am. Dec. 57. Prov. Life & Tr. Co. v. Seidel, (Pa. St.) 23 Atl. Rep. 561. Kenny v. Norton, 10 Heisk. (Tenn.) 384. Scoffins v. Grandstaff, 12 Kans. 467. Pence v. Duval, 9 B Mon. (Ky.) 48. Smith v. Jefts, 44 N. H. 482. Chapman v. Kimball, 7 Neb. 399; S. C., 11 Neb. 250; Davidson v. Cox, 10 Neb. 150; 4 N. W. Rep. 1035. Chapman v. Holmes, 5 Halst. (N. J.) 20 ; Carter v. Denman, 3 Zab. (N. J. L.) 260; Lot v. Thomas, 2 N. J. L. 297; 2 Am. Dec. 354; Garrison v. Sandford, 12 N. J. L. 261. Durand v. Williams, 53 Ga. 76, *obiter;* but see Redwine v. Brown, 10 Ga. 318, where a doubt was suggested as to the rule stated in the text in view of the general policy of the laws of that State in favor of the assignability of choses in action. By statute in Georgia since the above decision an assignee is given the benefit of the covenant against incumbrances. Rev. St. 1882, p. 672. Randolph v. Kinney, 3 Rand. (Va.) 397. Grist v. Hodges, 3 Dev. (N. C.) L. 200. Ravenel v. Ingram, 131 N. C. 549; 42 S. E. 967. Brady v. Spurck, 27 Ill. 482; Jones v. Warner, 81 Ill. 343; Richard v. Bent, 59 Ill. 38; 14 Am. Rep. 1. This case distinguishes between a covenant of seisin and that against incumbrances, holding that an assignee is entitled to the benefit of the latter. Moore v. Merrill, 17 N. H. 75; 43 Am. Dec. 593. Lowery v. Tilleny, 31 Minn. 500; 18 N. W. Rep. 452. Williams v. Wetherbee, 1 Aik. (Vt.) 253; Garfield v. Williams, 2 Vt. 327; Pierce v. Johnson, 4 Vt. 255; Swasey v. Brooks, 30 Vt. 692. Westrope v. Chambers, 51 Tex. 178. Pillsbury v. Mitchell, 5 Wis. 21. The rule stated in the text prevailed in Maine prior to the statute in that State providing in express terms that an assignee should have the benefit of the covenant of seisin. Hacker v. Storer, 8 Gr. (Me.) 228; Pike v. Galvin, 29 Me. 188. Lewis v. Ridge, Cro. Eliz. 863, and Lucy v. Livingston, 2 Lev. 26; 1 Vent. 175; 2 Keble, 831, have been very generally cited by the American courts in support of the proposition contained in the text. Mr. Rawle, however, in his erudite treatise on the Law of Covenants for Title, says that they decide nothing more than that a covenant for quiet enjoyment ceases to run with the land after it is broken. Covts. for Title, § 205. In Garrison v. Sanford, 12 N. J. L. 261, the court held that a breach of the covenants of seisin or against incumbrances did not enure to the benefit of a subsequent grantee of the land. "If," said the court, "a man breaks the leg of my horse, whom I afterwards sell, the purchaser cannot sue for the injury, as it is not done to him; and the injury to me is not diminished nor my right to redress destroyed because I have parted with the animal." The case supposed by the court is by no means parallel to that of a subsequent grantee claiming the benefit of the original grantor's covenant of seisin. In the case imagined the actual loss, whatever it may be, is sustained by the vendor, while in the case of a breach of the covenant of seisin the actual loss or injury must, if the land has been transferred, fall upon the grantee, and it would seem as mon law and by virtue of the statute 32 Hen. VIII, c. 24, incapable of assignment; and (2) that the grantor and covenantor having no title no estate could pass by his conveyance to the covenantee, and that consequently there was nothing with which the covenant could run so as to enure to the benefit of a remote grantee.[50]

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inequitable to deny to him the right of action on the covenant as it would be to give to the seller of the horse the right to recover for an injury to the horse inflicted after the property in it had passed to the vendee. In Raymond v. Squire, 11 Johns. (N. Y.) 47, the covenantee was allowed to recover in an action on a covenant of seisin after the land had been transferred by him. A covenantee does not lose his right to recover for breach of the covenant for seisin by conveying his right and title to the land to a third person. Cornell v. Jackson, 3 Cush. (Mass.) 506. A covenant that the land conveyed contains a certain number of acres is equivalent to a covenant of seisin, is broken as soon as made if there be a deficiency in the acreage, and the right of action does not pass to an assignee. Salmon v. Vallejo, 41 Cal. 481.

It is worthy of note that while the early New York decisions declare that the benefit of a covenant of seisin does not pass to a subsequent grantee or assignee by virtue of the covenantee's conveyance, they sustain a separate formal assignment of the benefit of that covenant, executed by the covenantee to secure his grantee against loss from an apprehended failure of the title. See Raymond v. Squire, 11 Johns. (N. Y.) 47. It is not easy to understand why the express and formal assignment should be upheld, and the incidental or implied assignment declared invalid, since in either case it is a chose in action that is assigned, and the one is as much within the rule prohibiting the assignment of rights in action as the other. In Kenny v. Norton, 10 Heisk. (Tenn.) 385, the court declined to depart from the rule that the covenant of seisin does not run with the land, which it conceives to be established by the weight of American authority, and assigns, as a reason, that the covenant of warranty, amply sufficient under all circumstances for the protection of the assignee, is invariably inserted in all conveyances in that State, except those in which the grantor merely quit claims such right or interest as he may have in the land, and the further reason that the assignee is protected by a short Statute of Limitations (seven years) against the demands of the adverse claimant.

Recent cases. Bryant v. Mosher, 96 Neb. 555; 148 N. W. 329; Gulf Coal Co. v. Musgrove, 195 Ala. 219, 70 So. 179; Pinckard v. Mortgage Co., 143 Ala. 571; 39 So. 350; Prestwood v. McGowan, 128 Ala. 267; 29 So. 386; 86 Am. St. Rep. 136; Bull v. Beiseker, 16 N. D. 290; 113 N. W. 870; 14 L. R. A. (N. S.) 514; Eames v. Armstrong, 142 N. C. 506; 146 N. C. 1; 59 S. E. 165; 125 Am. St. Rep. 436; Merch. Nat. Bank v. Otero, 24 N. M. 598; 175 Pac. 781; Thompson v. Richmond, 102 Me. 335; 64 Atl. 649; Simonds v. Diamond Match Co., 159 Mich. 241; 123 N. W. 1132.

[50] See the cases cited in the last note. See, also, Bender v. Fromberger, 4 Dall. (Pa.) 438; Stewart v. West, 14 Pa. 336. Webber v. Webber, 6 Gr.

§ 112. Contrary rule. Doctrine of "continuing breach." But while the rule that the covenant of seisin does not run with the land, obtains, perhaps, in most of the States, a contrary position has been taken in others, and maintained with much force.[51]

(Me.) 127. Jones v. Warner, 81 Ill. 343. McCarty v. Leggett, 3 Hill (N. Y.), 134. Wilson v. Forbes, 2 Dev. (N. C.) 32. Innes v. Agnew, 1 Ohio, 389. Allen v. Allen, (Minn.) 51 N. W. Rep. 473.

[51] Kingdon v. Nottle, 1 Maule & S. 355; S. C., 4 Maule & S. 53. This case was decided in the early part of the present century, and has been cited and followed in many of the American cases holding that the covenant of seisin runs with the land. The case establishes the proposition that want of title in the covenantor is a continuing breach, not completed until actual damage has been suffered by the covenantee or his grantee. The decision has been criticised by Chancellor KENT as "too refined to be sound" (4 Kent. Com. 472), and questioned in Spoor v. Green, L. R., 9 Exch. 99. See Rawle Covts. § 208. See cases cited to proposition that covenant against incumbrances runs with land, post, § 128. Mecklem v. Blake, 22 Wis. 495; Eaton v. Lyman, 33 Wis. 34; S. C., dissenting opinion of DIXON, C. J., 30 Wis. 41, 46. Collier v. Gamble, 10 Mo. 467; Dickson v. Desire, 23 Mo. 162, overruling Chauvin v. Wagner, 18 Mo. 531; Lawless v. Collier, 19 Mo. 480; Magwire v. Riggin, 44 Mo. 512; 75 Am. Dec. 121; Walker v. Deaver, 5 Mo. App. 139; Hall v. Scott Co., 2 McCrary (U. S.), 356; Jones v. Cohitsett, 79 Mo. 188; Allen v. Kennedy, 91 Mo. 324; 2 S. W. Rep. 142. Langenburg v. Dry Goods Co., 74 Mo. App. 12. Bacchus v. McCoy, 3 Ohio, 211; 17 Am. Dec. 585; Foote v. Burnet, 10 Ohio, 331; 36 Am. Dec. 90; Devore v. Sunderland, 17 Ohio, 52; 49 Am. Dec. 442; Great Western Stock Co. v. Saas, 24 Ohio St. 542. Scofield v. Iowa Homstead Co., 32 Iowa, 317; 7 Am. Dec. 197. This is the leading Iowa case. It contains an able review of authorities bearing upon the question of the assignability of the covenant of seisin, and has been frequently cited by the courts in other states. Knadler v. Sharp, 36 Io. 232; Boon v. McHenry, 55 Io. 202; 7 N. W. Rep. 503. Martin v. Baker, 5 Ind. 393; leading cases; Coleman v. Lyman, 42 Ind. 289, distinguishing Burnham v. Lasselle, 35 Ind. 425; Wright v. Nipple, 92 Ind. 313; Worley v. Hineman, (Ind.) 33 N. E. Rep. 261. The remark in Rawle Covt. (5th ed.) p. 264, n., that in Indiana the court has repudiated the contract of a "continuing breach" of the covenant of seisin, must be limited in its application to cases in which no possession passed to the covenantee Beyond that the cases there cited do not go. See, also, p. 314 of the same work, where it is said that the cases in that State maintain the doctrine of a continuing breach down to the present day. Cole v. Kimball, 52 Vt. 639. McCrady v. Brisbane, 1 Nott & McC. (S. Car.) 104; 9 Am. Dec. 676. Mecklem v. Blake, 22 Wis. 495; 82 Am. Dec. 707. The doctrine of the English courts, and its American adherents, in respect to the assignability of the covenant of seisin, was succinctly stated in this case as follows: "These courts hold that where the covenantor is in possession claiming title, and delivers the possession to the covenantee, the covenant of seisin is not a mere present engagement made for the sole benefit of a covenantee, but that it is a covenant of

They hold that the covenant is not completely broken, until the want of title in the covenantor has resulted in a loss of the premises, or actual damage suffered by the covenantee, or those deriving title from him; that the covenant is prospective in its nature, and intended as a security for the title, or an indemnity against loss, attaching to and running with the land for the benefit of such person as shall be the owner thereof at the time the loss is sustained.[52] The cases which decide that a covenant of seisin is in the nature of a security for the title attaching to and running

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indemnity entered into in respect of the land conveyed, and intended for the security of all subsequent grantees, until the covenant is finally and completely broken, and they consequently hold that no such right of action accrues to the covenantee on the mere nominal breach, which always happens the moment the covenant is executed, as is sufficient to merge or arrest the covenant in the hands of the covenantee, or to deprive it of the capacity of running with the land for the benefit of the person holding under the deed, when an eviction takes place or other real injury is actually sustained. The possession of the land or seisin in fact under the deed, by the covenantee or those claiming through him, is considered such an estate as carries the covenant along with it." In Catlin v. Hurlburt, 3 Vt. 403, it was held that a covenantee, who had subsequently conveyed the premises, could recover on a covenant of seisin, but should not have execution, until he had lodged with the clerk of the court a release from his grantee of all right of action on a covenant of *warranty* contained in the original conveyance from the plaintiff's grantor.

Recent Cases. Sturgis v. Slocum, 140 Iowa 25, 116 N. W. 128; Knapp v. Foley, 140 Minn. 423; 168 N. W. 183; Jones v. Hazeltine, 124 Mo. App. 674; 102 S. W. 40; Falk v. Organ, 160 Mo. App. 218; 141 S. W. 1; Talbert v. Grist, 198 Mo. App. 492; 201 S. W. 906; Coleman v. Lucksinger, 224 Mo. 1; 123 S. W. 441, 26 L. R. A. (N. S.) 934.

[52] Kimball v. Bryant, 25 Minn. 496, the court, by GILFILLAN, C. J., saying: "The covenant is taken for the protection and assurance of the title which the grantor assumes to pass by his deed to the covenantee, and where the covenantee assumes to pass that title to another, it is fair to suppose that he intends to pass with it, for the protection of his grantee, every assurance of it that he has, whether resting in right of action or unbroken covenant, so that if before enforcing his remedy for breach of the covenant, the covenantee execute a conveyance of the land, unless there be something to show a contrary intention, it may be presumed that he intends to confer on his grantee the benefit of the covenant, so far as necessary for his protection, that is, that he intends to pass all his right to sue for the breach, so far as the grantee sustains injury by reason of it." In Lowrey v. Tilleny, 31 Minn. 500, it was held that the right of action for breach of the covenant, if not assigned by a conveyance of the land, passed to the personal representative, and not the heir.

with the land for the benefit of a grantee of the covenantee would seem to establish the better rule, inasmuch as it adds to the security of purchasers, and tends to facilitate the alienation of real property. The opposite conclusion is founded upon the old rule that a chose in action is not assignable, a rule which has long since yielded to the exigencies of a commercial age, and exists no longer, it is apprehended, in any of the American States. The doctrine that a covenant of seisin does not run with the land seems to be supported chiefly by arguments of a subtle and technical character, and the rule itself seems not to subserve any just and desirable end; whereas that construction which gives to the actual sufferer the benefit of the covenant commends itself to the mind as both equitable and expedient.[53] Besides, the enforcement of such a rule practically destroys the usefulness of the covenant. For so long as the covenantee has suffered no actual damage from the breach, he can recover no more than nominal damages; and after the land has passed into the hands of a remote grantee who is evicted, the right of action remaining in the covenantee will, most probably, have become barred by the Statute of Limitations, usually a short period in most of the American States. And if not barred the covenantee, having received full value for the land without reference to any defect of title, would, unless he conveyed with warranty, have sustained no actual damage himself from the breach, and consequently would seem entitled to nothing more than nominal damages. In several of the States there are now statutes which provide in substance that the grantee of a covenant shall have the benefit of a covenant of seisin or against incumbrances contained in the conveyance to his grantor.[54] The same effect has been given to the generally prevalent statutory provision that all actions must be maintained in the name of the real party in interest.[55] The right of the remote covenantee to sue on the covenant is not affected by the fact that one of the intermediate deeds was void.[56]

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[53] 4 Kent Com. 471, the learned author saying that it is to be regretted that the "technical scruple" that a chose in action was not assignable does necessarily prevent the assignee from availing himself of any or all of the covenants; and that he is the most interested and the most fit person to claim the indemnity secured by them, for the compensation belongs to him as the last purchaser and the first sufferer.

[54] Code Civ. Proc. N. Y. 1876, § 449. Rev. St. Ohio, p. 1034, § 4993. Rev. St. Me. 1841, c. 115, § 16. Rev. St. Colo. 1883, p. 172. Rev. St. Ga. 1882, p. 672. *Semble,* Code Cal. 1876, p. 473, § 6462, and Code Dak. 1883, p. 917. Under a statute permitting the assignment of all choses in action, the benefit

The inconvenience of the American rule that a covenant of seisin does not run with the land is greatly reduced in practice by the fact that in equity the assignment of a chose in action is held to be valid, and that a court of law recognizes and enforces the rights of the assignee by permitting an action to be brought for his use and benefit in the name of the assignor, the original covenantee.[57] For this purpose a conveyance of the land will be treated as an assignment of the covenantee's right of action for a breach of the covenant.[58] This remedy, however, is cumbrous and unwieldy and has been rendered obsolete in many of the States by a provision of the Code that every action shall be brought in the name of the real party in interest. But for the foregoing reasons, and

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of a covenant of seisin passes to a subsequent grantee of the premises. Schofield v. Homestead Co., 32 Iowa, 317; 7 Am. Rep. 197. Allen v. Little, 36 Me. 175; Stowell v. Bennett, 34 Me. 422. But the statute in Maine provides that the subsequent grantee must first execute a release to his grantor before he can sue on the covenant of the original grantor. Prescott v. Hobbs, 30 Me. 345; Rev. St. Me. 1883, p. 697. See, also, Rev. St. Colo. p. 172; 2 Lev. Rev. Code Dak. p. 917; Hitt. Codes Cal. 1876, p. 743. Code Ga. 1882, p. 672.

[55] Code Civil Proc. N. Y. § 449. Andrew v. Appel, 22 Hun (N. Y.), 433, the court saying: "The objection existing at common law that a covenant or chose in action was not assignable has been obviated by modern legislation." The assignee is the real party in interest. The transfer of the land, the principal thing, should be held to imply an assignment of all remedies under the covenant for a breach thereof. Ernst v. Parsons, 54 How. Pr. (N. Y.) 163; Roberts v. Levy, 3 Abb. Pr. (N. S.) 339.

[56] Talbot v. Grist, 198 Mo. App. 492; 201 S. W. 906.

[57] Clark v. Swift, 3 Met. (Mass.) 395, the court saying: "As to the rule in question it interposes a formal difficulty only; and it is no actual obstruction to the due administration of justice. The assignment of a chose in action is valid in equity, and courts of law will take notice of equitable assignments made bona fide and for valuable consideration, and will allow the assignee to maintain an action in the name of the assignor." Peters v. Bowman, 98 U. S. 59. Collier v. Gamble, 10 Mo. 467.

[58] Rawle Covt. § 226. "The transfer of the land, the principal thing, should be held to imply in equity an assignment of all remedies under the covenant for a breach thereof. Ernst v. Parsons, 54 How. Pr. (N. Y.) 163; Roberts v. Levy, 3 Abb. Pr. (N. S.) 339. Newman v. Sevier, 134 Ill. App. 544.

the fact that a covenant of warranty is almost invariably inserted in conveyances of land, it is probable that in every State the assignee would long since have been by statute given the benefit of the covenant of seisin.

§ 113. **Possession must have passed with the covenantor's deed.** In some of the States adopting the rule that a covenant of seisin runs with the land, an important qualification of that rule exists, namely, that the land must actually pass, and possession be taken under the conveyance of the covenantor in order to give a subsequent grantor the benefit of the covenant.[59] The cases which establish this position, proceed upon the principle that the covenant of seisin is intended as an indemnity against loss of the land only, and that if no land passed to the assignee there is nothing to create a privity between him and the covenantor, and consequently that he has no right of action on the covenant.

§ 114. **When Statute of Limitations begins to run.** In those States in which it is held that an assignee or subsequent grantee is not entitled to the benefit of a covenant of seisin, the Statute of Limitations begins to run against an action for a breach of the covenant from the time the covenant was made; that is when the deed containing the covenant was delivered.[60] This follows necessarily from the rule that the covenant is broken as soon as made if the covenantor was not at that time seised of such an estate as the covenant describes. Consequently in all of those States the life of the covenant is measured by the statute of limitations, whether the covenantee or his grantee has or has not been evicted from the premises. But in those States in which the covenant of seisin is held to run with the land, the statute does not begin to run until actual damage from the breach has been sustained.[61]

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[59] Bottorf v. Smith, 7 Ind. 673; Bethell v. Bethell, 54 Ind. 428; 23 Am. Rep. 650; Craig v. Donovan, 63 Ind. 513; McClure v. McClure, 65 Ind. 485. Dickson v. Desire, 23 Mo. 162, overruling Chauvin v. Wagner, 18 Mo. 531. Shankle v. Ingram, 133 N. C. 254; 45 S. E. 578. Backus v. McCoy, 3 Ohio, 216; 17 Am. Dec. 585; Devore v. Sunderland, 17 Ohio, 60; 49 Am. Dec. 442; Foote v. Burnet, 10 Ohio, 327; 36 Am. Dec. 90. This case contains an elaborate note upon the law of covenants of title to real estate. In Chambers v. Smith, 23 Mo. 174, it was said: "If there be a total defect of title, and the possession have not gone along with the deed, the covenant is broken as soon as it is entered into, and cannot pass to an assignee upon any subsequent transfer of the supposed right of the original grantee. In such case the breach is final and complete; the covenant is broken immediately once for all, and the party recovers all the damages that can ever result from it. If, however, the possession pass, although without right — if an estate in fact though not in law, be transferred by the deed, and the grantee have the enjoyment of the property according to the terms of the sale, the covenant runs with the land, and passes from party to party, until the paramount title results in some damage to the actual possession, and then the right of action upon the covenant rests in the party upon whom the loss falls."

[60] Jenkins v. Hopkins, 9 Pick. (Mass.) 542. Bratton v. Guy, 12 S. Car. 42.

§ 115. **Conflict of laws.** At common law the covenantee might maintain an action at law against the covenantor wherever he found him, all actions dependent upon privity of contract being deemed transitory.[62] But an assignee, his right of action being dependent upon privity of estate, could maintain an action on the covenant only in the jurisdiction in which the land lay, and the construction of that covenant was governed of course by the *lex rei sitæ*.[63] One consequence of these rules is that an assignee who takes a conveyance in a State in which he would be entitled to the benefit of a covenant of seisin made with his grantor, the land lying in a State in which the contrary rule prevails, would be without remedy against the remote covenantor, in case he should lose the land. But now, by force of statutes abolishing the common-law distinction between local and transitory actions, it is held in several of the States that the right of an assignee to sue upon the covenants of a prior grantor, is to be determined by the law of the place where the contract was made, and not by the *lex rei sitæ*.[64]

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[61] White v. Stevens, 13 Mo. App. 240. Foshay v. Shafer, 116 Iowa 302; 89 N. W. 1106. Falk v. Organ, 160 Mo. App. 218; 141 S. W. 1; Brooks v. Mohl, 104 Minn. 404; 116 N. W. 931; 124 Am. St. R. 629; 17 L. R. A. (N. S.) 1195. But if no possession nor right passed under the conveyance, the statute begins to run at once. Sturgis v. Slocum, 140 Iowa 25, 116 N. W. 128.

[62] Chit. Pl. 270; Rawle Cov. (5th ed.) § 302. Clarke v. Scudder, 6 Gray (Mass.), 122.

[63] Worley v. Hineman, (Ind.) 33 N. E. Rep. 260, overruling Fisher v. Parry, 68 Ind. 465, where the subject was carefully considered and the rule announced that "whether a deed executed in Indiana, conveying land in another State, contains a covenant of seisin that runs with the land, is to be determined by the law of Indiana." See, also to same effect. Oliver v. Loye, 59 Miss. 320; 21 Am. Law Reg. 600.

[64] Bethell v. Bethell, 92 Ind. 318; S. C., 54 Ind. 428; 23 Am. Rep. 650.

§ 116. **MEASURE OF DAMAGES.** Upon a breach of the covenant of seisin, which results in the loss of the estate to the covenantee, the measure of his damages is the value of the estate at the time of the conveyance as fixed by the purchase price, in money or in property, agreed upon by the parties,[65] with interest thereon for such time as the covenantee is liable to the real owner for mesne profits,[66] together with such necessary costs and expenses as he may have incurred in defending the title,[67] or in recovering possession from a squatter.[68] The increased value of the land at the time of the loss of the bargain, whether resulting from a general rise in the value of lands or from improvements made by the covenantee, cannot be considered in estimating the damages.[69]

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[65] 4 Kent Com. 475; Rawle Covt. § 158; 2 Washb. Real Prop. 728. See, also, cases cited, post, § 164, as to measure of damages in case of breach of covenant of warranty. Staats v. Ten Eyck, 3 Caines (N. Y.), 111; 2 Am. Dec. 254. This is a leading case, but is confined solely to the question of damages where there has been an increase in value of the land from extrinsic causes. There was no claim for damages to the extent of improvements in addition to the purchase money. Pitcher v. Livington, 4 Johns. (N. Y.) 1; 4 Am. Dec. 229; Bennet v. Jenkins, 13 Johns. (N. Y.) 50. Bender v. Fromberger, 4 Dall. (Pa.) 442. This is the leading case upon the proposition that improvements made by the covenantee cannot be considered in estimating his damages for a breach of the covenant of seisin resulting in eviction or loss of the estate. Marston v. Hobbs, 2 Mass. 433; 3 Am. Dec. 61; Caswell v. Wendell, 4 Mass. 108; Sumner v. Williams, 8 Mass. 162, 222; 5 Am. Dec. 83; Bynes v. Rich, 3 Gray (Mass.), 518. Stubbs v. Page, 2 Gr. (Me.) 373; Wheeler v. Hatch, 12 Me. 389; Blanchard v. Hoxie, 34 Me. 376; Montgomery v. Reed, 69 Me. 510. Ela v. Card, 2 N. H. 175; 9 Am. Dec. 46; Parker v. Brown, 15 N. H. 176; Nutting v. Herbert, 35 N. H. 120; Willson v. Willson, 25 N. H. 229; 57 Am. Dec. 320. Mitchell v. Hazen, 4 Conn. 495; 10 Am. Dec. 169; Stirling v. Peet, 14 Conn. 245. Catlin v. Hurlburt, 3 Vt. 403. Bacchus v. McCoy, 3 Ohio, 211; 17 Am. Dec. 585. Brandt v. Foster, 5 Io. 295; Cox v. Strode, 2 Bibb (Ky.), 275; 5 Am. Dec. 603; Merc. Trust Co. v. So. Park Res. Co., (Ky.) 22 S. W. Rep. 314. Dale v. Shively, 8 Kans. 190; Scott v. Morning, 23 Kans. 253. Furman v. Elmore, 2 Nott & McC. (S. C.) 189, n.; Pearson v. Davis, McMull. L. (S. C.) 37; Henning v. Withers, 3 Brev. (S. C.) 458; 6 Am. Dec. 589. Kincaid v. Brittain, 5 Sneed (Tenn.), 119. Tapley v. Lebeaume, 1 Mo. 550; Martin v. Long, 3 Mo. 391. Egan v. Martin, 71 Mo. App. 60; 79 Mo. App. 676. Wilson v. Forbes, 2 Dev. (N. C.) 30. Overhiser v. McCollister, 10 Ind. 44. Frazer v. Supervisors, 74 Ill. 291. Daggett v. Reas, 79 Wis. 60; 48 N. W. Rep. 127. It seems, from the case of Nichols v. Walter, 8 Mass. 243, that in a case at *nisi prius* in New Hampshire the plaintiff was awarded the value of the land at the time of eviction as the measure of his damages for a breach of the covenant of seisin.

Recent Cases. Knapp v. Foley, 140 Minn. 423; 168 N. W. 183; Seyfried v. Knoblauch, 44 Colo. 86; 96 Pac. 993; Pridgen v. Long, (N. C.) 98 S. E. 451; Norfolk & W. R. Co. v. Mundy, 110 Va. 422; 66 S. E. 61. Jeffords v. Driesbach, 168 Mo. App. 577; 153 S. W. 274. Brown v. Carpenter, 99 Wash. 227; 169 Pac. 331. The covenantee is entitled to recover the full consideration paid without tendering a reconveyance to the covenantor. Murphy v.

U. S. Title G'ty Co., 172 N. Y. Supp. 243; 104 Misc. Rep. 607. See, also, Parker v. Brown 15 N. H. 176.

[66] 1 Post, § 172. If the claim of the owner of the paramount title against the covenantee for mesne profits be barred by the statute of limitations, the covenantor will be entitled to an allowance for such profits. Mather v. Stokely, 236 Fed. 124; 149 C. C. A. 334.

[67] Post, § 173. Hilliker v. Rueger, 151 N. Y. Supp. 234; 165 App. Div. 189. But he is not entitled to costs and expenses incurred by him in a proceeding to acquire an outstanding interest in the premises. Roake v. Sullivan, 125 N. Y. Supp. 835. The damages include the expense of removing an encroachment of the property conveyed on the lot of an adjoining owner. Fehlhaber v. Fehlhaber, 140 N. Y. Supp. 973; 80 Misc. Rep. 149.

[68] Lasswell L. & I. Co. v. Langdon, (Mo. App.) 204 S. W. 812.

[69] Pitcher v. Livingston, 4 Johns. (N. Y.) 7; 4 Am. Dec. 229, where it was said by VAN NESS, J.: "One, and perhaps the principal reason why the increased value of the land itself cannot be recovered, is because the covenant cannot be construed to extend to anything beyond the subject-matter of it, that is, the land, and not the increased value of it subsequently arising from causes not existing when the covenant was entered into. For the same reason the covenantor ought not to recover for the improvements, for these are no more the subject-matter of the contract between the parties than the increased value of the land." And by KENT, C. J.: "Improvements made upon the land were never the subject-matter of the contract of sale any more than the gradual increase or diminution in value. The subject of the contract was the land as it existed and what it was worth when the contract was made." In Bender v. Fromberger, 4 Dall. (Pa.) 436, the question was considered with learning and research and an elaborate opinion was delivered, settling the rule as stated in the text. Among other reasons for the rule, given by TILGHMAN, C. J., were these: "The title of lands rest as much within the knowledge of the purchaser as the seller; it depends upon writings which both parties have an equal opportunity of examining. If the seller make use of fraud, concealment or artifice to mislead the purchaser in examining the title, the case is different; he will then be answerable for all losses which may occur." These, with Staats v. Ten Eyck, supra, are the leading cases upon the measure of damages for a breach of the covenant of seisin where the covenantee has lost the estate, and they have been followed in every State in which the question has arisen.

If the covenantee buys in the outstanding title, he can recover on the covenant no more than was expended by him for that purpose.[70]

The foregoing rules, it is believed, prevail in every State of the Union,[71] except where the covenantor was guilty of fraud in misrepresenting his title to the covenantee.[72] The true consideration of the conveyance may be shown by parol evidence, and the deed may be contradicted in that respect.[73] If the consideration be not stated, and cannot be ascertained, the value of the land at the time of the conveyance will be the measure of damages.[74]

The covenant of seisin is broken as soon as made, and the covenantee's right of action therein complete, if the covenantor have not, at the time of the covenant, the title therein described.[75] It is obvious, however, that if the covenantee remain in the undisturbed enjoyment and possession of the estate he has suffered no damage from the breach. Possibly he may never be disturbed in the possession, for the real owner may never assert his rights, or they may become barred by the statute of limitations.[76] Accordingly, the rule has been established by numerous decisions that the covenantee can recover no more than nominal damages for a breach of the covenant of seisin, so long as he remains in the undisturbed possession of the estate.[77] But if the premises are in the possession of an adverse claimant at the time of the grant, the covenantee may recover substantial damages, not exceeding the purchase money and interest.[78] Such an adverse possession amounts also to a constructive eviction and operates a breach of a covenant of warranty.[79] If, before suit is brought by the covenantee for a breach of the covenant, the defendant gets in the outstanding title, the plaintiff can recover only nominal damages, for the title so acquired enures to the benefit of the plaintiff. If the paramount title should be gotten in after suit had been commenced, a different rule would probably apply.[80]

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[70] 4 Post, § 168. Eames v. Armstrong, 146 N. C. 1; 59 S. E. 165; 125 Am. St. Rep. 436. If he gets in the outstanding title without expense, he is entitled only to nominal damages. Werner v. Wheeler, 127 N. Y. Supp. 158; 142 App. Div. 358.

[71] The author has met with but one instance in which a different rule was applied, and that is a *nisi prius* decision of a New Hampshire court, referred to in the case of Nichols v. Walter, 8 Mass. 243. In the last-mentioned case, however, the rule was enforced under circumstances involving much hardship. It appeared that the plaintiff purchased the property for $18.67 and took a conveyance from the defendant with covenant of seisin. He then sold and conveyed the premises with covenants of *seisin and good right to convey* (not *warranty*, as stated in Rawle Covt. [5th ed.] p. 224, n.) for a consideration of $113.33. His grantee, being evicted, recovered against him as damages for breach of the *covenant of seisin*, $555.49, the value of the property at the time of eviction; but plaintiff, in his action on the original covenant of seisin, was adjudged to be entitled only to the consideration paid by him to the defendant, $18.67, upon the ground that the case must be governed by the Massachusetts rule of damages for a breach of that covenant.

[72] Pridgen v. Long, (N. C.) 98 S. E. 451.

[73] Post, § 167.

[74] Smith v. Strong, 14 Pick. (Mass.) 128; Bynes v. Rich. 3 Gray (Mass.) 518.

[75] Ante, § 109.

[76] If the covenantee's title be perfected by the Statute of Limitations he can recover only nominal damages for a breach of the covenant of seisin. Wilson v. Forbes, 2 Dev. (N. C.) 30.

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[77] Baxter v. Bradbury, 20 Me. 260; 37 Am. Dec. 49. Sable v. Brockmeier, 45 Minn. 248; 47 N. W. Rep. 794; Ogden v. Ball, 38 Minn. 237; 36 N. W. Rep. 344. Garfield v. Williams, 2 Vt. 328. Hartford Ore. Co. v. Miller, 41 Conn. 133. Nosler v. Hunt, 18 Io. 212; Boon v. McHenry, 55 Io. 202; 7 N. W. Rep. 503. Collier v. Gamble, 10 Mo. 467, 472; Bircher v. Watkins, 13 Mo. 521; Cockrell v. Proctor, 65 Mo. 41; Holladay v. Menifee, 30 Mo. App. 207. Egan v. Martin, 71 Mo. App. 60; 79 Mo. App. 676. Metz v. McAvoy Brewing Co., 98 Ill. App. 584; Building Co. v. Fray, 96 Va. 559; 32 S. E. 58. Small v. Reeves, 14 Ind. 164; Hacker v. Blake, 17 Ind. 97; Lacey v. Marman, 37 Ind. 168; Hannah v. Shields, 34 Ind. 272; Stevens v. Evans, 30 Ind. 39; McClerkin v. Sutton, 29 Ind. 407; Van Nest v. Kellum, 15 Ind. 264; Jordan v. Blackmore, 20 Ind. 419. O'Meara v. McDaniel, 49 Kans. 685; 31 Pac. Rep. 303, citing Hammerslough v. Hackett, 48 Kans. 700; 29 Pac. Rep. 1079; Danforth v. Smith, 41 Kans. 146; 21 Pac. Rep. 168. (But see Bolinger v. Brake, 4 Kans. App. 180; 45 Pac. 950.) Fehlhaber v. Fehlhaber, 140 N. Y. Supp. 973; 80 Misc. Rep. 149; Hammerstadt v. Bakeley, 182 Iowa, 1356; 166 N. W. 729. Murphy v. U. S. Title & Gty. Co., 172 N. Y. Supp. 243; 104 Misc. Rep. 607. In the early case of Harris v. Newell, 8 Mass. 622, it was held that if the covenantee had been threatened with eviction, and if it appear that he must inevitably lose the estate, he may recover the consideration money as damages for breach of the covenant of seisin, and that in such a case he could not be required to lie by until he was actually evicted; the covenantor might in the meanwhile become insolvent, and the remedy on the covenant be lost. See also, Mather v. Stokely, 218 Fed. 764; 134 C. C. A. 442; Hilliker v. Rueger, 228 N. Y. 11; 126 N. E. 266. It seems that the purchaser is permitted, in Michigan, to recover the purchase-money paid, in case of a breach of the covenant of seisin, though he has not been disturbed in the possession of the premises. Parkinson v. Woulds, 125 Mich. 325; 84 N. W. 292.

[78] Adkins v. Tomlinson, 121 Mo. 487. This rule, of course, would not obtain in those States in which a sale and conveyance by the vendor when out of possession is deemed champertous.

[79] Post, § 146.

If the covenantee sues and recovers nominal damages for breach of the covenant of seisin, the judgment will be no bar to an action for breach of the covenant of warranty if he should be afterwards evicted by the person having the better title.[81]

In Missouri, a purchaser, who has taken a conveyance with a covenant of seisin, is permitted, upon discovery that the title is bad, to buy in the rights of all adverse claimants, and thus to entitle himself to recover substantial damages for the breach of the covenant to the extent of the amount so paid, with interest, provided it do not exceed the consideration money and interest.[82] This rule has been criticised upon the ground that it confounds all distinctions between the covenant of seisin and the covenant of warranty. It is difficult to perceive any inconvenience or injustice that could result from the rule, provided it be restricted to cases in which the adverse title has been hostilely asserted.

If the breach of the covenant of seisin consist in the want of the entire quantity of estate or interest purported to be conveyed, as if the interest turns out to be a life estate instead of a fee, the covenantee cannot practically rescind the contract by recovering the entire purchase money as damages; he must keep the life estate. In other words, the measure of his damages will be the difference between the consideration money and the value of the life estate.[83] If it appear that title to a part of the land has failed, the plaintiff will be entitled to nominal damages, though there be no evidence as to the value of such part.[84] Where he is entitled to substantial damages for a loss of part of the premises, the measure thereof will be such part of the whole consideration paid as the value of the part at the time of purchase, to which title failed, bears to the whole of the premises,[85] unless the contract fixed a price per acre, in which case the measure of damages is the contract price of the number of acres lost.[86]

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[80] Sayre v. Sheffield Land Co., (Ala.) 18 So. Rep. 101. As to the right of the covenantor to require the covenantee to accept such title in lieu of damages, see, post, "Estoppel," § 215.

[81] Donnell v. Thompson, 10 Me. 170; 25 Am. Dec. 216. Ogden v. Ball, 40 Minn. 94; 41 N. W. Rep. 453.

[82] Lawless v. Collier, 19 Mo. 480; Hall v. Bray, 51 Mo. 288; Ward v. Ashbrook, 78 Mo. 517. Schnelle Lumber Co. v. Barlow, 34 Fed. Rep. 853. So also in North Carolina. Pridgen v. Long, 98 S. E. 451 and Oregon; Cobb v. Klosterman, 58 Oreg. 211; 114 Pac. 96. The covenantee is entitled to recover the necessary expenses incurred by him in a proceeding to perfect the title, the covenantor having refused to institute such proceeding when requested to do so. Pineland Mtge. Co. v. Trust Co., 139 Mo. App. 209; 122 S. W. 1133.

[83] Tanner v. Livingston, 12 Wend. (N. Y.) 83. Pinkston v. Huie, 9 Ala. 252, 259. Post, § 170.

If, before satisfaction of a judgment for damages resulting from a breach of the covenant, the title of the covenantee is perfected by the running of the statute of limitations, a suit to enjoin the enforcement of the judgment may be maintained.[87]

If the alleged breach of the covenant of seisin consist in the want of title to minerals under the soil, it is competent for the covenantor to show, in mitigation of damages, that the grantee purchased with knowledge of the fact that there had been a previous severance of the title in respect to the soil and the minerals, and that the consideration paid was merely for the land without the minerals.[88]

The burden is on the covenantee to prove the amount of damages sustained by him from the breach.[89]

§ 117. **BURDEN OF PROOF** In an action on a covenant of seisin the burden of proof has generally been held to lie with the defendant, the grantor, to show that the title is such as his covenant requires;[90] but there is a conflict of authority upon the point, some cases holding that the burden is on the plaintiff to show that the covenant has been broken, since it is to be presumed that he has knowledge of the facts constituting the breach of the covenant, and that there can be no hardship in requiring him to prove them.[91] The weight of authority probably is that the burden is on the defendant, and the rule results from a strictly technical adherence to that other rule, that the plaintiff may allege a breach by merely negativing the words of the covenant.[92] When the

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[84] Lawless v. Evans, (Tex.) 14 S. W. Rep. 1019. In Hilliker v. Rueger, 151 N. Y. Supp. 234; 165 App. Div. 189, it was held that he was entitled to substantial damages, though he had not been evicted from the part to which title had failed.

[85] McLennan v. Prentice, (Wis.) 55 N. W. Rep. 764. Roake v. Sullivan, 125 N. Y. Supp. 835; Seyfried v. Knoblauch, 44 Colo. 86; 96 Pac. 993; Campbell v. Shaw, 170 N. C. 186; 86 S. E. 1035.

[86] Conklin v. Hancock, 67 Ohio St. 455; 66 N. E. 518.

[87] Mather v. Stokeley, 236 Fed. 124; 149 C. C. A. 334.

[88] Lloyd v. Sandusky, 203 Ill. 621; 68 N. E. 154.

[89] Mixon v. Burleson, (Ala.) 82 So. 98.

[90] Bradshaw's Case, 9 Coke R. 60. Abbott v. Allen, 14 Johns. (N. Y.) 248; 7 Am. Dec. 554. Bircher v. Watkins, 13 Mo. 521; Cockrell v. Proctor, 65 Mo. 41. Beckmann v. Henn, 17 Wis. 412; Eaton v. Lyman, 30 Wis. 41; McClennan v. Prentice, 77 Wis. 124; 45 N. W. Rep. 943. Swafford v. Whipple, 3 Gr. (Io.) 261; 54 Am. Dec. 498; Schofield v. Homestead Co., 32

Iowa, 317; 7 Am. Rep. 197; Blackshire v. Homestead Co., 39 Iowa, 624; Barker v. Kuhn, 39 Iowa, 392. Marston v. Hobbs, 2 Mass. 433; 3 Am. Dec. 61. The reason given for the rule thus stated is that the grantor is presumed to have retained the evidences of his title, and, consequently, that the facts constituting a defect in his title must lie peculiarly within his knowledge. 1 Stark. Ev. 418, 423; Abbott v. Allen, 14 Johns. (N. Y.) 253; 7 Am. Dec. 554; Swafford v. Whipple, 3 Gr. (Io.) 265; 54 Am. Dec. 498; Wooley v. Newcombe, 87 N. Y. 805. This is doubtless true of the English practice where the grantor has conveyed only a portion of his estate, but in America, where a general system of registration of conveyances and incumbrances and, generally, of all documentary matter affecting the title prevails, there would seem to be no reason to presume that the grantor is better informed as to the state of the title than the grantee.

[91] Eames v. Armstrong, 142 N. C. 506; 55 S. E. 405. Ingalls v. Eaton, 25 Mich. 32, the court by COOLEY, J., saying: "Where parties contract concerning lands on the assumption that one of them is the owner, it is a reasonable presumption that they have first satisfied themselves by inquiry what the title is; and if a defect comes to their knowledge afterwards, the party complaining of it should point it out." The decision was also rested largely upon a statutory provision that the general issue is a denial of the plaintiff's cause of action, and calls upon him to prove it. No question was raised as to the sufficiency of the plaintiff's assignment of the breach, which was in general terms, negativing the words of the covenant. The court cited as sustaining their view "Brown v. Bellows, 4 Pick. (Mass.) 193; Snevilly v. Egle, 1 W. & S. (Pa.) 480; Martin v. Hammon, 8 Pa. St. 270; Espy v. Anderson, 14 Pa. St. 312; Dwight v. Cutler, 3 Miss. 566;" 64 Am. Dec. 105. See, also, Peck v. Houghtaling, 35 Mich. 132. Landt v. Mayor, (Colo.) 31 Pac. Rep. 524. Clapp v. Herdmann, 25 Ill. App. 509. In Wooley v. Newcombe, 87 N. Y. 605, it was held that under the Code of Civil Procedure of that State, providing that issue might be joined by service of an answer to the complaint, dispensing with a replication, the plaintiff, in an action on a covenant of seisin, assumed the burden of proving the breach alleged by him, that is, that the defendant was not seised of an indefeasible estate in fee simple.

[92] Mecklem v. Blake, 16 Wis. 102; 83 Am. Dec. 707. It has been held that if the defendant plead that he has not broken his covenant, the plaintiff by his joinder avers that he has, and therefore assumes the burden of proving that allegation. Montgomery v. Reed, 69 Me. 513; Boothbay v. Hathaway,

purchaser obtains an injunction against the collection of purchase money due by him, the burden is on him to show that the title is bad.[93] So, also, in an action for the purchase money in which he sets up the defense of failure of title.[94] So long as the parties are allowed to arrive at an issue by merely affirming on the one side and denying on the other the words of the covenant, it is difficult to perceive upon what principle the burden of proof can be adjusted, other than that which casts the burden on him who has the affirmative of the issue. No difficulty can arise in fixing the burden of proof in an action for breach of the covenant for warranty, for the plaintiff must allege that he was evicted, and it devolves on him to prove that fact; nor in an action for breach of the covenant against incumbrances, for he must set out the incumbrance constituting the breach and prove its existence. But with respect to an action for breach of the covenant of seisin, it may be doubted whether an equitable disposition of the burden of proof can be made upon the mere allegation that the defendant was or was not seised of such an estate as his covenant describes. Defects of title consist in the existence or non-existence of particular facts, and to rule arbitrarily from this form of pleading that the burden of proof was upon the one party or the other would be in some cases to require the defendant, and in others the plaintiff, to prove a negative;[95] that is, the non-existence of a particular fact. A solution of the difficulty would apparently

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20 Me. 251. Bacon v. Lincoln, 4 Cush. (Mass.) 212; 50 Am. Dec. 765. But as such an averment is no more in effect than an allegation that the defendant was not seised as he had covenanted, these decisions would seem to fall within the observation of Mr. Greenleaf that in disposing the burden of proof regard must be had to the substance and effect of the issue rather than to the form of it; for in many cases the party, by making a slight change in his pleading, may give the issue a negative or affirmative form at his pleasure. 1 Greenl. Ev. (Redf. ed.) § 74.

[93] Grantland v. Wight, 5 Munf. (Va.) 295. Lewis v. Bibb, Port. (Ala.) 84.

[94] Stokely v. Trout, 3 Watts (Pa.), 163. Sawyer v. Vaughan, 25 Me. 337. Breithaupt v. Thurmond, 3 Rich. (S. C.) 216. Zerfing v. Seelig, 14 S. Dak. 203; 85 N. W. 585.

[95] Thus, if the burden was held to be upon the defendant, grantor, he would, if the objection to the title was the existence of a prior conveyance, be required to prove, negatively, that no such conveyance existed; and if held to be upon the plaintiff, grantee, and the objection was that the defendant's claim of title by descent could not be sustained, the burden would be upon him to show that the defendant, or his predecessor in title, was *not* the heir;

be reached by requiring the plaintiff to set out in his pleadings the facts constituting the breach of the covenant, so that the parties might arrive at a specific and well-defined issue of fact, in respect to which the court could have no difficulty in adjusting the burden of proof.[96]

§ 118. **PLEADING.** At common law, the plaintiff, in alleging a breach of the covenant of seisin, merely negatives the words of the covenant; it is not necessary that he shall set out in his declaration the facts constituting the breach,[97] nor to allege an eviction.[98] The same form of pleading has been held a sufficient compliance with a statutory provision that the plaintiff's complaint shall contain a statement of his cause of action.[99] The defendant, at common law, having filed a plea of seisin to the declaration, might, it seems, require the plaintiff to set forth in his replication

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all of which would seem to be in direct contravention of the rule that the burden of proof is upon him who has substantially the affirmative of an issue. These observations are borne out by the case of Wilson v. Parshall, 129 N. Y. 223; 29 N. E. Rep. 297. There the plaintiff claimed that the deed under which the defendant (grantor) held was in fact a mortgage and not a conveyance of an indefeasible estate in fee simple, and it was held that the burden devolved on the plaintiff to show not only that the deed was in fact a mortgage, but that it was actually intended as such.

[96] This seems to have been feasible under the common-law system of procedure, by means of the replication and other successive pleadings tending to the production of an issue; but in those States in which the defendant is allowed to join, issue by service of an answer to the complaint would be impracticable, unless the plaintiff were required to set out in his complaint the facts constituting the breach of covenant, or to furnish the defendant with such a statement of the particulars of his claim as would enable him to frame his defense.

[97] Abbott v. Allen, 14 Johns. (N. Y.) 252; 7 Am. Dec. 554; Rickert v. Snyder, 9 Wend. (N. Y.) 421. Bacon v. Lincoln, 4 Cush. (Mass.) 212; 50 Am. Dec. 765. Floom v. Beard, 8 Blackf. (Ind.) 76; Truster v. Snelson, 29 Ind. 96. Montgomery v. Reid, 69 Me. 513; Blanchard v. Hoxie, 34 Me. 376. Bender v. Fromberger, 4 Dall. (Pa.) 438. Pringle v. Witten, 1 Bay (S. C.), 254; 1 Am. Dec. 612. Bircher v. Watkins, 13 Mo. 523. Socum v. Haun, 36 Iowa, 138. Koepke v. Winterfield, 116 Wis. 44; 92 N. W. 437. De Jarnette v. Dreyfus, 166 Ala. 138; 51 So. 932. Faller v. Davis, 30 Okl. 56; 118 Pac. 382. An allegation also that defendant warranted the title may be disregarded as surplusage. Viet v. McCauslan, 142 N. Y. Supp. 281; 157 App. Div. 335.

[98] Riddle v. Hudson, (Okl.) 172 Pac. 921.

[99] Wooley v. Newcombe, 87 N. Y. 605. The intimation contained in Rawle on Covenants for Title (5th ed.), § 64, that in New York and Michigan it is necessary for the plaintiff in an action for breach of covenant of seisin to set

the particulars of the breach.[1] Thus, it seems to have been possible at common law to develop by the pleadings the facts conceived by the plaintiff to be a breach of the covenant, and to join issue upon the existence of those facts, or, the facts themselves being admitted, to determine on demurrer whether they were sufficient for the purposes alleged. The same result, it appears, may be attained under the code system of civil procedure by requiring the plaintiff to set out the particulars of his claim more fully than they appear in his complaint.[2]

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out the facts constituting the breach with sufficient particularity to enable the defendant to farme his defense, seems to be scarely sustained by the cases cited. In the first, Wooley v. Newcombe, 87 N. Y. 605, it was expressly held that the complaint merely negativing the words of the covenant was sufficient. In the other cases, Ingalls v. Eaton, 25 Mich. 32, and Peck v. Houghtaling, 35 Mich. 127, the declaration was in precisely the same form, and no question was raised as to its sufficiency, the court holding that the burden of proving facts constituting a breach of the covenant devolved on the plaintiff, without adverting to any question of pleading in the cause. But whether such a rule (requiring the plaintiff to state the particulars of the breach) is or is not to be deduced from the cases cited, it will scarely be denied that it would tend greatly to a more rapid and covenient determination of the rights of the parties. As was said in Ingalls v. Eaton, supra, there can be no hardship in requiring the plaintiff to introduce, in the first place, evidence of the defects of which he complains, neither, it would seem, could there be any hardship in requiring him to set out the defects in the complaint, as was done by the plaintiff voluntarily in Sedgewick v. Hollenbeck, 7 Johns. (N. Y.) 380, when the common law system of pleading prevailed in the State of New York, and as was assumed to be his duty in Potter v. Kitchen, 5 Bosw. (N. Y.) 571, under a provision of the Code that the complaint must contain a statement of the plaintiff's cause of action.

[1] Marston v. Hobbs, 2 Mass. 433; 3 Am. Dec. 61. Wooley v. Newcombe, 87 N. Y. 605, 612, where it is said that if the common-law system of pleading still prevailed in the State of New York, the plaintiff, in replying to the plea of seisin, would doubtless be required to state, as in other actions on covenants, the particulars of the breach, and thus assume the affirmative. For instances in which the plaintiff set out the facts constituting the breach, see Sedgwick v. Hollenbeck, 7 Johns. (N. Y.) 380; Kennedy v. Newman, 1 Sandf. (N. Y. S. C.) 187, and the comments on that case in Potter v. Kitchen, 5 Bosw. (N. Y. S. C.) 566.

[2] Wooley v. Newcombe, 87 N. Y. 605, 612, the court saying: "The allegations that the defendant was not the true owner, and was not seised of the premises in fee, were allegations of matters of fact. It was not necessary to the sufficiency of the complaint that the title should be set out in detail. If the particulars of the defects complained of are required to enable the defendant to defend, they must be obtained in some of the modes provided by the code."

CHAPTER XIII.

COVENANT AGAINST INCUMBRANCES.

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§ 119. **FORM AND EFFECT.** The covenant against incumbrances as used in America is either general, namely, "that the premises are free from incumbrances,"[1] or special, "that the premises are free from incumbrances done, suffered or committed by" the grantor.[2] In England this covenant is usually expressed as a part of the covenant for quiet enjoyment, namely, that the grantor shall quietly enjoy the premises, "and that free from incumbrances." In some of the States the covenant of general warranty is construed to include a covenant against incumbrances,[3] and in other States the latter covenant is by statute implied from the use of the words "grant, bargain and sell"[4] in the granting part of a conveyance.[4] Such a covenant so implied is not limited

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[1] Rawle Covts. for Title (5th ed.), p. 29, n. The court will supply mere clerical omissions in the covenant, such as the word "himself" in the clause "for himself, his heirs," etc. Judd v. Randall, 36 Minn. 12; 29 N. W. Rep. 589; Harsin v. Oman, 68 Wash. 281, 123 Pac. 1; Stanley v. Goodrich, 18 Wis. 505; Hilmert v. Christian, 29 Wis. 104. Smith v. Lloyd, 29 Mich. 382. Contra. Dun v. Dietrich, 3 N. D. 3; 53 N. W. 81. Bowne v. Wolcott, (N. Dak.) 48 N. W. Rep. 426, citing Rufner v. McConnell, 14 Ill. 168; Thayer v. Palmer, 86 Ill. 477, and saying that the remedy of the grantee is in equity if the omission was by mistake. A covenant to warrant and defend "against all persons whomsoever, and all claims whatsoever," is a covenant against incumbrances as well as a covenant of warranty. Incumbrances are claims, and a covenant against all "claims" will include incumbrances. Johnson v. Hollensworth, 48 Mich. 140.

[2] Where the covenant against incumbrances is special, the grantor cannot, of course, be held liable for incumbrances not created by himself, *e. g.*, taxes assessed upon the property before he became owner. Jackson v. Sassaman, 29

Pa. St. 406. But taxes paid by the grantor constitutes a breach of the covenant against incumbrances created by himself. Milot v. Reed, (Mont.) 29 Pac. Rep. 343. The covenant against incumbrances implied from the words "grant, bargain and sell," covers taxes due by the covenantor's grantor, as well as those due by the covenantor himself. Shaffer v. Greer, 87 Pa. St. 370; Large v. McLain, (Pa. St.) 7 Atl. Rep. 101. Taxes assessed upon the premises after a conveyance by a prior owner constitute no breach of a covenant against any claim or demand of any person claiming by, through or under such prior owner. West v. Spaulding, 11 Met. (Mass.) 556. Where a widow and sole heir of an intestate quit claimed their interest in a part of his realty, covenanting that if any claim against the estate should not be paid and should become a lien on the premises, they would pay it, it was held that a right of way across the premises was not within the meaning of this covenant. Marsh v. Fish, 66 Vt. 213.

[3] Jeter v. Glenn, 9 Rich. L. (S. C.) 374. Maitlen v. Maitlen, 44 Ind. App. 559; 89 N. E. 966. Contra in Virginia, Wash. City Sav. Bank v. Thornton, 83 Va. 157; 2 S. E. Rep. 193; Lennig v. Land Co., 107 Va. 458; 59 S. E. 400; Cummings v. Hamrick, 74 W. Va. 406; 82 S. E. 44; and in New York: Boreel v. Lawton, 90 N. Y. 293; Hebler v. Brown, 40 N. Y. Supp. 441.

[4] Post, § 137. Moseley v. Hunter, 15 Mo. 322; Stoepler v. Silberberg, 220 Mo. 258; 149 S. W. 418; Waslee v. Rossman, 231 Pa. 219; 80 Atl. 643; Alston v. Pierson, (Tex. Civ. App.) 158 S. W. 1165; Crawford v. McDonald, 84 Ark. 415; 106 S. W. 206. Rotan v. Hays, (Tex Civ. App.) 77 S. W. 654. Warren v. Stoddart, (Idaho) 59 Pac. Rep. 540. In Alabama the words "grant, bargain and sell" imply only a covenant against incumbrances created by the grantor. Parker v. Parker, (Ala.) 9 So. Rep. 426; Hood v. Clark, (Ala.) 37 So. 550; Heflin v. Phillips, 96 Ala. 561, 11 So. 729. A covenant against incumbrances implied from the words "convey and warrant" is of the same force and effect as if expressed at full length in the deed. Kent v. Cantrall, 44 Ind. 452; Dalton v. Taliaferro, 101 Ill. App. 592. A statute in the State of Washington provides that the words "convey and warrant" in a deed shall be construed to include a covenant against incumbrances. But if the grantor, instead of using the words, insert the usual formal covenant of warranty, such covenant will not be construed to include a covenant against incumbrances. Leddy v. Enos, (Wash.) 33 Pac. Rep. 508. No covenant against incumbrances is implied from the use of the word *grant* where the deed conveys only the "right, title and interest" of the grantor. So. Pac. Ry. Co. v. Dore, 34 Cal. App. 521; 168 Pac. 147; nor where the operative words of conveyance were "give, grant, alien, and confirm." In re Wells' Est., 7 Cal. App. 515; 94 Pac. 856.

or restrained by an express covenant of special warranty contained in the same deed.[5] A covenant that the grantor will warrant and defend the title against the claims of all persons lawfully claiming the same, includes a covenant against incumbrances.[6]

The covenant against incumbrances must not be confounded with a covenant to discharge existing incumbrances, or to do a particular thing in exoneration of the covenantee, or to indemnify him against a particular liability. Such a covenant is broken as soon as the failure to exonerate the covenantee, or to discharge the incumbrance, or to indemnify against the liability occurs, and a right to substantial damages immediately accrues thereupon without alleging or proving any special damage.[7]

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[5] Funk v. Voneida, 11 S. & R. (Pa.) 109; 14 Am. Dec. 617.

[6] Garner v. Garner, 117 Miss. 694; 78 So. 623.

[7] Lethridge v. Mytton, 2 B. & Ad. 772. Here the covenant was to discharge incumbrances on the granted premises to the extent of £19,000, and, there having been a breach, judgment for £19,000 was entered for the plaintiff, though it was not alleged or proved that he had been damnified by the breach. The court, however, observed that the defendant might, if he thought fit, go into a court of equity for an injunction against the judgment, but did not intimate an opinion as to whether the injunction could be sustained. Terrett v. Brooklyn Imp. Co., 87 N. Y. 92. But see Aberdeen v. Blackmar, 6 Hill (N. Y.), 324, where it was held that on a covenant to indemnify and save harmless, plaintiff must show that he has been actually damnified. Gardner v. Niles, 16 Me. 280, *obiter*, the incumbrance having been actually enforced against the covenantee. Gennings v. Norton, 35 Me. 309, action on bond by grantor to indemnify against a particular incumbrance. Hartley v. Gregory, 9 Neb. 279. Mr. Rawle (Covts. for Title [5th ed.], § 740) cites several cases to the proposition in the text, which, upon examination, appear to have been actions upon agreements by the *grantee* to discharge an incumbrance out of the purchase money. Williams v. Fowle, 132 Mass. 385; Furnas v. Durgin, 119 Mass. 500; 20 Am. Rep. 341. Dorsey v. Dashiell, 1 Md. 204. Trinity Church v. Higgins, 48 N. Y. 532, and others. The equity of this application of the rule is plainly apparent, inasmuch as a failure to discharge the incumbrance is in substance a failure to pay part of the purchase money. Such a delinquency would appear to require a sterner rule of damages than one in which the grantor had failed to provide an indemnity against a loss which had not as yet occurred. Mr. Sedgwick has criticised the rule stated in the text. Sedg. Measure of Dam. 182. A contract of indemnity against liability is held to be broken as soon as the liability occurs, and the measure of damages is the full amount of such liability. Webb v. Pond, 19 Wend. (N. Y.) 423. Rockefeller v. Donelly, 8 Cow. (N. Y.) 623; Chace v. Hinman, 8 Wend. (N. Y.) 452; 24 Am. Dec. 39. But where the obligation is that the party indemnified shall not sustain damage or molestation by reason of

If the covenant be by several persons it will be construed to extend to several as well as joint incumbrances.[8]

§ 120. **RESTRICTIONS AND EXCEPTIONS** The covenant against incumbrances may, of course, be restricted to some particular incumbrance, or to the acts of some particular person, or a particular incumbrance may be excepted from the operation of the covenant.[9] When such a restriction or exception is expressed in the conveyance in clear and unambiguous terms, no difficulty will arise in the construction of the instrument, or in determining whether there has been a breach of the covenant. But much litigation has resulted from agreements of that character resting altogether in parol, or from the use of obscure and ambiguous terms in the conveyance with respect to a particular incumbrance adverted to by the parties.[10]

§ 121. **Parol agreements.** It may be stated, as a general rule, that where a conveyance containing a covenant against incumbrances has been executed by the seller and accepted by the pur-

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the acts or omissions of another or by reason of any liability incurred through such acts or omissions, there is no breach until actual damage is sustained. Gilbert v. Wyman, 1 Comst. (N. Y.) 563; 49 Am. Dec. 359. A covenant to indemnify and save harmless from a particular incumbrance is broken as soon as the grantee's title is extinguished by foreclosure. Dana v. Goodfellow, (Minn.) 53 N. W. Rep. 656.

[8] Duval v. Craig, 2 Wh. (U. S.) 45.

[9] In Duroe v. Evans, 101 Iowa 358; 70 N. W. 610, the deed, after reciting that it was subject to two mortgages, contained a covenant in print, that the premises were free from all incumbrances, followed by the written words "except as above" and a printed special warranty to defend against all persons, followed by the written words "in, through, or by us." It was held that the special warranty did not limit the general covenant against incumbrances, and that the grantee had a right of action upon the existence of a mortgage other than the two named in the general incumbrance clause. In a case in which the covenant excepted a mortgage for a named sum and it appeared that there were two mortgages instead of one, the two aggregating that sum, it was held that the covenant excepted both mortgages. Baker v. Bradt, 168 Mass. 58; 46 N. E. 409.

[10] In Smith v. Abington Sav. Bank, 165 Mass. 285; 42 N. E. 1133, it was held that the exception of "the taxes assessed for the year 1893," from the covenant against incumbrances, did not include an assessment for the construction of a sewer, and that the grantor was liable on his covenant for such assessment. The court said the exception indicated the common annual taxes for a particular year and nothing else, and it was immaterial that the power to levy the sewer assessment falls under the general power of taxation.

chaser, evidence of any contemporaneous parol agreement that such covenant should not extend to a particular incumbrance,[11] or that the grantee should assume and pay off a particular incumbrance embraced by the covenant, will not be received in an action for the breach of such covenant.[12] Nor will such evidence be received, where the conveyance was witout covenants for title, to show that the grantor orally agreed to discharge and pay off an incumbrance upon the premises.[13] Such a case is not within the rule which permits the true consideration of a written agreement to be shown by parol. But where the conveyance was "subject to mortgage" parol evidence was admitted to show that the grantee assumed payment of the mortgage; in such case the evidence is admitted, not as supplying a new term of the contract, but as explanatory of a doubtful expression employed by the parties.[14] And parol evidence will be received to show that the grantee was, in fact, indemnified against a particular incumbrance, as where other land had been conveyed to him in satisfaction of an existing mortgage on the premises.[15] Modifications of the foregoing general rule have been announced in several cases, which are difficult to be reconciled with that rule. Thus it has been said that parol evidence will be received, not to contradict the terms of a written warranty, but to show that the property was taken by the purchaser subject to incumbrances which he knew to exist at the time of the purchase, though not mentioned in the deed, and though there was a warranty against incumbrances.[16] The rule excluding parol evidence to show an exception from a covenant against incumbrances does not apply to cases of fraud[17] or mistake.[18] But the fraud or mistake complained of must, of course, be such as caused the omission of the true agreement of the parties from the conveyance, such as a fraudulent representation that the insertion of the exception was unnecessary, or that the instrument, in fact, contained the exception, or other fraud of a like kind. It could hardly be contended that either party was guilty of fraud in taking advantage of an inadvertent omission of a part of their agreement from the instrument.[19]

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[11] Scott v. Tanner, (Mo. App.) 208 S. W. 264; Morriss v. Hesse, (Tex. Civ. App.) 210 S. W. 710; Newmyer v. Roush, 21 Idaho 106, Pac. 464, the particular incumbrance in this case being a private road across the premises. McPherson v. Kissee, 239 Mo. 664; 144 S. W. 410.

[12] Buckner v. Street, 5 McCrary (C. C.), 59. Raymond v. Raymond, 10 Cush. (Mass.) 141; Howe v. Walker, 4 Gray (Mass.), 318; Dutton v. Gerish, 9 Cush. (Mass.) 94; 55 Am. Dec. 45; Flynn v. Bourneuf, 143 Mass. 277; 58 Am. Rep. 135; Simanovich v. Wood, 145 Mass. 180; 13 N. E. Rep. 391. Suydam v. Jones, 10 Wend. (N. Y.) 185; 25 Am. Dec. 552. Johnson v. Walton, 60 Iowa, 315; 14 N. W. Rep. 325. Edwards v. Clark, 83 Mich. 246; 47 N. W. Rep. 112. Bingham v. Bingham, 57 Tex. 238. McKennan v. Doughman, 1 Pen. & W. (Pa.) 417. Grice v. Scarborough, 2 Spear L. (S. C.) 650; 42 Am. Dec. 391. Long v. Moler, 5 Ohio St. 272. McClure v. Campbell, (Neb.) 40 N. W. Rep. 595. Garner v. Garner, 117 Miss. 694; 78 So. 623; Weiss v. Clamitz, 203 Ill. App. 246; Pierse v. Bronnenburg, 40 Ind. App. 662, 81 N. E. 739. The grantor cannot show that the grantee knew of the adverse claim under which he was evicted, and that it was agreed between the parties that the grantor should not be charged if the grantee should be evicted. Townsend v. Weld, 8 Mass. 146. Where the grantor expressly covenanted against tax liens, parol evidence was held not admissible to show an oral agreement by the grantee, before the execution of the deed, to pay off a tax lien to which his attention was called. Reagle v. Dennis, (Kan. App.) 55 Pac. 469. Parol evidence that the grantee assumed the payment of taxes on the land, as a part of the purchase price, is admitted in Indiana. Carver v. Louthain, 38 Ind. 530. See also, O'Connor v. Enos, 56 Wash. 448; 105 Pac. 1039; Clark v. Baker, 91 Conn. 651; 101 Atl. 8; Preble v. Baldwin, 6 Cush. (Mass.) 549. In Burk v. Brown, 58 Ind. App. 410; 108 N. E. 252, it was held that the vendor's oral agreement to pay off and discharge an incumbrance on the property, was not merged in the vendee's acceptance of a deed to the property from a third person, and that an action against the vendor for breach of the oral agreement was maintainable by the vendee. In Reis v. Epperson, 143 Mo. App. 90; 122 S. W. 353, it was held that the burden is on the covenantor to show that the covenantee assumed the payment of the incumbrance.

[13] Howe v. Walker, 4 Gray (Mass.), 318. Duncan v. Blair, 5 Den. (N. Y.) 196. McLeod v. Skiles, 81 Mo. 595.

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[14] Aufricht v. Northrup, 20 Iowa, 61.

[15] Johnston v. Markle Paper Co., 153 Pa. St. 189; 25 Atl. Rep. 560.

[16] Sidders v. Riley, 22 Ill. 110, *dict.*, citing Allen v. Lee, 1 Ind. 58; 48 Am. Dec. 352. Leland v. Stone, 10 Mass. 459. Pitman v. Connor, 27 Ind. 337. It is submitted, with diffidence, that such evidence does contradict the warranty. Leland v. Stone was a case of mistake in omitting the exception. This case of Sidders v. Riley has been criticized by Mr. Rawle (Covts. for Title [5th ed.] p. 113). Such, however, seems to be the established rule in Indiana. Maris v. Iles, (Ind.) 30 N. E. Rep. 152; Hendrick v. Wisehart, 57 Ind. 129; McDill v. Gunn, 43 Ind. 315; Fitzer v. Fitzer, 29 Ind. 468. And whether or not consistent with the doctrine of merger of parol agreements in the covenants for title, it, doubtless, in many cases, effectuates the true intent of the parties. As to the rule in Pennsylvania, see post, § 269.

[17] Buckner v. Street, 5 McCrary (U. S.), 59. Helton v. Asher, 135 Ky. 751; 123 S. W. 285. Kyle v. Febley, (Wis.) 51 N. W. Rep. 257. In this case the grantor, an ignorant woman, had been fraudulently induced to execute a deed, without excepting an outstanding lease from her covenants. Fraud is not merged in a covenant against incumbrances. Sargent v. Gutterson, 13 N. H. 473. See post, § 270. Taylor v. Gilman, 25 Vt. 413. Here the incumbrance complained of was a right in a railroad company to take gravel and earth from the granted premises. It appeared that the parties had divided between themselves the damages that were to be paid by the company, and had expressly agreed that the covenant should not embrace that incumbrance, and it was considered that to enforce the covenant would be to assist the

§ 121-a. **Conveyance "subject to" incumbrance.** It frequently happens in the sale of real property that the purchaser agrees to pay off and discharge known incumbrances upon the premises as a part of the consideration of the sale. When such is the case the seller should be careful to see that such an agreement is fully and unequivocally expressed in the conveyance.[20] A mere recital that the grantor conveys, or that the purchaser takes, "subject to mortgage" or "subject to incumbrances" imposes no obligation upon the grantee to pay the mortgage debt or remove the incumbrance, except for his own protection.[21] The statement that

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grantee in a fraud. It is not easy to draw a distinction in principle between this case and any other in which, for a valuable consideration, it was agreed that the covenant should not extend to a particular incumbrance, and in which the parties failed to insert the exception in the deed.

[18] Haire v. Baker, 1 Seld. (N. Y.) 361. Helton v. Asher, 135 Ky. 715; 123 S. W. 285. The fraud or mistake may, of course, be shown in equity, and in equitable defenses at law, very generally permitted by statute throughout the American States.

[19] See the remarks of the court in Collinwood v. Irwin, 3 Watts (Pa.), 306.

[20] Jones Mortg. § 748; Rawle Covts. for Title (5th ed.), § 88.

[21] Jones Mortg. § 748. Drury v. Tremont Imp. Co., 13 Allen (Mass.), 171. Belmont v. Coman, 22 N. Y. 438. Strohauer v. Voltz, 42 Mich. 444. Johnson v. Monell, 13 Iowa, 300; Aufricht v. Northrup, 20 Iowa, 61. Livingston Bank v. Salling, 66 Neb. 180; 92 N. W. 318. See, also, Tweddell v. Tweddell, 2 Bro. C. 154. Waring v. Ward, 7 Ves. Jr. 337. Evidence that the purchaser was familiar with the land, and that he knew its value exceeded the purchase price, is not admissible for the purpose of showing that he assumed the payment of a mortgage on the premises. Morehouse v. Heath, 99 Ind. 509. It seems, however, that parol evidence will be admitted to show that the incumbrance was deducted from the purchase money. See Townsend v. Ward, 27 Conn. 610. Ferris v. Crawford, 2 Denio (N. Y.) 595. Thompson v. Thompson, 4 Ohio St. 333. McMahon v. Stewart, 23 Ind. 590. Leipold v. Epler, 198 Ill. App. 618.

the deed is made "subject to" designated incumbrances is often made merely for the purpose of preventing a breach of the covenant against incumbrances, and not for the purpose of charging the grantee with the incumbrance.[22] If, however, the intention of the parties that the grantee should discharge incumbrances in part payment of the purchase money appears from the whole instrument, though not expressed in so many words, it will be enforced.[23] Parol evidence will be received to show that a grantee taking "subject to" an incumbrance was by his contract obliged to pay off and discharge the same as part of the consideration.[24] But, while a conveyance "subject to" a particular incumbrance will not oblige the grantee to pay the incumbrance, except for his own protection, it will, of course, relieve the grantor from liability as to that incumbrance upon his covenant against incumbrances.[25] That expression is sufficient as a special exception from the operation of the covenant.[26] And where there has been such an exception the covenant will not of course be broken by the existence of the excepted incumbrance.[27] Nor will the grantee be permitted to assign as a breach of the covenant against incumbrances a mortgage which he himself, for an adequate consideration, had undertaken to discharge.[28] But if a particular incumbrance of a named amount be excepted from the operation of the covenant, the mention of such amount will not be treated as mere matter of description; it will be held a guaranty that the sum mentioned constitutes the whole amount of the incumbrance, and the covenant will be broken if the incumbrance exceed that amount.[29] It has also been held that an agreement by the grantee to pay off incumbrances might be waived by the parties, and that the grantee might, after such waiver, maintain an action for breach of the covenant, if the vendor failed to satisfy the incumbrances, or to redeem the land if sold thereunder.[30] An agreement by the grantee to assume payment of an incumbrance on the premises need not be contained in the conveyance to him. Such an agreement contained in an instrument of equal dignity with the deed, such as a bond, will render inoperative a covenant of warranty contained in the deed.[31] In Massachusetts it is settled that if a conveyance contain a covenant against incumbrances, excepting a particular incumbrance and also a covenant of warranty, the exception applies only to the covenant against incumbrance and not to the covenant of warranty, and that the excepted incumbrance, if enforced, will constitute a breach of the covenant of warranty.[32] This rule, however, has been thus qualified in that State, namely, that if the *granting* part of the deed describe the premises as subject to an incumbrance, a covenant of warranty following thereafter will be limited precisely to what purported to be conveyed — that is the land, subject to the incumbrance.[33] And further, that the exception of a particular incumbrance will not be controlled by a subsequent covenant of warranty, if the deed recites that the grantee assumes and agrees to pay the excepted incumbrance.[34]

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[22] Van Winkle v. Earl, 26 N. J. Eq., 242. Barnett v. Keehn, 67 Wis. 154; 30 N. W. 112.

[23] Thus it has been held that "a conveyance of land expressly subject to all incumbrances" binds the grantee to pay off an incumbrance. Skinner v. Starner, 24 Pa. St. 123. A recital in a deed that "portion of the above-described premises was set off on execution by A. against B. * * * and this conveyance is made subject to the incumbrance of said execution," excepts such incumbrance from the grantor's covenants. Shears v. Dusenbury, 13 Gray (Mass.), 292.

[24] Aufricht v. Northrup, 20 Iowa, 61. Gill v. Ferrin, 71 N. H. 421; 52 Atl. 558.

[25] Freeman v. Foster, 55 Me. 508. Jackson v. Hoffman, 9 Cow. (N. Y.) 271; Walther v. Briggs, 69 Minn. 98; 71 N. W. 909; Hopper v. Smyser, 90 Md. 363; 45 Atl. 206. Van Winkle v. Earl, 26 N. J. Eq. 242.

[26] Freeman v. Foster, 55 Me. 508. Miller v. DeGraffenreid, 43 Colo. 306, 95 Pac. 941.

[27] Foster v. Woods, 16 Mass. 116.

[28] Watts v. Wellman, 2 N. H. 458. Reid v. Sycks, 27 Ohio St. 285.

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[29] Smith v. Lloyd, 29 Mich. 382. Potter v. Taylor, 6 Vt. 676.

[30] Sherwood v. Wilkins, (Minn.) 52 N. W. Rep. 394.

[31] Brown v. Staples, 28 Me. 497; 48 Am. Dec. 504. So generally, it seems, if the grantee assume in writing, the discharge of the incumbrance. Copeland v. Copeland, 30 Me. 446. McAbee v. Cribbs, 194 Pa. St. 94; 44 Atl. 1066. In Reid v. Sycks, 27 Ohio St. 285, it was held that an agreement by the purchaser contained in the contract of sale to pay an incumbrance, is not merged in a conveyance of the land with covenants for title.

[32] Estabrook v. Smith, 6 Gray (Mass.), 572. It is to be observed that in this case there was no mention of the incumbrance in the *granting* part of the deed. This decision has been questioned as adopting a construction of the covenants apparently at variance with the intention of the parties. The case has been criticized by Mr. Rawle (Covts. for Title [5th ed.], § 290), and disapproved in Bricker v. Bricker, 11 Ohio St. 240, where a contrary decision was rendered upon the same state of facts. It was approved, however, in King v. Kilbride, 58 Conn. 109; 19 Atl. Rep. 519. Sandwich Manfg. Co. v. Zellman, (Minn.) 51 N. W. Rep. 379, and distinguished in Toney v. Dewey, (Ala.) 78 So. 887.

In a covenant against incumbrances, a provision that the land is clear "except an incumbrance of $1,500," merely identifies the incumbrance and does not fix the amount by payment of which the incumbrance may be discharged. Hence the grantor is not liable on his covenant for the interest accrued on the mortgage at the time of the conveyance.[35] On the other hand, it has been held that an exception of an incumbrance, payment of which was assumed by the grantee, did not embrace interest coupons matured and in default at the date of the deed, with accrued interest thereon, and that the grantor remained liable for such coupons and interest.[36]

A deed of trust to secure payment of the purchase money in which the grantor covenants to pay all tax liens on the property, operates to restrict or qualify a covenant against incumbrances in the deed by the party secured by the trust.[37]

The grantee, by accepting a deed subject to an incumbrance, is estopped to deny the validity of the incumbrance.[38]

§ 122. **WHAT CONSTITUTES BREACH.** A covenant against incumbrances, if broken at all, is broken as soon as made. The mere existence of the incumbrance, if it be capable of enforcement, is a breach of the covenant without regard to the probability of its enforcement, though, as we shall hereafter see, the plaintiff can recover no more than nominal damages if he has suffered no inconvenience or loss on account of the incumbrance.[39] But a covenant to *defend* the grantee against a particular incumbrance is not broken by the mere existence of that incumbrance; such a covenant is broken only by an enforcement of the incumbrance. Any other construction would be plainly contrary to the manifest intention of the parties, even though the deed contained a general covenant against incumbrances.[40] The covenant is, of course, not broken by the existence of an incumbrance which the grantee has assumed to pay. And proceedings to foreclose such an incumbrance, accompanied by a *lis pendens,* cannot be held a breach of the covenant since these are mere incidents of the incumbrance.[41]

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[33] Brown v. Bank, 148 Mass. 300; 19 N. E. Rep. 382; Linton v. Allen, 154 Mass. 432; 28 N. E. Rep. 780. Freeman v. Foster, 55 Me 508. But where incumbrances were described in the granting part of the deed, and all of them were excepted from the covenant against incumbrances, and the grantor further covenanted that he would "warrant the premises against all claims and demands of all persons except" (two of the incumbrances mentioned), it was held that he had covenanted against the third incumbrance, such being the consequence of his failure to except that incumbrance from his covenant of warranty. Schaad v. Robinson, 59 Wash. 346; 109 Pac. 1072. Ayer v. Brick Co., (Mass.) 31 N. E. Rep. 717.

[34] Lively v. Rice, 150 Mass. 171; 22 N. E. Rep. 888. Keller v. Ashford, 133 U. S. 610.

[35] Bankson v. Lagerlof (Iowa), 75 N. W. 661; Laderoute v. Chale, 9 N. Dak. 331; 83 N. W. 218.

[36] Reagle v. Dennis, (Kan. App.) 55 Pac. 469.

[37] Cleveland Park L. & I Co. v. Campbell, 65 Mo. App. 109.

[38] Johnson v. Thompson, 129 Mass. 398; Fuller v. Devold, 144 Mo. App. 93; 128 S. W. 1011.

Nor is the covenant broken by the existence of an incumbrance when the deed contains a provision that it is made "subject to" such incumbrance. That recital is a part of the description of the estate, and the covenant has reference to that estate thus qualified.[42]

It has been held that an express covenant to remove a particular incumbrance imposes a higher obligation than the ordinary covenant against incumbrances, and that on the breach of such covenant, the covenantee may recover his actual damages, though he has not himself discharged the incumbrance nor suffered eviction thereunder.[43]

The covenant extends only to incumbrances existing at the time thereof; it does not extend to liens or incumbrances created by a subsequent purchaser of the premises.[44]

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[39] See post, § 129. Stamburgh v. Smith, 23 Ohio St. 584. Ladd v. Myers, 137 Mass. 151. Moseley v. Hunter, 15 Mo. 322. Dahl v. Stakke, 12 N. Dak. 325; 96 N. W. 353; Jewett v. Fisher, (Kan. App.) 58 Pac. 1023. Anniston Lumber Co. v. Griffith, (Ala.) 73 So. 418; Knowles v. Temple, 49 Wash. 595; 96 Pac. 1; Dudley v. Waldrop, (Mo. App.) 183 S. W. 1095; Smith v. Smith, 90 N. J. L. 282; 101 Atl. 254.

[40] Shelton v. Pease, 10 Mo. 473.

[41] Monell v. Douglas, 17 N. Y. Supp. 178, not officially reported.

[42] Johnson v. Nichols, 105 Iowa 122; 74 N. W. 750; Brown v. Bank, 148 Mass. 30; 19 N. E. 382.

[43] Bohlcke v. Buchanan, 94 Mo. App. 320; aff'd. 68 S. W. Rep. 92.

[44] Naylor v. McNair, 91 Ark. 345; 122 S. W. 662.

§ 123. **Definition of incumbrance.** The precise legal definition of the term *incumbrance* is a matter of some nicety. In a popular sense, it means, as has been said, a clog, load, hindrance, impediment, weight. Perhaps the best judicial definition of the term is that of Chief Justice PARSON: "Every right to or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee."[45] Hereunder all incumbrances may be classed as: (1) Pecuniary charges on the granted premises: (2) Estates or interests less than a fee in the premises; and (3) Easements or servitudes to which the premises are subject. The definition given is satisfactory as to the first two of these classes; for it is plain that a pecuniary charge upon the premises, or a lesser estate carved therefrom, must diminish their value. But the definition is necessarily inconclusive as respects the third class, inasmuch as there are certain easements, technically "incumbrances" which may be beneficial rather than detrimental to the premises, such, for example, as a railway or a public highway; a fact which, coupled with notice of the existence of the easements at the time of the purchase, has occasioned much conflict of decision as to whether they constitute such breaches of the covenant as entitle the purchaser to damage.[46]

§ 124. **Pecuniary charge or lien. Judgments. Tax liens. Notice to covenantee.** A pecuniary charge or lien upon the granted premises, existing at the time of the conveyance, constitutes a breach of the covenant against incumbrances. It is immaterial whether the purchaser had or had not notice of the incumbrance at the time the conveyance was executed. The right to rescind an executory contract and to recover back the purchase money already paid, or to detain that which remains unpaid, has been in some cases denied on the ground that the contract was made with notice of the incumbrance. But notice is of no importance after a conveyance with covenants for title has been executed. The purchaser takes the covenant as much for protection against known as against unknown incumbrances,[47] and he is not required to exercise any diligence in ascertaining whether there are incumbrances on the land,[48] and it is immaterial that an examination of the public records by him would have disclosed the incumbrances of which he complains.[49] The existence of the incumbrance constitutes a breach of the covenant though the incumbrance has been neither actually nor constructively enforced, and though the covenant be coupled with that for quiet enjoyment, and there has been no eviction of the purchaser.[50] But, as will be hereafter seen, the purchaser can recover no more than nominal damages if the breach has occasioned him no loss or injury.[51]

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[45] Prescott v. Trueman, 4 Mass. 627; 3 Am. Dec. 249. This definition has been approved by Mr. Greenleaf (2 Ev. § 242), and by Mr. Rawle (Covts. for Title [5th ed.] § 76, who however pertinently adds that the question "what does diminish the value of the land" must sometimes be a matter of doubt, as where the alleged incumbrance consists of a railroad or a public highway, either of which may be a benefit instead of a burden to the land. Definition approved in Herrick v. Moore, 19 Me. 313. Bronson v. Coffin, 108 Mass. 175; 11 Am. Rep. 335. Chapman v. Kimball, 7 Neb. 399; Fritz v. Pusey, 31 Minn. 368; 18 N. W. Rep. 94. Clark v. Fisher, 54 Kans. 403; 38 Pac. Rep. 493; Brodie v. Mtge. Co., 166 Ala. 170; 51 So. 861; Tuskegee Land Co. v. Realty Co., (Ala.) 49 So. 378; Booth v. Wyatt, (Utah) 183 Pac. 323, and in many other cases.

[46] Post, § 127.

A judgment lien binding the granted premises constitutes, of course, a breach of the covenant against incumbrances.[52] So, also, an attachment, though it be in its nature uncertain and dependent upon the final judgment to be rendered in the action;[53] the lien which it creates remains a continuing security for any judgment that the plaintiff may obtain in the suit.[54] The covenant is also broken by the existence of a mechanic's lien,[55] a vendor's lien,[56] or a mortgage or deed of trust upon the premises.[57] A mere *lis pendens*, without evidence that it is well founded, is no incumbrance;[58] neither is a tax deed which, though recorded, is for any reason insufficient to pass the title.[59] The grantee is under no obligation to the grantor to put the deed on record, and it is no defense to the grantor that an incumbrance created by him would have been defeated if the grantee had promptly had his deed recorded.[60]

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[47] Dunn v. White, 1 Ala. 645. Worthington v. Curd, 22 Ark. 285. Snyder v. Lane, 10 Ind. 424. Whitten v. Krich, 27 Ind. App. 419; 61 N. E. 593. Townsend v. Weld, 8 Mass. 146. Smith v. Lloyd, 29 Mich. 382; Clore v. Graham, 64 Mo. 249. Long v. Moler, 5 Ohio St. 272; Lloyd v. Quinby, 5 Ohio St. 263, 265. Funk v. Voneida, 11 Serg. & R. (Pa.) 109; 14 Am. Dec. 617. Cathcart v. Bowman, 5 Pa. St. 317; Shaffer v. Green, 88 Pa. St. 370. Evans v. Taylor, 177 Pa. St. 286; 35 Atl. 635. Lane v. Richardson, (N. Car.) 10 S. E. Rep. 189. Yancey v. Tatlock, (Iowa) 61 N. W. Rep. 997. Doyle v. Emerson, 145 Iowa 358; 124 N. W. 176; Schimmelfenning v. Brunk, 153 Iowa 177; 132 N. W. 838. Dudley v. Waldrop, (Mo. App.) 183 S. W. 1095; O'Connor v. Enos, 56 Wash. 448; 105 Pac. 1039; Anniston Lumber Co. v. Griffith, (Ala.) 73 So. 418; Neeley v. Lane, (Tex. Civ. App.) 205 S. W. 154; Askew v. Bruner, (Tex. Civ. App.) 205 S. W. 152; Delco Holding Co. v. Rosenthal, 164 N. Y. Supp. 785.

[48] Edwards v. Clark, 83 Mich. 246; 47 N. W. Rep. 112; Smith v. Lloyd, 29 Mich. 382. Woolums v. Hewitt, 142 La. 597; 77 So. 295.

[49] Downs v. Nally, 161 Ky. 432, 170 S. W. 1193.

[50] Hall v. Dean, 13 Johns. (N. Y.) 105.

[51] Post, § 129.

[52] Hall v. Dean, 13 Johns. (N. Y.) 105. Wilkinson v. Olin, 136 Ill. App. 527. A sale of the premises under an execution issued upon a dormant judgment without proceedings to revive, and without leave of court, is, nevertheless, a breach of the covenant against incumbrances. A sale of property under a merely voidable execution is valid. Jones v. Davis, 24 Wis. 229.

Taxes and assessments payable by the grantor and levied upon the property conveyed, are a breach of the covenant against incumbrances, especially under statutes which provide that they shall constitute liens on the property taxed or benefited.[61] Where, however, the conveyance made was after the tax had been ordered to be levied, or the improvement directed to be made, but before the tax or assessment had been placed in the hands of the revenue officers for collection, questions have been raised as to whether the grantor or the grantee was properly chargeable therewith. Independent of statutory construction, the general rule, supported by the weight of authority, seems to be that in such a case the tax

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[53] Norton v. Babcock, 2 Met. (Mass.) 510; Kelsey v. Remer, 43 Conn. 129; 21 Am. Rep. 638.

[54] Johnson v. Collins, 116 Mass. 392.

[55] Dyer v. Ladomus, 2 Del. Co. Ct. Rep. (Pa.) 422. Redmon v. Phenix Fire Ins. Co., 51 Wis. 292; 8 N. W. Rep. 226. This was a suit on a fire insurance policy, containing a statement that there was no incumbrance on the premises. The right to file a mechanics' lien at the time of the deed, is also a breach of the covenant. Duffy v. Sharp, 73 Mo. App. 316.

[56] McKennan v. Doughman, 1 Pen. & W. (Pa.) 417, *semble*. Neeley v. Lane, (Tex. Civ. App.) 193 S. W. 390.

[57] Tufts v. Adams, 8 Pick. (Mass.) 549; Brooks v. Moody, 20 Pick. (Mass.) 474. Bean v. Mayo, 5 Greenl. (Me.) 94. Boyd v. Bartlett, 36 Vt. 1. Funk v. Voneida, 11 Serg. & R. (Pa.) 109; 14 Am. Dec. 617. Askew v. Bruner, (Tex. Civ. App.) 205 S. W. 152.

[58] Kley v. Geiger, (Wash.) 30 Pac. Rep. 727. See, also, post, §§ 290, 306.

[59] Tibbetts v. Leeson, 148 Mass. 102; 18 N. E. Rep. 679.

[60] Greisinger v. Nabor, 96 Kan. 507; 152 Pac. 623.

[61] Carr v. Dooley, 119 Mass. 294. In fact, the assessment is no lien unless made so by statute. Cooley on Taxation, 305. Cadmus v. Fagan, 47 N. J. L. 549. Taxes constitute breach of covenant against incumbrances. Fuller v. Jillette, 9 Biss. (C. C.) 296. Long v. Moler, 5 Ohio St. 271; Craig v. Heis, 30 Ohio St. 550. Cochran v. Guild, 106 Mass. 30; 8 Am. Rep. 296; Hill v. Bacon, 110 Mass. 388; Blackie v. Hudson, 117 Mass. 181. Mitchell v. Pillsbury, 5 Wis. 407. Richard v. Bent, 59 Ill. 38; 14 Am. Rep. 1; Almy v. Hunt, 48 Ill. 45. Shaffer v. Green, 87 Pa. St. 370. Blossom v. Van Court, 34 Mo. 394; 97 Am. Dec. 412. Reid v. Epperson, (Mo. App.) 122 S. W. 353;

Branch v. Hough (Mo. App.) 206 S. W. 425; O'Connell v. First Parish, 204 Mass. 118; 90 N. E. 580; Weghorst v. Clark, (Colo.) 150 Pac. 742. The tax lien is a breach of the covenant even though there had been an invalid tax sale of the land. In such case the purchaser is subrogated to the right of the State to enforce the lien. Seldon v. Jones Co., 89 Ark. 234; 116 S. W. 217. An express provision in the contract, executed in 1910, that the purchaser should pay the taxes for that year, is not to be controlled by a receipt for the earnest money and an escrow deed showing that the property was to be conveyed free of incumbrances. Colby v. Keene, 84 Wash. 185; 146 Pac. 395. Taxes or assessments upon the granted premises payable by the grantor are breaches as well of a covenant against incumbrances created by himself, as of a general covenant against incumbrances. Devine v. Rawle, (Pa. St.) 23 Atl. Rep. 1119. Milot v. Reed, (Mont.) 29 Pac. 343. A betterment tax lawfully assessed, is a breach of the covenant against incumbrances. Foley v. City of Haverhill, 144 Mass. 352; 11 N. E. Rep. 554; Simanovich v. Wood, 145 Mass. 180; 13 N. E. Rep. 391. Smith v. Abington Sav. Bank, 171 Mass. 178; 50 N. E. 545. An unpaid municipal claim for water pipe, not entered of record so as to preserve its lien, is no breach of the covenant. Stutt v. Building Association, 12 Pa. Co. Ct. Rep. 344. In Ingalls v. Cooke, 21 Iowa, 560, it was held that a mortgagor is not liable for taxes assessed upon the property, after the mortgage was executed. COLE, J., dissenting. This decision is at least questionable. A mortgage is a mere security for the payment of money, and does not operate a change of title or ownership. (1 Jones Mortg. § 11; Rawle Covts. for Title [5th ed.], § 218; Stanard v. Eldridge, 16 Johns [N. Y.] 254), and the duty to pay the taxes would, therefore, seem to devolve upon the mortgagor, otherwise he might suffer the premises to be sold for taxes, purchase them himself, and acquire the estate discharged of the mortgage, which would contravene the rule that the owner of lands subject to lien cannot permit them to be sold for taxes, and then obtain a tax deed for the purpose of cutting off such lien. See Jones v. Davis, 24 Wis. 229; Smith v. Lewis, 20 Wis. 350; Bassett v. Welch, 22 Wis. 175. The liability of a pew in a church recently built, to be assessed for further building expenses incurred after the pew had been conveyed with covenants against incumbrances, is not an incumbrance for which the grantor is responsible, and such an assessment is, therefore, no breach of the covenant against incumbrances. Spring v. Tongue, 9 Mass. 28; 6 Am. Dec. 21.

Tax liens are covered by the statutory covenant against incumbrances implied from the words "grant" or "convey." Bullitt v. Coryell, (Tex.

relates back and becomes a lien as of the time when the assessment roll was made up, or the improvement ordered to be made, and that in such a case the existence of the inchoate tax or assessment operates a breach of the grantor's covenant against incumbrances.[62] But where a statute provides that all taxes and assessments shall become liens upon a certain day of the year, a tax or assessment levied or ordered before that day, will not constitute a breach of the covenant, in a deed executed in the interval between

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Civ. App.) 84 S. W. 482. Special assessments for street improvements are not "taxes," within the meaning of an exception from the operation of a covenant against incumbrances. Cleveland Park L. & I. Co. v. Campbell, 65 Mo. App. 109. Knight v. Clinkscales, 51 Okl. 508; 152 Pac. 133. A covenant of "seisin" in a deed is not broken by the existence of a tax deed to the property, executed two months after the execution of the covenant, though the tax certificate existed, when the covenant was executed. Lerfing v. Seelig, 14 S. Dak. 303; 85 N. W. 585. An assessment lien which, if valid, would have constituted a breach of the covenant against incumbrances, was declared unconstitutional, whereupon another assessment for the same improvement, but under another statute, was made. Held, that the lien of the second assessment did not constitute a breach of the covenant against incumbrances. Barth v. Ward, 71 N. Y. Supp. 340; 63 App. Div. 193.

[62] Cochran v. Guild, 106 Mass. 30; 8 Am. Rep. 296. De Peyster v. Murphy, 66 N. Y. 622. Sanders v. Brown, 65 Ark. 498; 47 S. W. 461. Cotting v. Commonwealth, 205 Mass. 523; 91 N. E. 900. The liability of the premises to an assessment for the expense of building a sewer, is an incumbrance from the time of the order for the construction of the sewer, and is, therefore, a breach of a covenant against incumbrances in a deed delivered before the assessment was laid, but after the order was passed. Carr v. Dooley, 119 Mass. 294. In Lafferty v. Milligan, 165 Pa. St. 534; 30 Atl. Rep. 1030, certain street improvements were made under an act afterwards held unconstitutional. A curative act was passed validating the improvements, and it was held that assessments therefor constituted a breach of a covenant against incumbrances in a deed executed after the passage of the curative act, though at the time of the execution of the deed the exact amount to be assessed upon the property had not been fixed. In Eaton v. Chesbrough, 82 Mich. 214; 46 N. W. Rep. 365, it was held that under a city charter making taxes a lien upon real estate, without fixing a time when such lien shall attach, such taxes become a lien from the time the assessment roll passed into the hands of the tax collector, that is, on the first day of July; so that taxes for the year 1889 assessed upon a city lot, constituted a breach of a covenant against incumbrances in a conveyance of such lot executed and delivered in the afternoon of the 1st day of July, 1890, in pursuance of a contract of sale made on the 22d day of May, 1890. The defendant (vendor) contended, among other things, that the covenant against incumbrances related back to the date of the contract (May twenty-second), and that there being no consummated tax lien at that time, the covenant was not broken, but this con-

the date of the levy and the date on which the tax became a lien.[63] In such a case, where, by the terms of the contract made three months before December 31st, the day when taxes became a lien, a deed was not to be made until after that date, the vendor meantime remaining in possession, it was held that the covenant against incumbrances in the deed so executed, was broken by the lien for taxes which attached on December 31st. The vendor in such case was regarded as practically the owner until the deed was delivered

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tention was denied by the court. Under a statute providing that a ditch assessment should be a lien on the property benefited, it was held that the lien attached when the assessment was made, and constituted a breach of covenant against incumbrances in a conveyance of the premises, though the tax, because not spread upon the assessment roll, could not have been paid until after the conveyance. Lindsay v. Eastwood, 72 Mich. 336; 40 N. W. Rep. 455. In Wisconsin it is provided by statute that where land is conveyed after the assessment but before warrant for collection of the tax is issued, the grantee shall be liable for such tax. This statute has been held applicable only to the tax of the year in which the conveyance was made. Peters v. Meyers, 22 Wis. 602. In Missouri it is held that the mere order for a tax or assessment, though the amount which the owner is to pay be not ascertained, is an incumbrance which will entitle the grantee to damages if he has had the use and enjoyment of the premises. Barnhart v. Hughes, 46 Mo. App. 318. Under a statute providing that an assessment for a street improvement shall be a lien from the time of the completion of the improvement, a covenant against incumbrances in a deed executed after the completion of the improvement but before levy of the assessment, is broken. Hartshorn v. Cleveland, (N. J.) 19 Atl. Rep. 974. In Carey v. Gundlefinger, 12 Ind. App. 645; 40 N. E. 1112 and Kimberlin v. Templeton, 55 Ind. App. 155; 102 N. E. 160, it was held that street and sewer assessments made after the execution of the contract, were not incumbrances on the property within the intent of a covenant against incumbrances in the deed executed and delivered before the assessments became a lien. The covenant is broken if, at the time of the conveyance to the purchaser, the report of the assessment commissioners is on file. Pierse v. Bronnenburg, 40 Ind. App. 662; 82 N. E. 126. Special assessments declared void but subseqently relevied, do not relate back to the original levy so as to come within a covenant against incumbrances entered into between the first levy and the relevy. Armstrong v. Trust Co., 96 Kan. 722; 153 Pac. 507.

[63] Bradley v. Dike, (N. J. Eq.) 32 Atl. Rep. 132. Bowers v. Real Est. Co., 28 R. I. 365; 67 Atl. 521. Thus, in Tull v. Royston, 30 Kans. 617, a statute provided that taxes and assessments should be liens from the first day of November in the year in which they were levied. Hereunder it was held that an assessment for a street improvement became a lien, not from the time the improvement was authorized, but from the time the assessment became due and payable, and that a covenant against incumbrances executed in the *interim* was not broken by such assessment. See, also, Overstreet v. Dobson,

and possession given.[64] In the case of a statute which provided that taxes should become a lien on the land on the first Monday of March in each year, it was held that a covenant against incumbrances contained in a deed executed on March 25, 1897, embraced taxes assessed to the grantor for the fiscal year beginning July 1, 1897.[65] In New York the rule is that until the amount of a tax is ascertained and determined in the manner provided by law no lien attaches. Therefore, where an assessment had been made prior to the execution of a deed, but the amount of the tax was not calculated and fixed by the authorities until after the deed was executed, it was held that there was no breach of the covenant against incumbrances.[66]

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28 Ind. 256. Long v. Moler, 5 Ohio St. 272. Warfield v. Erdman, 19 Ky. Law R. 1559; 43 S. W. Rep. 708; Everett v. Marston, 186 Mo. 587; 85 S. W. Rep. 540. In Everett v. Dilley, (Kans.) 7 Pac. Rep. 661, it was said that in the absence of special agreement the law determines which party shall pay taxes accruing while the purchase money remains unpaid, which is as much as to say that the tax follows the land, and that the person who is in equity the owner at the time of the imposition of the tax must pay it. In Nebraska a vendor selling after April first in any year is, by statute, liable for the taxes of that year. McClure v. Campbell, (Neb.) 40 N. W. Rep. 595. In Colorado, a grantor conveying between May 1st and the following January 1st, pays the tax assessed for the current tax year. Rambo v. Armstrong, 45 Colo. 124; 100 Pac. 586. Where the contract required the vendor to pay all taxes except those "not now due and payable," he was not required to pay special tax bills which, while a lien at the time of the contract, were not at that time enforcible. Swanson v. Spencer, 117 Mo. App. 124; 163 S. W. 285.

[64] Nungesser v. Hart, 122 Iowa, 647; 98 N. W. Rep. 505.

[65] McPike v. Heaton, 131 Cal. 109; 63 Pac. Rep. 179.

[66] Lathers v. Keogh, 109 N. Y. 583, distinguishing De Peyster v. Murphy, 66 N. Y. 622, and Barlow v. St. Nicholas Bank, 63 N. Y. 399; 20 Am. Rep. 547; McLaughlin v. Miller, 124 N. Y. 510; 26 N. E. Rep. 1104; People v. Gilon, 24 Abb. N. C. (N. Y.) 125; 9 N. Y. Supp. 212, 563; S. C., 56 Hun (N. Y.), 641. An elaborate note on the successive steps in the incidence of taxation, and the time at which taxes became a lien on real estate, will be found in 24 Abb. N. C. (N. Y.) 136. See also, Doonan v. Killilea, 222 N. Y. 399; 118 N. E. 851. Where a statute provides that estimates for a proposed street improvement shall be made from time to time, and the same shall constitute a lien on the adjoining premises, estimates made after execution of a conveyance constitute no breach of a covenant against incumbrances therein, though the contract for the improvement had been let before the deed was executed. Langsdale v. Nicklaus, 38 Ind. 289. The mere entry of land in an assessment roll does not constitute an incumbrance thereon, and the subsequent

In Washington it is held, as between grantor and grantee, that a local improvement assessment does not become a lien, so as to constitute a breach of a covenant against incumbrances, until after the assessment roll is placed in the hands of the proper officer for collection.[67] Taxes assessed after the execution of a deed, which do not relate back to a time prior to the execution of the deed, are, of course, no breach of the covenant.[68]

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assessment or levy of a tax thereon is not a breach of a covenant against incumbrances in a deed executed after completion of the assessment roll, but before levy of the tax. Barlow v. St. Nicholas Nat Bank, 63 N. Y. 399; 20 Am. Rep. 547, distinguishing Rundell v. Lakey, 40 N. Y. 513. The liability to assessment for a local improvement is no lien until the amount thereof has been fixed and determined. Therefore, where, before the execution of a deed with covenant against incumbrances, the work of paving a street on which the granted premises abutted had been completed, but no proportion of the cost was assessed against such premises until after the deed was executed, it was held that there was no breach of a covenant against incumbrances in such deed. Harper v. Dowdney, 113 N. Y. 644; 21 N. E. Rep. 63. Hastings v. Land Imp. Co., 61 N. Y. Supp. 998; 46 App. Div. 609. Where an assessment for benefits has not, at the time of a conveyance, been entered and confirmed as required by statute to make it a lien on the benefited premises, it will not operate a breach of a covenant against incumbrances in such conveyance. Dowdney v. Mayer, 54 N. Y. 186. Real Est. Corp. v. Harper, 174 N. Y. 123; 66 N. E. Rep. 660. Under the New York rule the burden devolves upon the purchaser to show that the amount of the tax or assessment had been legally ascertained and determined at the time the covenant was made. McLaughlin v. Miller, 124 N. Y. 510; 26 N. E. Rep. 1104. The right of a city to demand payment for the cost of laying water pipes in a rural district from users after the district becomes urban, is not a "tax-lien, claim, or incumbrance" within the meaning of a contract of sale. Gilham v. Real Est., etc., Co., 203 Pa. St. 24; 32 Atl. Rep. 85. The covenant against incumbrances is not broken by an assessment levied on the property but not "wholly confirmed" and entered on the record of assessments until after the conveyance, though the assessment proceedings were begun prior thereto. Real Est. Corp. v. Harper, 74 N. Y. Supp. 1065; 70 App. Div. 64. Charges for installation of a water meter, being by statute a lien on the premises, are within a covenant against incumbrances, though not entered on the books of the water register until after the execution of the deed. Cuba v. Duskin, 120 N. Y. Supp. 381; 135 App. Div. 508; 95 N. E. 1126.

[67] Knowles v. Temple, 49 Wash. 595; 96 Pac. 1 and Flajole v. Schulze, 80 Wash. 483; 141 Pac. 1026, disapproving Green v. Tidball, 26 Wash. 338; 67 Pac. 84; 55 L. R. A. 879.

[68] Lathers v. Keogh, 109 N. Y. 583; 17 N. E. Rep. 131. Lindenberger v. Rowland, 158 Ky. 760; 166 S. W. 242; Taylor v. Harvey, 90 Neb. 562; 134

An agreement to pay assessment liens existing at a specified date, cannot be construed to include liens possible only under legislation subsequent to that date.[69] Taxes are none the less incumbrances in that they constitute a personal liability of the grantor, and may be collected otherwise than by a sale of the land.[70] Nor because they are invalid, if the land be liable to reassessment.[71] Such reassessment will relate back to the entry of the land on the original assessment roll.[72] The grantee, complaining of a tax or assessment, must show that it was a valid and subsisting lien when the deed was executed. He must show that the proceedings were regular, and that everything was done necessary to make the tax or assessment valid.[73] The same evidence is required of him in this respect as if he were a purchaser at a sale to enforce the tax lien, and was asserting his title in ejectment.[74] If the tax was voluntarily paid by the grantee without previous demand on the grantor, the latter may show that the tax was invalid.[75]

N. W. 173; Cotting v. Commonwealth, 205 Mass 523; 91 N. E. 900; First Church Etc. v. Cox, 47 Ind. App. 541; 94 N. E. 1048; Blivis v. Franklin Inv. Co., 197 Mo. App. 369; 194 S. W. 1078; Patchell v. Garvin, (Okl.) 168 Pac. 423.

[69] Campbell v. Haven, 211 Mass. 121; 97 N. E. 611.

[70] Cochran v. Guild, 106 Mass. 29; 8 Am. Rep. 296. The same rule has been applied where the tax was assessed after the execution of a contract of sale, but before the execution of a conveyance of the premises. Gheen v. Harris, 170 Pa. St. 644; 32 Atl. Rep. 1094.

[71] Peters v. Meyers, 22 Wis. 602.

[72] Colburn v. Litchfield, 134 Mass. 449. Cadmus v. Fagan, 47 N. J. L. 549.

[73] Patterson v. Yancey, 81 Mo. 379. Robinson v. Murphy, 33 Ind. 482; Kirkpatrick v. Pearce, 107 Ind. 520. Mitchell v. Pillsbury, 5 Wis. 410. White v. Gibson, 146 Mich. 547; 109 N. W. 1049. But see Voorhis v. Forsyth, 4 Biss. (C. C.) 409, where it was held unnecessary to aver that the tax was valid, such being the *prima facie* presumption. Where A. bought land of B. in a city, B. having previously unlawfully connected a sewer on the land with a public sewer, no right so to use the sewer passed by implication, and A. having been compelled to pay the city a fee for connecting the sewer, could not recover the amount thereof on B.'s warranty against incumbrances, such fee not being a lien on the premises in favor of the city. Bumstead v. Cook, 169 Mass. 410; 48 N. E. Rep. 767.

[74] Kennedy v. Newman, 1 Sandf. (N. Y. S. C.) 187.

[75] Balfour v. Whitman, 89 Mich. 202; 50 N. W. Rep. 744.

The contention that the tax lien is not a breach of the covenant until the tax has become delinquent, is untenable.[76]

In England, a land tax is not deemed an incumbrance, because it is supposed to have been contemplated by the parties; and if nothing is said upon the subject, the purchaser will take the estate subject to the liability of the tax.[77]

The special assessments for improvements will not be deemed a breach of the covenant if the improvement is one which adds to the value of the property.[78]

Drainage assessments, it has been held, are "public charges" growing out of a benefit to the land, and do not constitute a breach of the covenant against incumbrances.[79]

§ 125. **Outstanding estate or interest in the premises.** An outstanding estate or interest, less than a fee,[80] in the granted premises is an incumbrance, and, therefore, operates a breach of the covenant against incumbrances;[81] such, for example, as the right in a stranger to enter upon the premises and cut and remove timber therefrom,[82] or a prior sale of "all the iron and coal" on the granted land, with right of way and privilege of removal;[83] or the right to enter on the land and take oil and asphalt therefrom;[84] or the statutory right to redeem from a mortgage sale.[85] So also an interest in the premises in favor of a third person, who holds as a tenant in common, is an incumbrance.[86] But an adverse equitable claim to the premises is not an incumbrance;[87] nor is a prior deed to the premises, where such deed is unenforcible and void;[88] nor is an unlawful encroachment, by an adjoining owner, on the property conveyed.[89] The better opinion seems to be that a condition which may work a forfeiture of the estate granted, or a contingency upon which the estate is liable to be determined in the hands of the purchaser, amounts to a breach of the covenant against incumbrances,[90] such, for example, as a provision in the deed that only buildings of a certain kind should be erected on the premises conveyed, with reversion to the grantor in case of a breach of the condition.[91]

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[76] Lowe v. Warehouse Co., 39 Utah 395; 117 Pac. 874; Ann. Cas. 1913 E. 246.

[77] 1 Sugd. Vend. (8th Am. ed.) 487.

[78] Cornelius v. Kromminga, 179 Iowa 712; 161 N. W. 625.

[79] Pate v. Banks (N. C.) 100 S. E. 251.

[80] The fact that the fee is outstanding, while a breach of the covenant of seisin, is no breach of the covenant against incumbrances. Huron v. Stratton, 120 Ala. 145; 23 So. Rep. 81. Tex & Pac. Ry. Co. v. El Paso Ry. Co. (Tex. Civ. App.), 156 S. W. 561. But see Morris v. Short (Tex. Civ. App.) 151 S. W. 633; where it was held that a "paramount outstanding title" operates a breach of that covenant.

[81] Jenkins v. Buttrick, 1 Met. (Mass.) 480.

[82] Spurr v. Andrews, 6 Allen (Mass.), 420. Cathcart v. Bowman, 5 Pa. St. 317. Clark v. Ziegler, 79 Ala. 346; 85 Ala. 154; 4 So. Rep. 669. Gates v. Parmly, 93 Wis. 294; 66 N. W. Rep. 253. Kreinbring v. Mathews, 81 Oreg. 243; 159 Pac. 75. But in Southwest Va. Min. & L. Co. v. Chase, 95 Va. 50, 27 S. E. Rep. 826, it was held that purchasers who accepted a warranty deed with notice that standing timber on the land had been conveyed to a third party, thereby waived any claim to an abatement of the purchase money in the future. In Lumpkin v. Blewitt (Tex. Civ. App.) 111 S. W. 1072, it was held that the covenant was not broken until the grantee's possession of the timber had been affected by the prior conveyance.

[83] Stanbaugh v. Smith, 23 Ohio St. 584. Ibbetson v. Knodle, 201 Ill. App. 373.

The covenant against incumbrances is broken by the existence of an outstanding term of years in, or lease of, the granted premises.[92] But where the conveyance is taken with knowledge that the land is in the possession of a lessee, the existence of the lease will not, under a statute transferring the constructive possession to the grantee without attornment by the tenant, operate a breach of the covenant;[93] nor, it is apprehended, independently of any statute, where there is an actual attornment by the tenant, or an apportionment of the rent between the parties.[94] And generally it may be said that if the purchaser knows that the premises are in the possession of a tenant, and no special contract is made, the occupant will become tenant to the purchaser, and there will be no breach of the covenant against incumbrances.[95] Nor will the covenant be broken if the purchaser accepts an assignment of the lease;[96] nor if the lease was void as to the grantee for want of record;[97] nor if the conveyance of the fee be made expressly subject to the lease; in such a case the rent is an incident to the reversion, and passes with it.[98] An outstanding life estate in a

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[84] Flood v. Graham, 61 Fla. 207; 54 So. 456; Ann. Cas. 1912D, 1137.

[85] Roy v. Martin (Ala.) 81 So. 142.

[86] Comings v. Little, 24 Pick. (Mass.) 266.

[87] Marple v. Scott, 41 Ill. 50.

[88] Reed v. Stevens (Conn.) 107 Atl. 495.

[89] Ratcewicz v. Kara, 88 N. J. Eq. 201; 103 Atl. 912.

[90] COOLEY, J., in Post v. Campau, 42 Mich. 90, citing Jenks v. Ward, 4 Metc. (Mass.) 412. A possibility may be an incumbrance. Sir F. Moore's Rep. 249, pl. 393; Haverington's Case, Owen, 6. In Van Rensselaer v. Kearney, 11 How. (U. S.) 316, it was contended by counsel, *arguendo*, that an estate in expectancy outstanding is an incumbrance on the land, citing 14 Vin. Abr. 352, tit. Encumbrance H. Sugden Vend. (old ed.) 527, § 9. In Estabrook v. Smith, 6 Gray (Mass.), 572; 66 Am. Dec. 443, it was held that a condition in a deed that the grantee (plaintiff's vendor) should build a house on the premises within a year from the date of the deed was not an incumbrance.

[91] Locke v. Hale, 165 Mass. 20; 42 N. E. Rep. 331.

[92] Cross v. Noble, 67 Pa. St. 74, 77; Dech's Appeal, 57 Pa. St. 467. Pease v. Christ, 31 N. Y. 141; Giles v. Dugro, 1 Duer (N. Y.), 331. Taylor v. Heitz, 87 Mo. 660. Edwards v. Clark, 83 Mich. 246; 47 N. W. Rep. 112. Fritz v. Pusey, 31 Minn. 368; 18 N. W. Rep. 94. Porter v. Bradley, 7 R. I. 538. Grice v. Scarborough, 2 Spear L. (S. C.) 649; 42 Am. Dec. 391. Clark v. Fisher, 54 Kans. 403; 38 Pac. Rep. 493; Smith v. Davis, 44 Kans. 362; 24 Pac. Rep. 428. Brass v. Vandecar, (Neb.) 96 N. W. Rep. 1035. An outstanding lease of the premises is an incumbrance entitling the grantee to

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damages, if he bought the property for speculation, and the grantor was aware of that purpose. Batchelder v. Sturgis, 3 Cush. (Mass.) 201. An agreement that in a certain event the lessee shall have a further term in the demised premises, is no incumbrance. Weld v. Traip, 14 Gray (Mass.) 330. Barker v. Denning, 91 Kan. 485; 138 Pac. 573; O'Connor v. Enos, 56 Wash. 448; 105 Pac. 1039; Estep v. Bailey, (Oreg.) 185 Pac. 227; Morriss v. Hesse (Tex. Civ. App.) 210 S. W. 710; Simonds v. Diamond Match Co., 159 Mich. 241; 123 N. W. 1132; Crawford v. McDonald, 84 Ark. 415; 106 S. W. 206.

[93] Kellum v. Berkshire Life Ins. Co., 101 Ind. 455. Ream v. Goslee, 21 Ind. App. 241; 52 N. E. Rep. 93. The rule stated in the text was approved in Demars v. Koehler, 60 N. J. L. 314; 38 Atl. Rep. 808. But this decision was reversed on appeal (62 N. J. L. 203; 41 Atl. Rep. 720), the court reaching the conclusion that the right to recover for the breach was not affected by notice of the existence of the lease, mainly upon the ground that in New Jersey parol evidence is not admissible to vary the effect of the covenant.

[94] Rawle Covts. for Title (5th ed.), § 78. Haldane v. Sweet, 55 Mich. 196.

[95] Lindley v. Dakin, 13 Ind. 388; Page v. Lashley, 15 Ind. 152. Mann v. Montgomery, 6 Cal. App. 646; 92 Pac. 875; Richardson v. Brewer, 71 Wash. 192; 127 Pac. 1098; Musial v. Kudlik, 87 Conn. 164; 87 Atl. 551; Ann. Cas. 1914 D, 1172. In Edwards v. Clark, 83 Mich. 246; 47 N. W. Rep. 112, it was said that there would still be a breach of the covenant, notwithstanding the acceptance of rent, but that the amount so accepted must be deducted from the damages for the breach.

[96] Gale v. Edwards, 52 Me. 363.

[97] Hampton Park Co. v. Scottile, 102 S. C. 372; 86 S. E. 1066.

[98] Pease v. Christ, 31 N. Y. 141. Spaulding v. Thompson, 119 Iowa, 484; 93 N. W. Rep. 498.

stranger is an incumbrance.[99] The weight of authority is that the covenant is broken by a claim for dower in the granted premises,[1] whether the right be inchoate and contingent, or consummate by the death of the husband.[2] If the covenant be special, against any claim for dower which a certain person may set up, it will not be broken until the right to dower has been perfected by the husband's death.[3] The right of a wife to elect whether she will take dower in lieu of a jointure or settlement, is such an incumbrance on land acquired by the husband after the settlement, as amounts to a breach of a covenant against incumbrances in a subsequent conveyance of the land.[4] The rule that the covenant is broken by the existence of a contingent right of dower in the land conveyed is not changed by statutes which substitute for dower a fee simple or other interest in a portion of the husband's lands.[5] The grantor, having been served with notice of a proceeding to establish the dower right is, in the absence of fraud or collusion, bound by a judgment in favor of the plaintiff.[6]

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[99] Christy v. Ogle, 33 Ill. 295. Mills v. Catlin, 22 Vt. 98, *semble.* See cases cited below.

[1] Fishel v. Browning, 145 N. C. 71; 58 S. E. 759. In Allen-West Com. Co. v. Patrick, 123 Ark. 55; 184 S. W. 436, it was held that there was no breach of the covenant if there were other lands of the decedent out of which the dower could be assigned.

[2] Shearer v. Ranger, 22 Pick. (Mass.) 447; Jenks v. Ward, 4 Met. (Mass.) 412; Harrington v. Murphy, 109 Mass. 299. Blanchard v. Blanchard, 48 Me. 174; Donnell v. Thompson, 1 Fairf. (Me.) 170; 25 Am. Dec. 216; Runnels v. Webber, 59 Me. 490; Smith v. Connell, 32 Me. 126; Porter v. Noyes, 2 Greenl. (Me.) 27; 11 Am. Dec. 30. Russ v. Perry, 49 N. H. 549; Fitts v. Hoitt, 17 N. H. 530. Carter v. Denman, 3 Zab. (N. J. L.) 273. Jones v. Gardiner, 10 Johns. (N. Y.) 266. Durrett v. Piper, 58 Mo. 551; Henderson v. Henderson, 13 Mo. 151; Walker v. Deaver, 79 Mo. 664; Ward v. Ashbrook, 78 Mo. 515. Contra, *dictum* of STORY, J., in Powell v. Munson, 3 Mason (C. C.), 355. Nyce v. Obertz, 17 Ohio, 70; Johnson v. Nyce, 17 Ohio, 66; 49 Am. Dec. 444. Hutchins v. Moody, 30 Vt. 658, *obiter.* Bostwick v. Williams, 36 Ill. 65, *semble;* 85 Am. Dec. 385; Humphrey v. Clement, 44 Ill. 299, *dictum.* It is now settled in Illinois that an inchoate right of dower is embraced by a covenant against incumbrances. McCord v. Massey, 155 Ill. 123; 39 N. E. Rep. 592; Cowan v. Kane, 211 Ill. 527; 71 N. E. Rep. 1097; Raftery v. Easeley, 111 Ill. App. 413. In Blevins v. Smith, (Mo.) 16 S. W. Rep. 213, the covenantee bought in an inchoate right of dower in the premises, and it was held that he was not entitled to damages, there being no means of computing the value of the interest. THOMAS, J., dissenting. In Kreinberg v. Mathews, 81 Oreg. 243; 159 Pac. 75, it is said that the outstanding dower right is a breach of the covenant of seisin rather than of the covenant against incumbrances. In Aiple & C. Real Est. Co. v. Spelbrink, 211 Mo. 671; 111 S. W. 480, it was held that there would be no substantial breach of the covenant until the dower right became consummate by the death of the husband.

[3] Hudson v. Steare, 9 R. I. 106.

[4] Bigelow v. Hubbard, 97 Mass. 195.

§ 126. **Easements or physical incumbrances.** An easement or servitude to which the granted premises are subject, and which was unknown to the purchaser at the time of the conveyance, or subject to which he cannot be reasonably presumed to have taken the premises, constitutes everywhere a breach of the covenant against incumbrances.[7] Such, for example, as a private right of way over the premises,[8] a building restriction running with the land, and binding the covenantee;[9] an obligation to maintain a division fence;[10] the right in a stranger to maintain a drain across the warranted land;[11] the right to conduct water from a spring on the granted premises, through pipes laid beneath the surface;[12] the right to have the eaves of a building on an adjoining lot overhang the granted premises, so as to drip water thereon;[13] the right in an adjoining proprietor to dam up and use the water of a stream running through the granted premises;[14] the right in a stranger to divert the water from a stream on such premises;[15] or to flow the premises with the waters of a mill dam;[16] a restrictive covenant against the use of fire arms on the land;[17] the right to use an adjoining wall as a support for joists;[18] the right to construct an irrigation ditch across the land;[19] or to harvest ice from a pond on the land, and to require the maintenance of a certain depth of water in the pond;[20] or to maintain a telephone line along a highway opposite the premises under grant from the owner;[21] or the release of a railway company from liability for damages from the operation of its road in front of the premises conveyed;[22] the right to extract resin from trees on the land.[23] These, and other easements and servitudes,[24] all constitute breaches of a covenant against incumbrances, if the purchaser had no notice of them at the time of the conveyance, and, in some of the States, whether he did or did not have such notice.[25] If the easement or servitude complained of consist of a mere license, revocable at the will of the licensor, it will not, of

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[5] Crowley v. Lumber Co., 66 Minn. 400; 69 N. W. Rep. 321.

[6] Raftery v. Easeley, 111 Ill. App. 413.

[7] See cases cited in the notes below.

[8] Blake v. Everett, 1 Allen (Mass.), 248; Wetherbee v. Bennett, 2 Allen (Mass.) 428; Harlow v. Thomas, 15 Pick. (Mass.) 66. Wilson v. Cochran, 46 Pa. St. 233; 86 Am. Dec. 574. Richmond v. Ames, 164 Mass. 467; 41 N. E. Rep. 671. Teague v. Whaley, 20 Ind. App. 26; 50 N. E. Rep. 41; Young v. Gower, 88 Ill. App. 70. Smith v. White, 71 W. Va. 639; 78 S. E. 378. The purchaser's knowledge at the time of the covenant, that there was a passway over the land, does not affect his right to recover, where he did not know that such passway was an easement enforcible against the owner of the premises. Perry v. Williamson, (Tenn.) 47 S. W. Rep. 189. A private right of way over the premises is a breach of the covenant for quiet enjoyment, though the covenantee bought with notice of the easement. Eller v. Moore, 63 N. Y. Supp. 88; 48 App. Div. 403.

[9] Roberts v. Levy, 3 Abb. Pr. (N. S.) (N. Y.) 311. Greene v. Creighton, 7 R. I. 1. Bull v. Burton, 227 N. Y. 101; 124 N. E. 111. A "condition" in a conveyance that no buildings shall be erected on a particular part of the lot, and that no buildings of less than a certain height shall be erected thereon, is a building restriction operating a breach of the covenant against incumbrances, and not a condition which may defeat the estate in case of a breach. Ayling v. Kramer, 133 Mass. 12. A condition that during a certain number of years only one house shall be erected on the premises, which shall be used for a dwelling house only, and by but one family, constitutes a breach of a covenant against incumbrances. Foster v. Foster, 62 N. H. 46. A grantor has a right to impose building restrictions, and they are valid incumbrances. Coudert v. Sayre, (N. J. Eq.) 19 Atl. Rep. 190. Whitney v. Railroad Co., 11 Gray (Mass.), 359; 71 Am. Dec. 715. Building restrictions, and restrictions as to the use of the granted premises, whether they run with the land or not, will be enforced in equity against a purchaser, with notice. Coudert v. Sayre, (N. J. Eq.) 19 Atl. Rep. 190.

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[10] Kellogg v. Robinson, 6 Vt. 276; 27 Am. Dec. 550. Bronson v. Coffin, 108 Mass. 175; 11 Am. Rep. 335. Ensign v. Colt, 75 Conn. 111; 52 Atl. Rep. 829. Sherwood v. Johnson, 28 Ind. App. 227; 62 N. E. Rep. 645. An agreement to maintain a certain fence upon designated premises, recorded so as to bind a subsequent purchaser, constitutes a breach of covenant against incumbrances. Burbank v. Pillsbury, 48 N. H. 475; 97 Am. Dec. 633. But see Parish v. Whitney, 3 Gray (Mass.), 516, where it was held that a covenant to perpetually maintain a division fence, contained in the deed under which the grantor holds, does not run with the land, is not binding on a subsequent grantee, and is, therefore, no breach of a covenant against incumbrances in a conveyance to such subsequent purchaser. Explained in Bronson v. Coffin, 108 Mass. 186; 11 Am. Rep. 335, and see cases there collected, showing that such a covenant in a deed poll does run with the land.

[11] Ladd v. Noyes, 137 Mass. 151. Compare Williams v. Beatty, 139 Mo. App. 167; 122 S. W. 323. In Stuhr v. Butterfield, 151 Iowa 736; 130 N. W. 897; 36 L. R. A. (N. S.) 321, it was held that a public drainage ditch was a benefit to the land, and hence that an order for the excavation of such ditch was not a breach of the covenant in a conveyance of the land subsequently executed.

[12] McMullin v. Wooley, 2 Lans. (N. Y.) 394. Melick v. Cross, 62 N. J. Eq. 545; 51 Atl. 16.

[13] Carbrey v. Willis, 7 Allen (Mass.), 364; 83 Am. Dec. 688.

[14] Morgan v. Smith, 11 Ill. 199. Huyck v. Andrews, 113 N. Y. 81.

[15] Mitchell v. Warner, 5 Conn. 498, 527, *ob.*

[16] Craig v. Lewis, 110 Mass. 377; Isele v. Arlington Sav. Bank, 135 Mass. 142. Patterson v. Sweet, 3 Ill. App. 550. Whether known to the purchaser at the time of the conveyance or not. Medlar v. Hiatt, 8 Ind. 171. Contra. Kutz v. McCune, 22 Wis. 628; 99 Am. Dec. 85. The right of a mill owner to enter on adjoining lands, through which a raceway from the mill passes, for the purpose of cleansing such raceway, is a right necessary to the enjoyment of his easement, which he would have independently of agreement or prescription, and is, therefore, not an incumbrance of which a grantee of the premises traversed by the raceway can complain. Prescott v. Williams, 5 Met. (Mass.) 433; 39 Am. Dec. 688. As to whether the right in a down-stream mill owner to raise the water in his dam to a height that interferes

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with an adjoining up-stream mill owner, see Carey v. Daniels, 8 Met. (Mass.) 466. An owner of land may by parol waive his right to damages against a person flowing his land with a mill dam; but such waiver is not binding on his grantee, and, therefore, constitutes no breach of his covenant against incumbrances. Fitch v. Seymour, 9 Met. (Mass.) 466.

[17] Fraser v. Bentel, 161 Cal. 390; 119 Pac. 509; Ann. Cas. 1913B, 1062.

[18] Kahn v. Cherry, 131 Ark. 49; 198 S. W. 266.

[19] Friendly v. Ruff, 61 Oreg. 42; 120 Pac. 745.

[20] Gadow v. Hunholz, 160 Wisc. 293; 151 N. W. 810; Ann. Cas. 1917D, 91.

[21] Fossume v. Requa, 218 N. Y. 339; 113 N. E. 330.

[22] Tuskegee Land Co. v. Realty Co., (Ala.) 49 So. 378.

[23] Brodie v. Mortgage Co., (Ala.) 51 So. 861.

[24] The right in an adjoining owner to use a stairway on the granted premises is a breach of the covenant against incumbrances. McGowen v. Myers, 60 Iowa, 256; 14 N. W. Rep. 788. So also, the right of a railroad company to take earth and gravel from the granted premises. Taylor v. Gilman, 25 Vt. 413. The right of a stranger to enter on the premises for the purpose of cleansing a drain. Smith v. Sprague, 40 Vt. 43. The right of a canal company to appropriate the water in a stream bounding or traversing the premises. Ginn v. Hancock, 31 Me. 42. A condition that no ardent spirits shall be sold on the premises; such a condition is not invalid as being in restraint of trade. Hatcher v. Andrews, 5 Bush (Ky.), 561. The owner of a lot erected a building thereon with the stoop extending by mistake on an adjoining lot, of which he was an owner in common with another. He then sold the house and lot, and afterwards acquired title in severalty to the adjoining lot encroached upon by the stoop. Held, that such acquisition did not create an easement entitling the owner of the first lot to maintain the stoop on the second; and hence, there resulted no breach of a covenant against incumbrances in a conveyance by the original owner of the lot encroached upon. Farley v. Howard, 70 N. Y. Supp. 51; 60 App. Div. 193.

[25] Post, § 127.

course, amount to an incumbrance, and will, therefore, operate no breach of the covenant.[26]

A lease of a right to an adjoining proprietor to use a wall on the granted premises as a party wall is a breach of the covenant against incumbrances.[27] So, also, a wall standing wholly on one lot with a right in the adjoining proprietor to use it creates a breach.[28] But the better opinion seems to be that a wall standing equally on both lots, and held in common by the adjoining proprietors, is not an incumbrance, but a valuable appurtenant which passes with the title to the property.[29] A covenant between adjoining proprietors that one may build a party wall, and that the other shall pay half the cost if he afterwards uses the wall, runs with the land and binds a subsequent purchaser who avails himself of the wall.[30] In such a case, it is apprehended, that if the purchaser bought without knowledge of his liability to pay such cost he would be entitled to recover as damages the amount so disbursed by him.

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[26] Patterson v. Sweet, 3 Ill. App. 550.

[27] Giles v. Dugro, 1 Duer (N. Y.), 331.

[28] Mohr v. Parmelee, 43 N. Y. Super. Ct. 320.

[29] Hendricks v. Stark, 37 N. Y. 106; 93 Am. Dec. 949 (distinguished in O'Neill v. Van Tassell, 137 N. Y. 297; 33 N. E. Rep. 314, and Corn v. Bass, 59 N. Y. Supp. 315); Mohr v. Parmelee, 43 N. Y. Super. Ct. 320. Bull v. Burton, 227 N. Y. 101; 124 N. E. 111; Cap. City Inv. Co. v. Burnham, 143 Iowa 134; 121 N. W. 708; Percival v. Colonial Inv. Co., 140 Iowa 275; 115 N. W. 941; 24 L. R. A. (N. S.) 293. In Hoffman v. Dickson, 65 Wash. 556; 118 Pac. 737; 39 L. R. A. (N. S.) 67; Ann. Cas. 1913B, 869, it was held that the value of the easement right of the one party could not be set off against the lien of the other party for one half of the cost of the wall. The existence of a party wall on the granted premises is no breach of the covenant against incumbrances, under a statute authorizing the adjoining owner at any time to build such a wall without incurring any liability to the owner. Bertram v. Curtis, 31 Iowa, 46. And where by statute adjoining proprietors have the right to use division walls as party walls no breach of the covenant occurs. Barns v. Wilson, 116 Pa. St. 303; 9 Atl. Rep. 437.

[30] Richardson v. Tobey, 121 Mass. 457; 23 Am. Rep. 283; Savage v. Mason, 3 Cush. (Mass.) 500. Burlock v. Peck, 2 Duer (N. Y.), 90. Compare Cole v. Hughes, 54 N. Y. 444; 13 Am. Rep. 611. In Mackey v. Harmon, 34 Minn. 168; 24 N. W. Rep. 702, the whole wall was built by H., under an agreement that he should be reimbursed by X., the adjoining owner, if he should afterwards join to the wall. X. conveyed to the plaintiff, who was compelled to pay one-half the cost of the wall in order to build to it, and this was obviously held a breach of the covenant against incumbrances contained in X.'s deed. See, also, Blondeau v. Sheridan, 81 Mo. 545; Keating v. Korfhage, 88 Mo. 524. Burr v. Lamaster, (Neb.) 46 N. W. Rep. 1015. An owner agreed, by recorded contract, to pay half the cost of a party wall if one should be built so as to be capable of use by him, and he made the prospective half of the cost

A mere dedication to public uses without evidence of use or acceptance by the public authorities is no breach of the covenant against incumbrances.[31]

§ 127. **Notice of easement.** There can be no doubt that a pecuniary charge upon the granted premises such as a judgment, a mortgage, or a vendor's lien, constitutes a breach of the covenant against incumbrance, though the purchaser was fully advised of its existence when the contract was made or the conveyance taken. The covenant is taken for the protection of the purchaser in case the incumbrance should not be removed by the seller and the purchaser be compelled to pay it at some future day.[32] But such an incumbrance in nowise interferes with the present enjoyment and possession of the estate, and is seldom considered in fixing the purchase price of the property, unless the purchaser undertakes to remove it as a part of the consideration.[33] Therefore, the question of notice of the existence of the incumbrance is immaterial to the right of the purchaser to recover on the covenant. But with respect to an easement visibly and notoriously affecting the physical condition of the land at the time of the purchase, such as a public highway,[34] public levee,[35] drainage ditch right of way,[36]

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a lien on his land. Afterward, without having built, he conveyed with warranty against incumbrances. It was held that on the purchaser's building the land was charged with a lien as per the party wall contract. Arnold v. Chamberlain, 14 Tex. Civ. App. 634; 39 S. W. Rep. 201.

[31] De Long v. Spring Lake Imp. Co., (N. J. L.) 59 Atl. Rep. 1034. It has been held that an easement acquired by a city in condemnation proceedings does not constitute a breach of a covenant of the grantor that the premises are free from incumbrances *made by him.* Weeks v. Grace, 194 Mass. 296; 80 N. E. 220; 9 L. R. A. (N. S.) 1092.

[32] Ante, cases cited, note 47, p. 311.

[33] Kutz v. McCune, 22 Wis. 628; 99 Am. Dec. 85, where it was said that a pecuniary incumbrance does not affect the physical condition of the premises. It is a mere incident, and where the purchaser takes a covenant against incumbrances, there is no reasonable ground for supposing that he intended to have his land subsequently sold to pay the vendor's debt, or else pay it himself.

[34] A public highway through the granted premises, laid out, opened, in use and known to the purchaser, is no breach of the covenant against incumbrances. Whitbeck v. Cook, 15 Johns. (N. Y.) 483; 8 Am. Dec. 272, leading case, in which, however, the covenant was that of seisin, and not against

incumbrances. The principle is the same in either case. Huyck v. Andrews, 113 N. Y. 81; Hymes v. Esty, 116 N. Y. 501. Smith v. Hughes, 50 Wis. 620. Scribner v. Holmes, 16 Ind. 142. Butte v. Riffe, 78 Ky. 352. Weller v. Trust Co. 23 Ky. Law R. 1136; 64 S. W. Rep. 843. Lallande v. West, 18 La. Ann. 290. Harrison v. Railway Co., 91 Iowa 114; 58 N. W. 1081. A public highway is generally regarded as a benefit to the land; and whether so or not, the purchaser is presumed to have taken it into consideration, and to have fixed the price with reference to its supposed advantages or disadvantages. STAPLES, J., in Jordan v. Eve, 31 Grat. (Va.) 1. "To hold that a public road running through a tract of land, which was known to the purchaser at the time of his purchase, is such an incumbrance as would constitute a breach of a covenant of warranty against incumbrances, would produce a crop of litigation in this State that would be interminable." *Per curiam.* Desverges v. Willis, 56 Ga. 515; 21 Am. Rep. 289. Ake v. Mason, 101 Pa. St. 21. This was an extreme case. The highway (a street) had been laid out, but not opened, and the grantee had no other notice of its existence than constructive notice of the proceedings under which it was laid out. A strip was taken from one end of the premises by the highway. This was held no breach, SHARSWOOD, C. J., and TURNKEY, P., dissenting. It appeared, however, that the condemnation money had not been paid, and it was intimated that the remedy of the grantee was against the public authorities. Highway no breach; Smith v. Hughes, 50 Wis. 620. Scribner v. Holmes, 16 Ind. 142. An alley known to the purchaser is no incumbrance. Haldane v. Sweet, 55 Mich. 196, per COOLEY, J., who said: "The alleys were open to observation at the time (of the purchase), and the (grantee) must have known all about them and bought with them in mind." If the highway be laid out, but not opened, and the purchaser has no actual notice of its existence, he will be entitled to damages. Hymes v. Esty, 116 N. Y. 501. People's Sav. Bank v. Alexander, 3 Cent. Rep. 388. So, also, where the premises encroach upon a public highway, but the encroachment is not visible to the purchaser. Trice v. Kayton, 84 Va. 217; 4 S. E. Rep. 377. If the highway be merely laid out and not visibly opened, and there be nothing to charge the purchaser with notice of its existence, the covenant will of course be broken. James v. Warehouse Co., (Ky.) 56 S. W. Rep. 19. Hymes v. Esty, 116 N. Y. 501, the court saying that the rule that a covenant of warranty is not broken by the existence of a public highway through the warranted premises rests upon the presumption arising from the opportunity furnished the purchaser by the apparent existence or use of the highway to take notice of it, and in such case he is charged with knowledge and is presumed to have purchased with reference thereto. But this rule does not apply where, at the time of the conveyance, there was no indication or notice, actual or constructive, of the existence of a highway or public easement; in such case, where there is a subsequent appropriation for a highway by the public in the exercise of a pre-existing right (the street in this case having been actually laid out and condemned but not opened) the covenant is broken. These remarks were made in respect of a covenant of warranty, but they apply with equal force to the covenant against incumbrances. In the following cases a public highway over the premises has been held a breach of the covenant against incumbrances, without regard to the question of notice on the part of the purchaser. Kellogg v. Ingersoll, 2 Mass. 101. Hubbard v. Norton, 10 Conn. 422. Butler v. Gale, 27 Vt. 739. Pritchard v. Atkinson, 3 N. H. 335. If the public road has been located but not opened, it will be treated as an incumbrance. Herrick v. Moore, 19 Me. 313. The highway must be shown to have been legally laid out. If the record do not show all the necessary proceedings, the highway must have been in use for such a length of time that a jury would be justified in presuming that the road was legally laid out, and damages paid to the land owners. Pritchard v. Atkinson, 3 N. H. 336. The covenant against incumbrances will not be broken if the highway merely bounds instead of traverses the premises. Frost v. Angier, 127 Mass. 212. Austin street, formerly a private way, was laid out in July, 1882. Part of the premises taken were conveyed as bounded on Austin street, with covenant against incumbrances, in December, 1882. In 1883 the street was opened and graded. Held, that there was no breach of the covenant against incumbrances, even though the grantor had executed a release of damages to the city, and that the grantee could not recover damages from the grantor caused by lowering the grade of the street. Patten v. Fitz, 138 Mass. 456. A street laid out, and dedicated but not opened, constitutes a breach of a covenant against incumbrances, whether the city had or had not accepted the dedication. Daisy Realty Co. v. Brown, 18 Ky. Law R. 155; 35 S. W. 637. Under Mass. Stats. 1891, no incumbrance is created by preliminary proceedings to lay out a street in Boston, until a plan is filed. French v. Folsom, 181 Mass. 483; 93 N. E. Rep. 938. Where the entire premises conveyed consisted of a strip of land that had been dedicated, accepted, and used as a public highway or street, it was held that there was a breach of the covenant against incumbrances. Turner v. State Bank, 101 Kan. 493; 167 Pac. 1052.

Recent Cases. Walquist v. Johnson, 103 Wash. 30; 173 Pac. 735; Hoyt v. Rothe, 95 Wash. 369; 163 Pac. 925; Crams v. Durdall, 154 Iowa 468; 134 N. W. 1086; Sandum v. Johnson, 122 Minn. 368; 142 N. W. 878; 48 L. R. A. (N. S.) 619 Killen v. Funk, 83 Neb. 622; 120 N. W. 189; 131 Am. St. Rep. 658. In McWhorter v. Forney, 69 Wash. 414; 125 Pac. 164, it was held that a well-defined public road across the land, if a detriment and not a benefit to the land, was a breach of the covenant against incumbrances. In Newmyer v. Roush, 21 Idaho 106; 120 Pac. 464; Ann. Cas. 1913D, 433; a distinction was drawn between a public highway and a private road — the former being held not to be, and the latter to be, a breach of the covenant against incumbrances. An unopened highway dedicated to public use but giving no indication of its existence, is a breach of the covenant. McAndrews & C. Co. v. Bank, 87 N. J. L. 231; 94 Atl. 627; Ann. Cas. 1917C, 146.

[35] Schurger v. Mooreman, 20 Idaho 97; 117 Pac. 122; 36 L. R. A. (N. S.) 313; Ann. Cas. 1912D, 1114. Ireton v. Thomas, 84 Kan. 70; 113 Pac. 306; 32 L. R. A. (N. S.) 737.

[36] Birkett v. De Vans, 206 Ill. App. 187; in which case it was held, however, that only nominal damages could be recovered if the construction of the ditch would be a benefit to the land. See post, § 132.

irrigation ditch,[37] public sewer,[38] railway,[39] or canal, a different rule as to the effect of notice upon the right to recover has been established in many of the States. In such a case the purchaser has no contingent or prospective enforcement of the incumbrance to provide against with covenants for title. There would be neither reason, utility, nor convenience in requiring the vendor to covenant against a fact that depreciates the value of the premises, but is capable of accurate and equitable adjustment between the parties in fixing the purchase price. The purchaser is presumed to have taken into consideration the existence of the incumbrance, and any loss or inconvenience it might occasion him, and to have agreed upon the consideration to be paid as the value of the premises with the incumbrance.[40] It is inconceivable that the purchaser would agree to pay more for the incumbered premises than they were worth, merely because he could recover damages on the covenant to the extent of such excess. If then, having bought the premises at their depreciated value, with reference to the visible easement, he should be permitted to recover damages for the breach of the covenant against incumbrances resulting from such easement, it is plain that he would be twice compensated for any damage or depreciation in value which the premises may have sustained. In some of the States these principles are declared applicable to any purchase with notice of the easement, without regard to the nature of the easement, whether public or private;[41] in one State, at least, they are restricted to the single case of a purchase with notice of a public highway through the premises;[42] and in others they are rejected altogether, upon the ground that notice of an incumbrance at the time of the conveyance cannot affect the right to recover on a covenant against incumbrances.[43] In a recent well-considered case in Pennsylvania[44] it was observed by the court that incumbrances are of two kinds, (1) Such as affect the title; and (2) Such as affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road or right of way of the latter. Where incumbrances of the former class exist, the covenant against incumbrances is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title.[45] Such incumbrances are usually of a temporary character and capable of removal; the very object of the covenant is to protect the vendee

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[37] Schurger v. Mooreman, 20 Idaho 97; 117 Pac. 122; 36 L. R. A. (N. S.) 313; Ann. Cas. 1912D, 1114. But the right of way for an unopened ditch is a breach of the covenant. Feldhut v. Brummitt, 96 Kan. 127; 150 Pac. 549.

[38] Burke v. Trabue, 137 Ky. 580; 126 S. W. 125; Kahn v. Cherry, 131 Ark. 49; 198 S. W. 266; First Unitarian Soc. v. Cit. &c. Trust Co., 162 Iowa 389; 142 N. W. 87; 51 L. R. A. (N. S.) 428; Ann. Cas. 1916B, 575.

[39] Smith v. Hughes, 50 Wis. 620; 7 N. W. 653. This would probably be so held wherever it is held that a public highway known to the purchaser would not be an incumbrance. And obviously wherever it is held that a public highway is such a breach, a railway through the premises would also be so held. Kellogg v. Malin, 50 Mo. 496; 11 Am. Rep. 426. Beach v. Miller, 51 Ill. 206; 2 Am. Rep. 290. Barlow v. McKinley, 24 Iowa, 70. Kostendader v. Pierce, 37 Iowa, 645. Fierce v. Houghton, (Iowa) 98 N. W. Rep. 306. Burke v. Hill, 48 Ind. 52; 17 Am. Rep. 731. Farrington v. Tourtellot, 39 Fed. Rep. 738. Van Ness v. Royal Phosphate Co., 60 Fla. 284; Ann. Cas. 1912C, 647; 30 L. R. A. (N. S.) 833; 53 So. 381; Goodman v. Heilig, 157 N. C. 6; 72 S. E. 866; 36 L. R. A. (N. S.) 1004. In McDonald v. Ward, 99 Wash. 354; 169 Pac. 851; L. R. Ann. Cas. 1918F, 662, it is said that the weight of authority is that the existence of the railway right of way is a breach of the covenant: citing Matthews v. Livingston, 86 Conn. 263; 85 Atl. 529; Ann. Cas. 1914A, 195. In Gerald v. Elley, 51 Iowa, 317, it was held that the mere fact that a railroad company exercises a right of way, is not of itself a breach of the covenant against incumbrances. The company may be a trespasser. It must be shown that the right of way has been lawfully acquired. The grantor cannot have his covenant against incumbrances reformed on the ground that he did not know that it would extend to and embrace a railroad right of way over the land, known to the grantee when the covenant was made. Gerald v. Elley, 45 Iowa, 332. An *unopened* railroad right of way in possession of the company will constitute a breach of the covenant against incumbrances. Bruns v. Schreiber, (Minn.) 51 N. W. Rep. 120; especially where the right of way has been graded. Wisc. Cent. Ry. Co. v. Schug, 155 Wisc. 563; 145 N. W. 177. The encroachment of the premises upon a railroad right of way, for which the covenantee was compelled to pay, is a breach of the covenant. Pritchard v. Rebori, 135 Tenn. 328; 186 S. W. 121.

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[40] Patterson v. Arthur, 9 Watts (Pa.), 152. Jaques v. Tomb (Cal.) 177 Pac. 280; Sachs v. Owings, 121 Va. 162; 92 S. E. 997.

[41] Deacon v. Doyle, 75 Va. 258. Memmert v. McKeen, 112 Pa. St. 315, where the alleged incumbrance consisted of the stone steps of an adjoining house, which were so constructed as to occupy a part of the sidewalk in front of the plaintiff's house. Kutz v. McCune, 22 Wis. 628; 99 Am. Dec. 85, a mill pond of many years standing. Haldane v. Sweet, 55 Mich. 196, an alley. James v. Jenkins, 34 Md. 1; 6 Am. Rep. 300. Here the question was whether the right of an adjoining proprietor to forbid the erection of a wall on the granted premises to such a height as to obstruct the light and air from his windows, constituted a breach of a covenant of special warranty in a conveyance of such premises. Mr. Justice ALVEY, answering this question, and delivering the opinion of the court, said: "This depends upon the apparent and ostensible condition of the property at the time of the sale. And as the wall had been erected, and the lights therein were plainly to be seen when the appellant purchased the property overlooked by them, it is but rational to conclude that he contracted with reference to that condition of the property, and that the price was regulated accordingly. The parties, in the absence of anything to the contrary, are presumed to have contracted with reference to the then state and condition of the property, and if an easement to which it is subject be opened and visible, and of a continuous character, the purchaser is supposed to have been willing to take the property as it was at the time, subject to such burden. That being so, the covenants in the deed must likewise be construed with reference to the condition of the property at the time of conveyance. The grantor, by his covenant, warranted the premises as they were, and by no means intended to warrant against an existing easement which was open and visible to the appellant, and over which the former had no power or control whatever. To construe the covenant to embrace such subject would most likely defeat the understanding and intention of the parties, certainly of the grantor." Citing Washburn on

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Easements, 68, and approving Patterson v. Arthur, 9 Watts (Pa.), 154. See, also, Newbold v. Peabody Heights Co., 70 Md. 493; 17 Atl. Rep. 372. Constructive notice of a building restriction from the record of a deed in which it is contained does not affect the right of a subsequent grantee to recover on a covenant against incumbrances, but actual notice of the restriction it was intimated would go in mitigation of the damages. Roberts v. Levy, 3 Abb. Pr. (N. S.) 311.

[42] New York, Huyck v. Andrews, 113 N. Y. 81; 20 N. E. Rep. 581, disapproving Kutz v. McCune and Memmert v. McKeen, supra. Helton v. Asher, 135 Ky. 751; 123 S. W. 285.

[43] Van Wagner v. Nostrand, 19 Iowa, 422; Barlow v. McKinley, 24 Iowa, 69; McGowan v. Myers, 60 Iowa, 256; 14 N. W. Rep. 788; Flynn v. White Breast Coal Co., 72 Iowa, 738; 32 N. W. Rep. 471. Fierce v. Houghton (Iowa), 98 N. W. Rep. 306. Morgan v. Smith, 19 Ill. 199. Butler v. Gale, 27 Vt. 739. Watts v. Fletcher, 107 Ind. 391; 8 N. E. Rep. 111; Burk v. Hill, 48 Ind. 52; 17 Am. Rep. 731; Medlar v. Hiatt, 8 Ind. 171; McHargue v. Calchina, 78 Oreg. 326; 153 Pac. 99; Quick v. Taylor, 113 Ind. 540; 16 N. E. Rep. 588. In this case it seems that the right of way had been condemned but not opened. Teague v. Whaley, 20 Ind. App. 26; 50 N. E. Rep. 41; Whiteside v. Magruder, 75 Mo. App. 364, an unopened railway right of way. Scott v. Tanner, (Mo. App.) 208 S. W. 264. Foster v. Foster, 62 N. H. 532. See, also, cases cited, ante, this section, to proposition that public highway or railway traversing the premises is breach of covenant against incumbrances. This is true enough, as observed by Mr. Rawle (Covts. for Title [5th ed.], § 76, note 3), where the thing complained of is *really* an incumbrance, but loses its application where the question is whether such thing is in fact an incumbrance.

[44] Memmert v. McKeen, 112 Pa. St. 320.

[45] Cathcart v. Bowman, 5 Pa. St. 317; Funk v. Voneida, 11 Serg. & R. (Pa.) 109; 14 Am. Dec. 617.

against them; hence, knowledge, actual or constructive, of their existence is no answer to an action for the breach of such a covenant. Where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects not the title but the physical condition of the property,[46] a different rule prevails. Thus it was held that where the owner had covenanted to convey certain lots free from all incumbrances, a public road which occupied a portion of the lots was not an incumbrance within the meaning of the covenant.[47] This is not because of any right acquired by the public, but by reason of the fact that the road, although admittedly an incumbrance, and possibly an injury to the premises, was there when the purchaser bought, and he is presumed to have had knowledge of it. In such and similar cases there is the further presumption that if the incumbrance is really an injury, such injury was in the contemplation of the parties and that the price was regulated accordingly.

The rule that a purchaser, with notice of an easement affecting the premises, cannot complain thereof as a breach of the covenant against incumbrances unquestionably applies where the easement is obviously an appurtenance or incident of the estate, Nothing which constitutes part of an estate, or which, as between the parties, is to be regarded as an incident to which the estate is subject, can be considered an incumbrance.[48] And where the owner of two tenements sells one of them, the purchaser takes the portion sold with and subject to all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the owner retains.[49]

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[46] Such as an irrigation ditch. Sisk v. Caswell, 14 Cal. App. 377; 112 Pac. 185; Ireton v. Thomas, 84 Kan. 70; 113 Pac. 306.

[47] Patterson v. Arthur, 9 Watts (Pa.), 152. But a telephone line in operation along a highway in front of the granted premises and visible to the purchaser, has been held to be none the less a breach of the covenant against incumbrances. Fossume v. Requa, 218 N. Y. 339; 113 N. E. 330. The encroachment of the premises upon a street which was abandoned by the public many years after the encroachment began, has been held not to be a breach of the covenant. Deutzmann v. Kuntze, 147 Iowa 158; 125 N. W. 1007.

[48] Dunklee v. Wilton R. Co., 4 Fost. (N. H.) 489. In this case the plaintiff conveyed to the defendants a right of way for their railroad, which intersected a mill race owned by the plaintiff. The action was to recover damages from the defendant for building a culvert at a point which caused a deflection and less ready discharge of the waters of the race. The right to have the water flow freely under or across the defendant's right of way was held no breach of a covenant against incumbrances in the plaintiff's deed, and, therefore, that he was not estopped by such covenant to maintain the action.

Where a landowner has created a servitude upon one portion of his land for the benefit of another portion, and conveys the servient part, there is an implied reservation of the easement if necessary to the enjoyment of the land reserved; and the existence of such an easement does not constitute a breach of a covenant against incumbrances or of general warranty, if the easement was so open and apparent that the covenantee must have been aware of its existence.[50]

It is suggested, with diffidence, that it is immaterial, so far as the mere question of damages is concerned, whether a highway or other easement of which the purchaser had notice, shall be considered a technical incumbrance. If he bought, knowing that the easement was there, it will be presumed that the price he agreed to pay was the value of the land after allowing for the loss, inconvenience or injury occasioned by the easement. On the other hand, if it appear that the easement is a benefit instead of a burden to the premises, there is no loss or injury to the grantee.[51] In either case it would seem that he could recover only nominal damages for the breach.[52] It may even be doubted whether the easement, when it is a benefit, could be regarded as a technical breach of the covenant so as to entitle the plaintiff to a judgment for costs. If the grantee elect, for a number of years, to treat the easement as a benefit, he will be estopped to set it up as a breach of the covenant.[53]

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[49] James v. Jenkins, 34 Md. 1; 6 Am. Rep. 300. Seymour v. Lewis, 2 Beas. (N. J.) 439. Harwood v. Benton, 32 Vt. 724.

[50] Kutz v. McCune, 22 Wis. 628; 90 Am. Dec. 85; Bennett v. Booth, 70 W. Va. 264; 73 S. E. 909; 39 L. R. A. (N. S.) 618. In both of these cases part of the land conveyed was covered by a mill-pond, and it was held that the implied reservation of the right to maintain the pond for the use of the mill, was no breach of the covenant against incumbrances.

[51] Hymes v. Esty, 133 N. Y. 342; 31 N. E. Rep. 105. Stuhr v. Butterfield, 151 Iowa 736; 130 N. W. 897. Mr. Rawle concludes that an easement beneficial to the premises cannot be an incumbrance, and, therefore, cannot be a breach, technical or substantial, of the covenant against incumbrances. Also, that parol evidence may be received as to the nature of the alleged incumbrance, and that the question whether the same be or be not in fact an incumbrance, is not a mere abstract question of law, but a question of fact to be determined by the jury upon consideration of all the surrounding circumstances, such as the advantages or disadvantages accruing to the premises from the easement, notice to the purchaser, the price agreed to be paid, etc. (Covenants for Title [5th ed.], §§ 76, 85). But see Eddy v. Chace, 140 Mass. 471; 5 N. E. Rep. 306, where it was said that the construction of a deed, and the operation and extent of the covenants therein con-

§ 128. **ASSIGNABILITY OF THE COVENANT AGAINST INCUMBRANCES.** The covenant against incumbrances, like the covenant of seisin, has been generally held in the American States to be an agreement as to the *present* state of the title, and to be broken as soon as made, if, at the time of the covenant, there be an incumbrance on the premises, and that, consequently, all rights of action for breach of contract being incapable of assignment at common law and by the statute 32 Hen. VIII, c. 24, a grantee of the covenantee, or one claiming under him, could bring no action at law in his own name for the breach; in other words, that the covenant against incumbrances does not run with the land.[54] This rule does

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tained is for the court and not for the jury, and that it cannot be left to the latter to say whether, upon the evidence, a covenant against certain incumbrances was intended by the deed.

[52] Post, § 132.

[53] Ladue v. Cooper, 67 N. Y. Supp. 319; 32 Misc. Rep. 544.

[54] See, generally, the cases cited to the proposition that a covenant of seisin does not run with the land, ante, § 111. See, also, Lawrence v. Montgomery, 37 Cal. 183. Woodward v. Brown, 119 Cal. 283; 51 Pac. Rep. 2, 542. McPike v. Heaton, 131 Cal. 109; 63 Pac. Rep. 179. Heath v. Whidden, 24 Me. 383. Mygatt v. Coe, 124 N. Y. 212; 26 N. E. Rep. 611. Stewart v. Drake, 9 N. J. L. 139; Garrison v. Sandford, 12 N. J. L. 261. Blondeau v. Sheridan, 81 Mo. 545. Osborne v. Atkins, 6 Gray (Mass.), 423; Smith v. Richards, (Mass.) 18 N. E. Rep. 1132. Guerin v. Smith, 62 Mich. 369; 38 N. W. Rep. 906. Smith v. Jefts, 44 N. H. 482. Fuller v. Jillette, 9 Biss. (U. S.) 296, *obiter*. Sears v. Broady, 66 Neb. 207; 92 N. W. Rep. 214; Waters v. Bagley, (Neb.) 92 N. W. Rep. 637. Brass v. Vandecar, (Neb.) 96 N. W. Rep. 1035. Pease v. Warner, 153 Mich. 140; 116 N. W. 994. Simonds v. Diamond Match Co., 159 Mich. 241; 123 N. W. 1132. Thompson v. Richmond, 102 Me. 335; 65 Atl. 649. Shalet v. Stoloff. 120 N. Y. Supp. 345; 135 App. Div. 376. In Pearson v. Ford, 1 Kan. App. 580; 42 Pac. 257, the court declined to pass upon the question whether a covenant against incumbrances ran with the land, but held that a general warranty deed executed pending proceedings to foreclose a mortgage on the land, did not give the grantee the right to maintain an action on an agreement in a deed by his grantee to a third party, conveying other land by which such third party undertook to discharge the mortgage in question as a part of the consideration for his deed.

not prevail, however, in many of the States, their courts holding that if the loss resulting from a breach of the covenant fall upon the subsequent grantee, he will have a right of action against the covenantor, upon the ground that the covenant is prospective in its operation, and intended for the security of the title and the indemnity of him into whose hands the land may pass.[55] A distinction has also been made between a covenant "that the land is free from incumbrances," and one that the covenantee "shall quietly enjoy the same, *free from incumbrances,*" it being considered that in this form the covenant is prospective and runs with the land.[56]

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[55] See cases cited ante, § 112, to proposition that covenant of seisin runs with the land. See, also, Cole v. Kimball, 52 Vt. 639. Walker v. Deaver, 5 Mo. App. 139; Alexander v. Schreiber, 13 Mo. 271; Winningham v. Pennock, 36 Mo. App. 688. Sage v. Jones, 47 Ind. 122. This case holds also that the grantor cannot at the time of conveyance reserve, by parol, the right to recover for a breach of the incumbrance. Whitten v. Krick, 31 Ind. App. 577; 68 N. E. Rep. 694. Burk v. Hill, 48 Ind. 52; 17 Am. Rep. 731; Dehority v. Wright, 101 Ind. 382; Mecklem v. Blake, 22 Wis. 495; 99 Am. Dec. 668; Killilea v. Douglas, 133 Wis. 140; 126 Am. St. Rep. 938; 17 L. R. A. (N. S.) 1189. Tucker v. McArthur, 103 Ga. 409; 30 S. E. Rep. 283. Taylor v. Lane, 18 Tex. Civ. App. 545; 45 S. W. Rep. 317. Pillsbury v. Mitchell, 5 Wis. 17. Hawthorne v. City Bank, 34 Minn. 382. This rule seems also to have been recognized in Virginia. Wash. City Savings Bank v. Thornton, 83 Va. 157; 2 S. E. Rep. 193, *dictum*, citing Dickinson v. Hoomes, 8 Grat. (Va.) 353; Sheffey v. Gardner, 79 Va. 313. It is settled in New York that a covenant against incumbrances runs with the land, and that a remote grantee may sue on the original covenant. Geiszler v. De Graaf, 166 N. Y. 339; 59 N. E. Rep. 993; 82 Am. St. Rep. 659; Mandigo v. Conway, 90 N. Y. Supp. 324; 45 Misc. 389. In Clarke v. Priest, 47 N. Y. Supp. 489; 21 App. Div. 174, the rule was thus stated: If the covenantee has on an alienation of the property by him, either rendered himself liable to his grantee by a covenant against incumbrances, or, by his conveyance, estopped himself from asserting title to the incumbrance, as against his grantee, should he afterward acquire it, then his deed should be held to operate as an assignment to his grantee of his right of action against his grantor. The husband of a deceased grantee, not being a party to the deed containing a covenant against incumbrances, nor assignee of such covenant, cannot maintain an action for breach thereof, though he joined his wife in a deed conveying the premises with a covenant against incumbrances. Ladd v. Montgomery, 83 Mo. App. 355.

[56] Rawle Covts. §§ 70, 212. In Brisbane v. McCrady, 1 Nott & McC. (S. C.) 104, it was held that a covenant that the land was free from incumbrances was equivalent to a covenant that the grantee should quietly enjoy the premises *free from incumbrances*, and being thus prospective in its char-

As a general rule the cases which decide that the covenant of seisin does not run with the land, apply the same rule to the covenant against incumbrances, and the reader is referred to the remarks in this work on the assignability of the covenant of seisin, and to the cases there cited, as being, in the main, applicable to the covenant against incumbrances.[57] In several of the States, however, in which it is held that a covenant of seisin does not run with the land, a subsequent grantee of the land has been permitted to recover for a breach of the covenant against incumbrances.[58]

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acter, would pass with the land to a subsequent grantee. See, also, Jeter v. Glenn, 9 Rich. L. (S. C.) 376. Tuskegee Land Co. v. Realty (Ala.) 49 So. 378.

[57] Ante, § 112.

[58] Richard v. Bent, 59 Ill. 38; 14 Am. Rep. 1. Newman v. Sevier, 134 Ill. App. 544. In Ernst v. Parsons, 54 How. Pr. (N. Y.) 163, it was held that in redeeming land, which had been conveyed with warranty against incumbrances, from a tax sale, a remote grantee did that which it was the covenantor's duty to do, and that so long as the tax lien remained unpaid there was a continuing breach of the covenant, for which the remote grantee had a right of action. The rule that a covenant of seisin is broken as soon as made, and, being a chose in action, cannot run with the land, is perhaps nowhere more firmly established than in the State of Massachusetts. It has been intimated there, however, that the same rule would not apply in the case of a breach of the covenant against incumbrances. In Sprague v. Baker, 17 Mass. 589, it was held by WILDE, J.: "There was a breach of the covenant (against incumbrances), it is true, before the assignment; but for this breach the covenantee could only have recovered nominal damages. The actual damages accrued after assignment. They were sustained by the assignee, and not by the covenantee, who has no interest in them, except what arises from his covenants with the assignee. But suppose there had been no such covenants, or suppose the covenantee to be insolvent; then unless the assignee can maintain the present action he is without remedy. This certainly would not be right; nor do I think that such is the law. It seems to me that, if the present case required a decision upon that point, we might be well warranted in saying that the covenant against incumbrances, notwithstanding the breach, passed to the assignee, so as to entitle him to an action for any damages he might sustain after the assignment, because the breach continued and the ground of damages has been materially enlarged since that time, so that the assignee's title does not depend upon the assignment of a mere chose in action. He is principally interested in the covenant; that those covenants run with the land in which the owner is solely or principally interested, and which are necessary for the maintenance of his rights. Covenant lies by an assignee on every covenant which concerns the land. Com. Dig. B. S." The foregoing remarks would seem to apply with equal force in a case in which actual damages from a breach of the covenant

The rule that a covenant against incumbrances does not run with the land, is comparatively unimportant where the deed contains also a covenant of warranty, which, of course, must always be the case in those jurisdictions in which by statute or judicial construction, a covenant of warranty includes a covenant against incumbrances. The covenantee may wait until he is actually evicted by enforcement of the incumbrance, or he may suffer a constructive eviction by discharging the incumbrance in order to prevent an actual dispossession, and in either case recover for breach of the warranty, regardless of the covenant against incumbrances.[59] No damage, as a general rule, flows from the breach of the covenant until the incumbrance has been actually or constructively enforced, and when that occurs the covenant of *warranty* is broken and an action for damages immediately accrues in favor of the person then owning the premises.[60]

Of course if the damage from a breach of the covenant against incumbrances accrue, that is, if the incumbrance be enforced, before the land passes from the covenantee, the right to recover for the damages thence ensuing would not pass to a subsequent grantee or to the heir of the covenantee.[61]

The provisions of the Code, that every action shall be brought by the real party in interest, has been construed to give to a grantee of the covenantee the right to maintain an action in his own name for a breach of the covenant against incumbrances.[62]

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of seisin have been sustained by the assignee. In Stinson v. Sumner, 9 Mass. 143; 6 Am. Dec. 49, a remote grantee was permitted to recover on a covenant against incumbrances. The objection that the right of action did not pass to him was not made. Later decisions in Massachusetts have disregarded those cases, and the rule that the covenant against incumbrances does not run with the land may be considered to be settled in that State. Osborne v. Atkins, 6 Gray (Mass.) 423; Whitney v. Dinsmore, 6 Cush (Mass.) 128.

[59] Worley v. Hineman, (Ind.) 33 N. E. Rep. 260. Mauzy v. Flint, 42 Ind. App. 386; 83 N. E. 757. Maitlen v. Maitlen, 44 Ind. App. 559; 89 N. E. 966.

[60] Tufts v. Adams, 8 Pick. (Mass.) 549; Thayer v. Clemence, 22 Pick. (Mass.) 490. Lloyd v. Quimby, 5 Ohio St. 262.

[61] Frink v. Bellis, 33 Ind. 135; 5 Am. Rep. 193. 2 Sugd. Vend. (8th Am. ed.) 577 (237).

[62] Andrews v. Appel, 22 Hun (N. Y.), 429. This was an action on a covenant against incumbrances brought, by the last grantee, after several mesne conveyances. The plaintiff had been compelled to redeem the land from a tax

In the State of New York, where it is held that the covenant against incumbrances runs with the land, it is also held that a subsequent conveyance "subject to" an incumbrance constituting a breach of the covenant in the original conveyance, breaks the continuity of the covenant and extinguishes its benefits, so that a subsequent grantee who acquires title under a deed containing such a covenant, cannot recover upon it as against the original grantor.[63]

§ 129. **MEASURE OF DAMAGES. General Rules.** Incumbrances are of two kinds, namely: (1) Pecuniary, or those which the debtor, his creditors and purchasers from him, have a right to remove after maturity by payment of the debt which the incumbrance secures, such as a mortgage, deed of trust, judgment or other lien.[64] (2) Permanent, or those which cannot be removed without the consent of him who has the right, such as an outstanding life estate, an unexpired lease, a right of way, easement, building restriction or the like. If the breach of the covenant against incumbrances consist in the existence of a pecuniary incumbrance upon the estate the covenantee can recover no more than nominal damages if he has not been disturbed in the enjoyment of the estate or has paid nothing or sustained no loss on account of the incumbrance.[65] But he will be entitled to nominal

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sale under tax liens existing at the time the original conveyance was made. The court held that the plaintiff having suffered the loss occasioned by the incumbrance, was the real party in interest and acquired the right to enforce the covenant by an assignment implied in equity from the original, and each successive conveyance. 2 Story Eq. § 1040.

[63] Geiszler v. De Graaf, 166 N. Y. 329; 59 N. E. Rep. 993.

[64] As to the right of a purchaser or creditor to pay off an incumbrance and be subrogated to the rights of the incumbrancer, see Sheldon on Subrogation, § 29 *et seq.*

[65] Sedg. Dam. p. 953; Rawle Covt. (5th ed.) § 188; 3 Washb. Real Prop. (3d ed.) 495. Delavergne v. Norris, 7 Johns. (N. Y.) 359; 5 Am. Dec. 281, leading case; Stanard v. Eldridge, 16 Johns. (N. Y.) 254; Andrews v. Appel, 22 Hun (N. Y.), 474; Reading v. Gray, 37 N. Y. Super. Ct. 79, distinguishing Rector v. Higgins, 48 N. Y. 532; McGuckin v. Milbank, 83 Hun (N. Y.), 473; 31 N. Y. Supp. 1049. Prescott v. Trueman, 4 Mass. 627; 3 Am. Rep. 249; Wyman v. Ballard, 12 Mass. 304; Brooks v. Moody, 20 Pick. (Mass.) 474; Harrington v. Murphy, 109 Mass. 299. Bean v. Mayo, 5 Gr. (Me.) 94; Randell v. Mallett, 14 Me. 51; Clark v. Perry, 30 Me. 148. Richardson v. Dorr, 5 Vt. 9. Briggs v. Morse, 42 Conn. 258. Brown v. Brodhead, 3 Whart. (Pa.) 88. This was an action on a title-bond to indemnify the purchaser

damages though the incumbrance was paid off before his action

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against incumbrances. Pomeroy v. Burnett, 8 Bl. (Ind.) 142; Reasoner v. Edmundson, 5 Ind. 393; Black v. Coan, 48 Ind. 385; Bundy v. Ridenour, 63 Ind. 406. Willets v. Burgess, 34 Ill. 494. Lane v. Richardson, (N. C.) 10 S. E. Rep. 189. Wilcox v. Musche, 39 Mich. 101; Norton v. Colgrove, 41 Mich. 544. Egan v. Yearman, (Tenn.) 46 S. W. Rep. 1012. Eaton v. Lyman, 30 Wis. 41, DIXON, C. J., dissenting, held the covenant could not even recover nominal damages. If the grantee, selling the premises, receive, in consequence of the incumbrance, a less price than he would have received if the incumbrance had not existed, he will be entitled to recover as damages the difference between what he actually received and what he would have received if there had been no incumbrance. McGuckin v. Milbank, 152 N. Y. 297; 46 N. E. Rep. 490.

Recent Cases. D'Amelio v. Abraham, 105 N. Y. Supp. 1019, S. C., 108 N. Y. Supp. 1128; Gen. Underwriting Co. v. Stilwell, 123 N. Y. Supp. 653; 139 App. Div. 189; King v. Union Tr. Co., 133 N. Y. Supp. 18; 148 App. Div. 110; Killilea v. Douglas, 133 Wis. 140; 113 N. W. 411; 126 Am. St. Rep. 938; 17 L. R. A. (N. S.) 1189. N. Y. City v. Tranp'n. Co., 172 N. Y. Supp. 495; 104 Misc. Rep. 438; Woods v. Bennett, (Cal. App.) 181 Pac. 25; Internat'l Dev. Co. v. Clemans, 59 Wash. 398; 109 Pac. 1034; Seldon v. Jones Co., 89 Ark. 234; 116 S. W. 217; Ledowsky v. Rubin, 194 Ill. App. 442. In Boice v. Coffeen, 158 Iowa 705; 138 N. W. 857, it was held that the rule stated in the text does not control in equity suits, and that a court of equity may provide in the decree for substantial damages which the covenantee must incur in paying off an incumbrance in the future.

It is easy to see that a pecuniary incumbrance upon the premises may be a source of loss or injury to the covenantee in some way other than the mere removal of the incumbrance, and that a breach of the covenant of seisin may result in serious loss to the covenantee, though the adverse title never be asserted. Thus, it frequently happens that negotiations for the sale of the property are broken off upon the discovery of an incumbrance or a defect in the title, the purchaser preferring to abandon his bargain rather than await the removal of the objection. In such a case the incumbrance, or the defect, is the immediate and proximate cause of the loss of the sale. The injury need not consist in the *loss of a bargain*, or the difference between the consideration money, paid by the covenantee, and that which he was to receive from the prospective purchaser; the right of action, if any exist would be for the *loss of the opportunity to sell*. This question was raised in McCarty v. Leggett, 3 Hill (N. Y.), 134, but was not decided, the judgment of the court below having been reversed, and the case sent back on other grounds. A practical inconvenience, however, resulting from a recovery of damages in such a case would be that the recovery would satisfy the breach, it is apprehended, and the judgment might be pleaded in bar of any further action in case the incumbrance should be enforced, or the covenantee evicted. Rawle Covt. (5th ed.) § 189. If, however, he should remove the incumbrance, there seems to be no reason why the covenantee should not, in addition to the amount paid for that purpose, recover damages for whatever actual injury he may have sustained from its existence, provided the was commenced.[66] In Massachusetts it has been held that in case of a breach of this covenant, resulting from an outstanding interest in the premises in favor of a tenant in common, the covenantee may recover substantial damages though the incumbrance has never been enforced by proceedings for partition.[67]

The mere fact that the property has depreciated in value during the period intervening between the execution of the deed and the time when incumbrances on the property became barred by the statute of limitations, does not entitle the covenantee to damages, where he has paid nothing on account of the incumbrance, and has never been disturbed in the possession and enjoyment of the premises.[68]

In a case in which the deed contained a covenant to "pay and satisfy" on demand, a particular judgment against the grantor, which was a lien on the premises conveyed, it was held that the covenantee was entitled to recover the amount of the judgment as damages for a breach of the covenant, though he had neither paid, nor had been called upon to pay, anything on that account. The distinction made by the court was that a covenant to "pay and satisfy" was more onerous than a mere covenant of indemnity.[69]

It seems that a judgment for nominal damages for a breach of the covenant against incumbrances will operate as a bar to any future recovery upon the covenant, after actual damages shall have been sustained.[70] Practically the rule is of no great importance,

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total recovery do not exceed the consideration money and interest. In Harrington v. Murphy, 109 Mass. 299, it was held that the covenantee could not recover as damages a sum paid by him to an auctioneer for selling the land to a person who refused to complete the purchase on discovering an incumbrance.

[66] Smith v. Jefts, 44 N. H. 482. Hasselbusch v. Mohmking, 76 N. J. L. 961; 73 Atl. 961. In Harwood v. Lee, (Iowa) 52 N. W. Rep. 521, the court refused to reverse a judgment merely for failure to give nominal damages for a breach of the covenant against incumbrances.

[67] Comings v. Little, 24 Pick. (Mass.) 266.

[68] Egan v. Yeaman, (Tenn.) 46 S. W. Rep. 1012.

[69] Bristor v. McBean, 37 N. Y. Supp. 18; 1 App. Div. 217.

[70] Rawle Covts. for Title (5th ed.), §§ 176, 189. Taylor v. Heitz, 87 Mo. 660. In Eaton v. Lyman, 30 Wis. 41, it was held that the plaintiff was entitled to nominal damages, though he had not removed the incumbrance,

inasmuch as an action upon the covenant will seldom be brought until the incumbrance has been actually or constructively enforced, and the covenantee has sustained actual damages, in which case, as we have seen, the plaintiff will be entitled to substantial damages.

§ 130. **Measure of damages where covenantee discharges incumbrance.** The covenantee may, of course, pay off an incumbrance on the premises, and thereby become entitled to substantial damages for breach of the covenant, without waiting to be evicted,[71] provided the grantor has refused to remove the incumbrance after notification and request.[72] But in such case he can recover as damages no more than the amount actually and fairly

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but the court declined to say whether a second action could be maintained and damages recovered if the incumbrance should be enforced and actual damages sustained. In Harsin v. Oman, 68 Wash. 281; 123 Pac. 1, it was held that the judgment for damages would not bar a suit after actual damages had been sustained.

[71] Hall v. Dean, 13 Johns. (N. Y.) 105. Rainey v. Hines, 121 N. C. 318; 28 S. E. Rep. 410. King v. Union Tr. Co., 133 N. Y. Supp. 18; 148 App. Div. 110; Thompson v. Conran, (Mo. App.) 181 S. W. 595; Pee Dee Stores Co. v. Hamer, 92 S. C. 423; 75 S. E. 695.

[72] Warren v. Stoddart, (Idaho) 59 Pac. Rep. 540. Greene v. Tallman, 20 N. Y. 191; 75 Am. Dec. 384. Here the incumbrance complained of was a species of quit rent due the city of New York. The court, by STRONG, J., said, that in order to avail himself of the discharge of the incumbrance the covenantee "would be bound to prove either that what had been paid by him was actually due, or that he had given notice to his vendor requiring that such vendor should pay off the incumbrance within a limited time, or that, otherwise, the purchaser would pay a specified amount. Some of the authorities lay down the rule that the purchaser may set off or recover the amount paid, without any qualification, but it seems to us that a vendor who has been innocent of any fraud should have an opportunity to set himself right, before he should be obliged to pay, or allow more than the amount actually due. It is, I think, well settled that where the incumbrance has not been paid off by the purchaser of the land, and he has remained in quiet and peaceable possession of the premises, he cannot have relief against his contract to pay the purchase money, or any part of it, on the ground of defect of title. The reason is, that the incumbrance may not, if let alone, ever be asserted against the purchaser, as it may be paid off or satisfied in some other way." The purchaser's damages include the amount expended by him in getting in an outstanding tax title; but he has the burden of showing the validity of the tax title. Dininny v. Brown, 133 N. Y. Supp. 314; 148 App. Div. 671.

paid to discharge the incumbrance,[73] together with compensation for his trouble and expenses incurred in that behalf.[74] He will be entitled to that amount as damages even though paid after the institution of his action on the covenant,[75] or before the incumbrance was due.[76] But, it seems, that in order to recover fees paid counsel in defending a suit to enforce the incumbrance, he must have given the covenantor notice to defend the suit.[77] The covenantee is not necessarily entitled to recover as damages the whole sum paid by him to remove an incumbrance on the premises, even though such sum do not exceed the purchase price of the estate. He is entitled to recover only what he fairly and reasonably paid for that purpose.[78] Of course, if it should appear that the incumbrance removed was the first lien on the premises, and could have been satisfied in full if enforced, and the covenantee had paid the full face value of the incumbrance, it is apprehended that such payment would be deemed fair and reasonable, for it is to be presumed that no creditor would part with a solvent security for less than its face value. But in any case in which it might appear that the incumbrance, either because a junior lien [79] or because the premises had decreased in value, or for any other reason, was not worth the sum paid to remove it, the grantee must show that the sum so paid was the fair and reasonable value of the incumbrance. He will also have the burden of showing that the incumbrance was valid and enforcible against the premises.[80] If the covenantee buys in an incumbrance he must extinguish it by foreclosure or otherwise before he will be permitted to recover as for a breach of covenant against incumbrances. The reason is that if he were permitted to recover substantial damages without extinguishing the incumbrance he might be in a position to perpetrate a fraud upon the covenantor by transferring his notes secured by the incumbrance to innocent purchasers for value before maturity.[81] The covenantee paying to his grantee the amount of an incumbrance on the land must show, as against the covenantor, that the payment removed the incumbrance, or that his grantee took subject thereto.[82]

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[73] Washb. Real Prop. (4th ed.) 495; Sedg. Dam. 198; Rawle Covt. (5th ed.) § 192; 4 Kent Com. (11th ed.) 563. Delavergne v. Norris, 7 Johns. (N. Y.) 358; 5 Am. Dec. 281; Braman v. Bingham, 26 N. Y. 483, 494. McGuckin v. Millbank, 31 N. Y. Supp. 1049; 83 Hun, 473. Hastings v. Hastings, 58 N. Y. Supp. 416; 27 Misc. 244. Seventy-third St. Bldg. Co. v. Jencks, 46 N. Y. Supp. 2; 9 App. Div. 314. Prescott v. Trueman, 4 Mass. 627; 3 Am. Dec. 249; Smith v. Carney, 127 Mass. 179; Coburn v. Litchfield, 132 Mass. 449. Richmond v. Ames, 164 Mass. 467; 41 N. E. Rep. 671. Davis v. Lyman, 6 Conn. 255, *obiter*. Cole v. Kimball, 52 Vt. 639; Downer v. Smith, 38 Vt. 464. Willson v. Willson, 5 Fost. (N. H.) 229; 57 Am. Dec. 320. Reed v. Pierce, 36 Me. 455; 58 Am. Dec. 761. Mayo, etc. v. Maxwell, (Ark.) 215 S. W. 678; Boice v. Coffeen, 158 Iowa 705; 138 N. W. 857; Helm v. Griffith, (Ala.) 82 So. 570. Anderson v. Knox, 20 Ala. 156. Amos v. Cosby, 74 Ga. 793. Schumann v. Knoebel, 27 Ill. 175; McDowell v. Milroy, 69 Ill. 498. Rinehart v. Rinehart, 91 Ind. 89. Edington v. Nix, 49 Mo. 134; Kellogg v. Malin, 62 Mo. 429; 11 Am. Rep. 426. Guthrie v. Russell, 46 Iowa, 269; 26 Am. Rep. 135. Pillsbury v. Mitchell, 5 Wis. 17. Pearson v. Ford, 1 Kan. App. 580; 42 Pac. Rep. 257. Dahle v. Stakke, 12 N. Dak. 325; 96 N. W. Rep. 353; even though the covenantor deceived him as to the existence of the incumbrance; Thomas v. Ellison, (Tex. Civ. App.) 116 S. W. 1141. Where the covenantee discharged a mortgage on the premises executed to secure a debt, and to indemnify the mortgagee against certain liabilities, but paid nothing on account of the liabilities in question, it was held that he was only entitled to recover, as damages, the amount he had actually paid out. Comings v. Little, 24 Pick. (Mass.) 266. The grantee cannot recover a sum paid by him to a mortgagor for release of his right to redeem after that right had become barred by the Statute of Limitations. McMichael v. Russell, 74 N. Y. Supp. 212; 68 App. Div. 104.

[74] Willson v. Willson, 5 Fost. (N. H.) 229; 57 Am. Dec 320. Lost time, legal expenses and car fares incurred in removing from the record an apparent lien, which the covenantor had discharged, are not within a statute which provides that a grantee may recover for all damages sustained in removing an incumbrance on the premises, when there is a covenant against incumbrances. Bradshaw v. Crosby, (Mass.) 24 N. E. Rep. 47.

[75] Brooks v. Moody, 20 Pick. (Mass.) 475. Kelly v. Lowe, 18 Me. 244. Mosely v. Hunter, 15 Mo. 322.

[76] Snyder v. Lane, 10 Ind. 424.

[77] Richmond v. Ames, 164 Mass. 467; 41 N. E. Rep. 671.

The covenantee cannot recover a sum paid by him to extinguish an incumbrance on the premises if the right to enforce the incumbrance was barred by the statute of limitations at the time of the payment.[83]

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[78] 2 Devlin on Deeds, § 919. Gilbert v. Rushmer, 49 Kans. 632; 31 Pac. Rep. 123. Anderson v. Knox, 20 Ala. 156. Guthrie v. Russell, 46 Iowa, 269; 26 Am. Rep. 125.

[79] As in Gilbert v. Rushmer, 49 Kans. 632; 31 Pac. Rep. 123.

[80] Robinson v. Bierce, 102 Tenn. 428; 52 S. W. Rep. 992; 47 L. P. A. 275. Maitlen v. Maitlen, 44 Ind. App. 559; 89 N. E. 966; Globe Merc. Co. v. Perkey, (Ind. App.) 121 N. E. 844.

[81] Harwood v. Lee, (Iowa) 52 N. W. Rep. 521.

[82] Ostrow v. Lesser, 151 N. Y. Supp. 512, citing Delavergne v. Norris, 7 Johns. 358; 5 Am. Dec. 281.

In Massachusetts, as has already been seen, if the covenantee be evicted by the enforcement of an incumbrance, but has a right to redeem the premises, the measure of his damages will be the amount he will be obliged to pay for the purpose of redemption.[84] This rule seems eminently fair and reasonable, since it prevents the covenantee from recovering the consideration money and interest from the covenantor, and then regaining the estate by redeeming it with a smaller sum. The earlier Massachusetts cases hold that in case of eviction under an incumbrance the measure of damages is the purchase money and interest,[85] and there are several decisions to the same effect in other States,[86] but it does not in them appear that the covenantee had a right to redeem, or that the limitation of his damages to the redemption money was demanded by the defendant. No duty, however, devolves upon the covenantee to discharge the incumbrance before it is enforced,[87] or to redeem the premises after enforcement,[88] and his failure to redeem, by reason of which the title of the purchaser under the incumbrance becomes absolute, will not affect his right to recover the consideration money and interest as damages. Nor will the measure of his damages be affected by the fact that he bought with notice of the incumbrance.[89] Evidence of the purposes for which the covenantee bought the premises, *e. g.*, as a speculation, is inadmissible for the purpose of aggravating the damages,[90] unless it can be shown that the intention with which the premises were bought was known to the other party and entered into the consideration of the sale.[91] Except where the right of redemption exists, the measure of the covenantee's damages in case of eviction is the same, whether the action be for a breach of the covenant of warranty, or that against incumbrances. In neither case can the plaintiff recover for his improvements or the increased value of the estate.[92]

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[83] McMichael v. Russell, 74 N. Y. Supp. 212; 68 App. Div. 104.

[84] Ante, this section. The rule was so stated in an early edition of Mr. Rawle's Covenant for Title, but in the last edition of that valuable treatise (5th ed., § 182) it has fallen a sacrifice to the author's theory that the covenantee cannot be deprived of his right to damages by the subsequent acquisition of a perfected title to the estate.

[85] Chapel v. Bull, 17 Mass. 213; Jenkins v. Hopkins, 8 Pick. (Mass.) 346.

[86] Waldo v. Long, 7 Johns. (N. Y.) 173; Bennet v. Jenkins, 13 Johns. (N. Y.) 50. Stewart v. Drake, 4 Halst. (N. J.) 139. King v. Kerr, 5 Ohio, 155; 22 Am. Dec. 777.

[87] Bank v. Clements, 16 Ind. 132.

[88] Sanders v. Wagner, 32 N. J. Eq. 506.

[89] Mohr v. Parmelee, 43 N. Y. S. C. 320. Snyder v. Lane, 10 Ind. 424; Medler v. Hiatt, 8 Ind. 171.

§ 131. **Damages cannot exceed purchase money and interest.** But while the covenantee is, as a general rule, entitled to recover as damages the amount paid by him to remove the incumbrance, it has been held that such recovery cannot exceed the purchase price of the land with interest. This limitation of the rule has been recognized in most of the States in which it has been considered.[93] In Missouri, however, it has been rejected.[94]

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[90] Batchelder v. Curtis, 3 Cush. (Mass.) 204; Greene v. Creighton, 7 R. I. 10.

[91] Foster v. Foster, 62 N. H. 46.

[92] Stewart v. Drake, 4 Halst. (N. J.) 139.

[93] 4 Kent Com. (11th ed.) 563; Rawle Covt. § 193. Dimmick v. Lockwood, 10 Wend. (N. Y.) 142; Grant v. Tallman, 20 N. Y. 191; 75 Am. Dec. 384; Andrews v. Appel, 22 Hun (N. Y.), 429. Boyd v. Whitfield, 19 Ark. 447; Collier v. Cowger, 52 Ark. 322; 12 S. W. Rep. 702. Kelsey v. Remer, 43 Conn. 129; 21 Am. Rep. 638. Foote v. Burnet, 10 Ohio, 333; 36 Am. Dec. 90; Nyce v. Obertz, 17 Ohio, 77; 49 Am. Dec. 444. Eaton v. Lyman, 30 Wis. 41. Willetts v. Burgess, 34 Ill. 494, *obiter*. He cannot recover the increased value of the land resulting from improvements made by him. King v. Union Tr. Co., 133 N. Y. Supp. 18; 148 App. Div. 110. Knadler v. Sharp, 41 Iowa, 332, has been supposed to depart from the rule limiting damages for breach of the covenant against incumbrances to the purchase money and interest. Rawle Covt. (5th ed.) 275. Guthrie v. Russell, 46 Iowa, 271; 26 Am. Dec. 135. It is by no means clear that such was the intention of the court. The opinion in the case, however, is somewhat obscure. On page 237 it is said that the grantees had a right to the benefit of their purchases and not simply to a return of their money and interest. And in the next sentence the apparently conflicting statement is made that any expenditure the grantee might be required to make in order to protect his title, *not exceeding the purchase money and interest*, he might properly make and demand its return from the grantor, etc. In Hawthorne v. City Bank, 34 Minn. 382; 26 N. W. Rep. 4, it was held that a statute providing that the covenantor should, in case an incumbrance appeared of record to exist on the premises, be liable for all damages incurred in removing the same, applied only to incumbrances *appearing* of record *but not existing in fact*, and was not intended to change the rule limiting the damages for a breach of the covenant to the consideration money.

[94] Walker v. Deaver, 5 Mo. App. 139, where it was held that the covenantee

In Massachusetts it has been held that the recovery cannot exceed the value of the land at the time the incumbrance was removed,[95] and this, it is presumed, would be the rule in each of the New England States in which the covenantee is allowed as damages the value of the land at the time of eviction. The rule limiting the damages to the consideration money and interest, of course denies to the plaintiff any recovery for the value of improvements placed by him on the land. Incumbrances must appear of record in order to bind the property at the time of purchase, and if the plaintiff improved the estate without examining the title, the loss of the improvements is the result of his own negligence.[96] The payment of the incumbrance by the covenantee is a material, traversable fact, and in an action on the covenant should be set forth in the declaration or complaint, so that issue may be taken upon it.[97]

If the consideration expressed in the deed be merely nominal, but the real consideration is some benefit to accrue to the grantor not easily susceptible of exact measurement in money, such, for example, as the increase in the value of adjoining property belonging to the grantor from the use to be made of the granted premises by the grantee, the measure of damages will be the amount actually paid by the grantee to protect himself against the incumbrance, not exceeding the then value of the premises.[98]

§ 132. Measure of damages where the incumbrance is permanent. Where the incumbrance is permanent, or one that the covenantee cannot remove as a matter of right, he will be entitled to a just compensation for the injury sustained,[99] the measure of

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is entitled to recover what he fairly and reasonably paid to remove the incumbrance, regardless of the consideration money and interest, and that the question of the fairness and reasonableness of the payment so made was for the jury. Dimmick v. Lockwood, supra, was expressly disapproved. See also, Henderson v. Henderson, 13 Mo. 151; St. Louis v. Bissell, 46 Mo. 157; Winningham v. Pennock, 36 Mo. App. 688.

[95] Norton v. Babcock, 2 Met. (Mass.) 510.

[96] Dimmick v. Lockwood, 10 Wend. (N. Y.) 142.

[97] Pillsbury v. Mitchell, 5 Wis. 17, citing De Forest v. Leete, 16 Johns. (N. Y.) 122. Funk v. Voneida, 11 S. & R. (Pa.) 109; 14 Am. Dec. 617. Tufts v. Adams, 8 Pick. (Mass.) 549.

[98] Utica C. & S. V. R. Co. v. Gates, 47 N. Y. Supp. 231; 21 Misc. 205, in which case the granted premises were to be used for railroad purposes.

[99] 3 Washb. Real Prop. (4th ed.) 495; Sedg. Dam. (6th ed.) 199; Rawle

which will be, as a general rule, the difference between the present value of the premises and their fair market value without the in-

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Covt. 291. Prescott v. Trueman, 4 Mass. 630; 3 Am. Dec. 249; Harlow v. Thomas, 15 Pick. (Mass.) 69. Richmond v. Ames, 164 Mass. 467; 41 N. E. Rep. 671. Hubbard v. Norton, 10 Conn. 450; Mitchell v. Stanley, 44 Conn. 312. The incumbrance complained of in this case was a right to pass and repass on the premises for the purpose of cleaning a canal. The actual damage was found to be ten dollars, but that by reason of the easement the value of the land was diminished by $750. Judgment was rendered for $750. Mackey v. Harmon, 34 Minn. 168; 24 N. W. Rep. 702. The measure of damages for a breach of the covenant against incumbrances resulting from a building restriction is the actual impairment of the value of the estate because of the incumbrance. Foster v. Foster, 62 N. H. 46. Where the incumbrance was the prior condemnation of a drainage ditch right of way through timber lands, the measure of damages was held to be the purchase price of the timber lost, with interest. Scott v. Tanner (Mo. App.) 208 S. W. 264. In Kellogg v. Malin, 62 Mo. 429; 11 Am. Rep. 426, the incumbrance complained of was a right of way through the warranted land. The court, after declaring that the grantee was entitled only to nominal damages where he had not suffered any actual injury from the incumbrance, and that if he removed the incumbrance he was entitled to recover what he paid for that purpose, if reasonable, continued: "When, however, the incumbrance has inflicted an actual injury upon the purchaser, the rule can only be generally stated to be that the damages are to be proportioned to the actual loss sustained. Thus, if the incumbrance be of a character which cannot be extinguished, such as an easement or servitude, an existing lease or the like, it is said that the damages are to be estimated by the jury according to the injury arising from its continuance. There is a good reason for the distinction. In case of an incumbrance by an ordinary lien or mortgage, the grantee may pay off the incumbrance at any time and free the premises, or the person who made the lien or mortgage may extinguish them, and the grantee may never be injured. But an easement or servitude is unextinguishable by any act of the parties, either grantor or grantee, and if its continuance is permanent the damages must be assessed accordingly." Whiteside v. Magruder, 75 Mo. App. 364. In Greene v. Creighton, 7 R. I. 10, it was held that the covenantor will not be liable for damages arising from the unfitness of the premises, by reason of the easement, for use in connection with adjoining premises, for which use the covenantee purchased the premises, the covenantor being ignorant of such intended use. Such damages are too remote. A party wall standing wholly on the warranted land is an incumbrance for which the grantee is entitled to more than nominal damages. Mohr v. Parmelee, 43 N. Y. S. C. 320. In Kostenbader v. Pierce, 41 Iowa, 204, where the incumbrance consisted of a railroad right of way through the premises, it was held that the appreciation in value of the remainder of the land could not be considered in estimating the damages to the covenantee. A decision to the contrary was made in Wadhams v. Swan, 109 Ill. 46. An annuity charged upon the premises in favor of a widow is not a permanent incumbrance entitling the purchaser to damages for actual cumbrance.[1] If the incumbrance consist of an unexpired lease of the premises, the whole purchase money cannot be recovered as damages.[2] In such a case it has been held that the annual value of the land, or the interest on the purchase money, is the proper rule of damages.[3] This, however, has been denied, and the better rule declared to be that the covenantee is entitled only to a just compensation for whatever injury he may have suffered, to be determined by the jury from all the circumstances of the case, for which purpose the annual value or annual interest on the purchase money may be taken into consideration.[4] If he has sustained no loss or injury on account of the incumbrance, he will be entitled to nominal damages only.[5] If the covenantee has been kept out of the estate by a life tenant, the measure of damages will be the value of the estate for the time that he has been deprived of its enjoyment.[6]

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injury to the estate. It is a pecuniary incumbrance, which will entitle him to damages only so far as he may have made payments thereon. Myers v. Brodbeck, 110 Pa. St. 198; 5 Atl. Rep. 662.

[1] Sutton v. Baillie, 65 Law Times Rep. 528. Bronson v. Coffin, 108 Mass. 175; 11 Am. Rep. 335. Streeper v. Abelin, 59 Mo. App. 485. Smith v. White, 71 W. Va. 639; 78 S. E. 378; Helton v. Asher, 135 Ky. 751; 123 S. W. 285; Tuskegee Land Co. v. Realty Co., 5 Ala. App. 499; 59 So. 557. The real measure of damages is the amount of actual injury to the premises, and not such sum as the grantee might be required to pay to remove the easement. Smith v. Davis, (Kans.) 24 Pac. Rep. 428.

[2] Rickert v. Snyder, 9 Wend. (N. Y.) 423.

[3] Rickert v. Snyder, 9 Wend. (N. Y.) 423. Porter v. Bradley, 7 R. I. 542. Moreland v. Metz, 24 W. Va. 137; 49 Am. Rep. 246. Barker v. Denning, 91 Kan. 485; 138 Pac. 573; Malsbary v. Jacobus, 88 Neb. 751; 130 N. W. 524. In O'Connor v. Enos, 56 Wash. 448; 105 Pac. 1039, it was held that the measure of the covenantee's damages was the reasonable rental value of the premises during the time the possession was withheld.

[4] Batchelder v. Sturgis, 3 Cush. (Mass.) 204, disapproving Rickert v. Snyder, supra. Brass v. Vandecar, (Nebr.) 96 N. W. Rep. 1035. The measure of damages is the rental value of the land for the unexpired term. Wragg v. Meade, 120 Iowa, 319; 94 N. W. Rep. 856. Estep v. Bailey, (Oreg.) 185 Pac. 227. In Hartman v. Stoll (Mich.) 171 N. W. 369, the damages were limited by the court to the amount paid by the covenantee to the tenant in consideration of his removal from the premises..

[5] Fishel v. Browning, 145 N. C. 71; 58 S. E. 759; Schwartz v. Black, 131 Tenn. 360; 174 S. W. 1146; L. R. A. Ann. 1915 D, 898; Ann. Cas. 1916 C, 1195, where the incumbrance complained of was a railway across the premises, which the court held to be a benefit, instead of injury, to the land.

[6] Christy v. Ogle, 33 Ill. 296.

The fair annual rent of the premises will, in the absence of evidence to the contrary, be taken to be that paid by the tenant in possession.[7] If the incumbrance consist of a present outstanding life estate it has been held that the value of that estate, as governed by the probable duration of the life of the tenant, is the measure of the plaintiff's damages, and that the jury may make use of approved tables of longevity in computing the damages.[8] It may be observed here that wherever, as in the case just mentioned, the covenantee is entitled to prospective as well as past damages for a breach of the covenant against incumbrances by which he is kept out of the estate, he must include both in his recovery. He cannot take judgment for the value of the estate up to the time of verdict, and after the estate has expired maintain another action to recover the value for the time intervening between the judgment in the first action and the expiration of the estate. There can be but one recovery for one breach of the covenant against incumbrances, and the judgment for the annual value of the estate accrued at that time would be a bar to any further action for the same breach.[9] Where the incumbrance complained of is an easement which has never been used, and from which the covenantee has suffered no real injury, it has been held that he can recover only nominal damages.[10] But the fact that an easement or servitude was extinguished without expense to the plaintiff before action brought, will not of necessity deprive him of the right to substantial damages. He may have been prevented from improving the estate, or may have been otherwise injured by the existence of the incumbrance. He is entitled to compensation for whatever actual damage he may have suffered.[11]

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[7] Moreland v. Metz, 24 W. Va. 137; 49 Am. Rep. 246.

[8] Mills v. Catlin, 22 Vt. 98.

[9] Rawle Covt. § 189. Taylor v. Hertz, 87 Mo. 660. But a judgment for nominal damages in an action for breach of the covenant against incumbrances is no bar to an action on a covenant of warranty, contained in the same conveyance, brought after the incumbrance was enforced and the plaintiff evicted. Donnell v. Thompson, 1 Fairf. (Me.) 170; 25 Am. Dec. 216.

[10] Rosenberger v. Keller, 33 Grat. (Va.) 493. Ensign v. Colt, 75 Conn. 111; 52 Atl. Rep. 829. Hunter v. Keightley, 184 Ky. 835; 213 S. W. 201, an unopened railroad right of way.

[11] Wetherbee v. Bennett, 2 Allen (Mass.), 428. HOAR, J., saying: "The incumbrance was a right of way over the land, which subsisted at the time of

If the easement affects the market value of the property, the covenantee is entitled to recover the difference between the value of the premises with and without the easement, though he has expended no money on account of the easement.[12]

Where the incumbrance consists of a restriction of the uses to which the premises may be put, and the grantee is made defendant to a suit to enforce the restriction, he will be entitled to recover on the covenant against incumbrances the expenses of his defense, including fair and reasonable attorney's fees. He will be entitled to recover what his attorney's services were reasonably worth, but nothing in excess of the value of such services.[13]

In a case in which the breach consisted of the existence of a restrictive covenant against the use of fire arms on the land, it was held that the covenantee was entitled to nominal damages only, in the absence of anything to show actual damages from the breach.[14]

Damages to other lands of the covenantor not embraced in the deed containing the covenant, cannot be considered.[15]

Notice to covenantor to defend. A judgment enforcing the incumbrance as against the covenantee is conclusive upon the

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the conveyance and for some time after. The defendant contended that the evidence showed that the plaintiff had never been disturbed in the enjoyment of his estate by any user of the way, and that the right of way had been extinguished without expense, and asked that the jury be instructed to return a verdict for nominal damages only, but the judge declined to give these instructions. It does not follow from these facts than no actual damage had been sustained. While the right of way lasted the plaintiff was precluded from using the part of the land covered by the way as fully as he might otherwise have done. He could not set a tree or a post or a building upon it, or sell or lease it to any person to whom such an incumbrance would be objectionable. It was an apparently permanent subtraction from the substance of the estate." But see Herrick v. Moore, 19 Me. 313, where it was held that if a country road, being an incumbrance on the land, was discontinued without expense to the plaintiff before he brought his action, he could recover only nominal damages.

[12] Herb v. Met. Hosp. & Disp., 80 N. Y. Supp. 552; 80 App. Div. 145.

[13] Charman v. Tatum, 66 N. Y. Supp. 275; 54 App. Div. 61. If the incumbrance enhances the market value of the property but decreases its rental value for a particlar use, the covenantee can recover only nominal damages. Tuskegee Land Co. v. Realty Co., (Ala.) 59 So. 557.

[14] Fraser v. Bentel, 161 Cal. 390; 119 Pac. 509; Ann. Cas. 1913 B, 1062.

[15] Smith v. White, 77 W. Va. 377; 87 S. E. 865.

covenantor in a case in which he neglects a notice and request by the covenantee to appear and defend the suit.[16]

§ 132a. **Statute of Limitations.** In some of the States it is held that inasmuch as the covenant against incumbrances is broken as soon as made if there is an incumbrance upon the property, the statute of limitations begins to run against an action upon the covenant from the time the deed was made.[17] But in those States in which it is held that a covenant against incumbrances runs with the land, the statute of limitations does not begin to run until the covenantee has sustained actual damages from the breach.[18]

§ 133. **PLEADING AND PROOF.** In assigning a breach of the covenant against incumbrances, it is not sufficient merely to negative the words of the covenant, alleging that the premises were not free from incumbrances, or that the defendant did not indemnify the plaintiff, and save him harmless from incumbrances; the plaintiff must go further and set forth the incumbrance which produces the breach;[19] that is, he must describe the incumbrance, giving name, date, amount and other particulars of description, but, of course, without reciting the instrument in so many words.[20] It is necessary that the incumbrance be substantially described, in order that the court may determine whether it be in fact an incumbrance.[21] It is not necessary to allege an eviction under the incumbrance.[22] If the declaration be upon a special or limited covenant, it will be fatally defective if it does not allege that the incumbrance complained of originated from, by, or under the grantor.[23] If the plaintiff has extinguished the incumbrance, he must aver that fact in the declaration;[24] and the declaration will be bad on demurrer if he fails to allege that he has not been reimbursed by the grantor.[25] Under a statute permitting the plaintiff to amend his declaration if he does not change the form or ground of his action, he may add a new count setting forth a new and distinct incumbrance.[26]

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[16] Post, § 175. Ballou v. Clark, (Iowa) 171 N. W. 682, where it was held, however, that the covenantor was not concluded as to the amount of damages awarded against the covenantee.

[17] Guerin v. Smith, 62 Mich. 369; 38 N. W. 906.

[18] Ante, § 114; Killilea v. Douglas, 133 Wis. 140; 113 N. W. 411; 126 Am. St. Rep. 938; 17 L. R. A. (N. S.) 1189; Hunt v. Marsh, 80 Mo. 396; Thompson v. Conran (Mo. App.) 181 S. W. 595; Maitlen v. Maitlen, 44 Ind. App. 559; 89 N. E. 966; Whitten v. Krick, 31 Ind. App. 577; 68 N. E. 694.

[19] Marston v. Hobbs, 2 Mass. 433; 3 Am. Dec. 61; Bickford v. Page, 2 Mass. 455. French v. Slack, 89 Vt. 514; 96 Atl. 6. Mills v. Catlin, 22 Vt. 98. Shelton v. Pease, 10 Mo. 473. If the facts set out in the complaint constitute a breach of the covenant against incumbrances as well as a breach of the covenant of warranty, the plaintiff is not, under the Code practice, bound to elect upon which breach he will proceed. Bruns v. Schreiber, (Minn.) 51 N. W. Rep. 120.

[20] Duval v. Craig, 2 Wh. (U. S.) 45. Morgan v. Smith, 11 Ill. 200. It would be unsafe to set forth the incumbrance *in hæc verba*, because if not accurately described, there would be a variance. In an action on a covenant against incumbrances where the breach alleged is an outstanding tax, a variance between the description of the premises contained in the deed and

The burden of proof will be on the plaintiff to establish the existence of the incumbrance,[27] and to show that it was a valid and subsisting lien at the time of the conveyance.[28]

The plaintiff must produce in evidence the deed containing the covenant against incumbrances. If the deed be in existence, he cannot show by parol testimony that it contains such a covenant.[29]

The remedy for a breach of a covenant against incumbrances is by action at law on the covenant, and not a suit in equity to compel the covenantor to satisfy and discharge the incumbrance.[30]

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that contained in the assessment roll is immaterial, provided the same land is adequately and particularly described in each, though by different words. Mitchell v. Pillsbury, 5 Wis. 410.

[21] Vorhis v. Forsyth, 4 Biss. (C. C.) 409.

[22] De Jarnette v. Dreyfus, 166 Ala. 138; 51 S. 932.

[23] Mayo v. Babcock, 40 Me. 142. The incumbrance complained of here was taxes on the premises. The declaration did not allege that they were assessed while defendant was the owner of the property.

[24] Ante, § 131. Pillsbury v. Mitchell, 5 Wis. 22. De Forest v. Leets, 16 Johns. (N. Y.) 122. The reason of this rule is, that inasmuch as no actual damage necessarily results from a breach of the covenant against incumbrances, it must, if sustained, be specially laid to prevent surprise.

[25] Kent v. Cantrell, 44 Ind. 452.

[26] Spencer v. Howe, 26 Conn. 200.

[27] Jerald v. Elly, 51 Iowa, 321; 1 N. W. Rep. 639.

[28] Abb. Tr. Ev. 520. Kirkpatrick v. Pearce, 107 Ind. 520; 8 N. E. Rep. 573, citing Cook v. Fuson, 66 Ind. 521, and other Indiana cases; Rife v. Glass Co., 42 Ind. App. 346; 85 N. E. 726.

[29] Patterson v. Yancey, 81 Mo. 379. The rule requiring the best evidence makes the production of the deed necessary.

[30] Hastings v. Hastings, 58 N. Y. Supp. 671; 41 App. Div. 540.

CHAPTER XIV.

COVENANTS OF WARRANTY AND FOR QUIET ENJOYMENT.

- **FORM.** § 134.
- **CONSTRUCTION AND EFFECT.** § 135.
- **QUALIFICATIONS AND RESTRICTIONS.** § 136.
- **WHEN IMPLIED.** § 137.
- **PARTIES BOUND AND BENEFITED.** § 138.
  - **Married women.** § 138-a.
  - **Heirs and devisees. Joint covenantors.** § 139.
  - **Personal representatives.** § 140.
  - **Municipal corporations.** § 140-a.
  - **Who may sue for breach of warranty.** § 141.

- **WHAT CONSTITUTES BREACH.**

  - **Tortious disturbances.** § 142.
  - **Eminent domain and acts of sovereignty.** § 143.

  - **Actual eviction.**

    - *General rule.* § 144.
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  - **Constructive eviction.**

    - *Inability to get possession.* § 146.
      - *Vacant and unoccupied lands.* § 147.
    - *Surrender of possession.* § 148.
      - *Hostile assertion of adverse claim.* § 149.
    - *Purchase of outstanding title.* § 150.
      - *Hostile assertion of adverse claim.* § 151.
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- **COVENANT OF WARRANTY RUNS WITH THE LAND.**

  - **General rule.** § 153.
  - **Assignee may sue in his own name.** § 154.
  - **Separate actions against original covenantor.** § 155.
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  - **Remote assignee may sue original covenantor.** § 159.
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- **MEASURE OF DAMAGES.**

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Where covenantee buys in paramount title. § 168.
Loss of term for years. § 169.
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Improvements. § 171.
Interest on damages. § 172.
Costs. § 173.
Counsel fees and expenses. § 174.
NOTICE OF HOSTILE SUIT AND REQUEST TO DEFEND. § 175.
PLEADING AND BURDEN OF PROOF. § 176.
CONVENANT FOR QUIET ENJOYMENT. § 177.

§ 134. **GENERAL OBSERVATIONS. FORM OF THE COVENANT.** The modern covenant of warranty is derived from the ancient common-law warranty, though it is neither in terms nor in effect the same. The latter was an agreement on the part of the feoffor or grantor to invest the feoffee or grantee with other lands of equal value in case he should be evicted from the demised premises.[1] It could be created only by deed[2] and by the use of the technical word *warrant,* the formula being, "I and my heirs will warrant."[3] It was a covenant real, that is, a covenant for the breach of which a personal action sounding in damages could not be maintained. The remedy was by "voucher to warranty," in which the feoffor was called upon to make good his covenant by rendering to the feoffee other lands equal in value to those lost; or by writ of *warrantia chartæ*[4] in which the same relief was afforded and, it seems, a recompense in money in case the feoffor were unable to make restitution in kind.[5] With the disuse of real actions warranty fell into disuse in England, and has been there entirely superseded by personal covenants for title, for the breach of which a personal action of covenant sounding in damages may be maintained.[6] And with the disuse of warranty these ancient remedies have also disappeared in that country.

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[1] Co. Litt. 365a. Stout v. Jackson, 2 Rand. (Va.) 142.

[2] Co. Litt. 386a.

[3] *Ego et hæredes mei warrantizabimus in perpetuum.* Bac. Abr. Warranty M. Tabb v. Binford, 4 Leigh (Va.), 140 (150); 26 Am. Dec. 317.

[4] Stout v. Jackson, 2 Rand. (Va.) 132.

[5] Paxson v. Lefferts, 3 Rawle (Pa.), 68, n., citing Fitzh. Nat. Brev. 135 H.; Id. 315.

[6] The covenant of warranty is not found among those enumerated by Sir Edward Sugden. See Sugd. Vend. (8th Am. ed.) ch. 14, § 3.

The modern covenant of warranty is peculiar to the American States, being unemployed in England,[7] where its place is taken by the covenant for quiet enjoyment. No case, it is believed, can be found in the American reports in which the covenant of warranty has been treated as a covenant real and judgment entered directing the covenantor to yield other lands to the covenantee equal in value to those whereof he had been evicted; nor any case in which *a voucher to warranty* or writ of *warrantia chartæ* has been maintained against the covenantor. These remedies have been deemed unsuited to the character of our institutions by many decisions in the older States, which declare that the remedy of the covenantee in case of eviction is by personal action for breach of the covenant of warranty.[8]

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[7] 3 Washb. Real Prop. 466 (660); Rawle Covts. (5th ed.) ch. 8.

[8] Townsend v. Morris, 6 Cow. (N. Y.) 123, a leading case. Chapman v. Holmes, 5 Halst. (N. J. L.) 24. Stout v. Jackson, 2 Rand. (Va.) 182. See the erudite opinions of GREEN *and* COALTER, JJ., in this case, in which the nature of the real actions of voucher and *warrantia chartæ*, and the practice therein, are set forth. Ricketts v. Dickens, 1 Murph. L. (N. C.) 343; 4 Am. Dec. 555; Jacocks v. Gillian, 3 Murph. L. (N. C.) 47. Booker v. Bell, 3 Bibb (Ky.), 173; 6 Am. Dec. 641. Jourdain v. Jourdain, 9 Serg. & R. (Pa.) 276; 11 Am. Dec. 24. Stewart v. West, 14 Pa. St. 336. The American doctrine and practice upon this point is fairly represented by the following extract from the case of Booker v. Bell, 3 Bibb (Ky.), 173; 6 Am. Dec. 641: "Where the conveyance was by feoffment with warranty, the ancient and usual remedy in case the feoffee was evicted was by voucher of *warrantia chartæ*. Whether in such a case an action of covenant would not also lie is not very clearly settled in the English books, so far as we have had an opportunity of examining them. It is, however, said to be the better opinion that it would not. But be that as it may, it does not necessarily follow that the same doctrine will hold good with regard to a warranty contained in a deed of bargain and sale, or other deed operating under the statute of uses. It is evident that prior to that statute, if any action would lie for a breach of the covenant of warranty contained in such a deed, it must have been an action of covenant. It could then have been but a personal covenant, and ought, we apprehend, to be still so considered. But there are other considerations which we think are entitled to greater weight upon this point. The covenant of warranty has ever since, and long before the establishment of this commonwealth, been uniformly treated as a personal covenant, upon which the action of covenant would lie. The invariable practice for so many years in a case where the balance hangs so nearly *in equilibris*, ought to turn the scale in favor of the action; more especially as the remedy by voucher is taken away by statute, and the writ of *warrantia chartæ* has become obsolete."

The modern covenant of warranty can, like the ancient warranty, be created only by deed.[9] A covenant in an instrument, in form a deed, but in fact a will, cannot be treated as a covenant of warranty, and, therefore, is not broken by a subsequent conveyance on the part of the maker of the instrument.[10] It is not necessary, however, that the covenant should appear in any particular part of the deed.[11] The four corners of the instrument are to be looked to in order to ascertain the intention of the parties. And it has been held that a covenant of warranty indorsed upon a deed is valid.[12] If a person, under a fictitious or assumed name, execute a conveyance, he will, under his real name, be bound by the covenants for title therein contained.[13]

The covenant of warranty as employed in America is either general, that is, against the claims of all persons whatsoever, or special, that is, against any claim by, through or under the grantor, or against the claims of a designated person or persons.[14] The covenant of general warranty is usually thus expressed: "The said (grantor) covenants that he, his heirs and personal representatives, will forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of all persons whomsoever." The covenant of special warranty is expressed in the same way, except the last clause, which is written " against the claims and demands of the (grantor), and all persons claiming or to claim by, through or under him."[15] In some of the States, these forms may, by statute, be greatly abbreviated, a covenant that the grantor " will warrant generally the property hereby conveyed," or a mere conveyance " with general warranty," being given the force and effect of a full covenant of warranty. In the same way, the grantor may " warrant specially " the property conveyed, or convey " with special warranty," and these forms will be given the same effect as a covenant of special warranty expressed at full length.[16] We have seen that at common law a warranty could not be created except by the use of the word *warrant.* But no such strictness prevails at the present day. While the foregoing forms are those usually employed, the law has not appropriated any particular form of words to the creation of a covenant; any words sufficient to show the intention of the parties will suffice as a covenant.[17] In some of the American States, there is employed what is called the covenant of non-claim. It is in substance a covenant by the grantor that neither he nor any one claiming under him will thereafter lay any claim to the granted premises. It has been frequently held to be the same in effect as a covenant of special warranty.[18]

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[9] Scott v. Scott, 70 Pa. St. 244.

[10] Scott v. Scott, 70 Pa. St. 244.

[11] Midgett v. Brooks, 12 Ired. L. (N. C.) 145, 148; 55 Am. Dec. 405.

[12] Platt Covts. 136. Coster v. Monroe Mfg. Co., 1 Gr. Ch. (N. J.) 478.

[13] Preiss v. Le Poidevin, 19 Abb. N. Cas. (N. Y.) 123.

[14] See § 67 note, for form of general and special covenants of warranty. A covenant to defend the title against any person claiming under the original grantee or patentee of the land is equivalent to a covenant of general warranty. Little v. Allen, 56 Tex. 133. The word "warrant" is not indispensable in a covenant of warranty. A covenant to "defend" the title against the claims of all persons, etc., is sufficient. Kirkendall v. Mitchell, 3 McL. (U. S.) 144. An interesting case arose in Wisconsin in which the question was whether the covenant was to be treated as general or special. A printed form for a special warranty deed was used, containing the usual clause that the grantor the peaceable possession of the premises "against every person claiming any part thereof by, through, or under ——, and no other ——, will forever warrant and defend." The deed was executed without filling these blanks. It was held that the court had no power either to fill the blanks, so as to make a special warranty, nor to disregard them and treat the language as a general warranty; and hence, that the clause was meaningless, and that the grantee, who had been evicted by the holder of a better title, was without relief. Miss. River Logging Co. v. Wheelihan, 94 Wis. 96; 68 N. W. Rep. 878.

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[15] If the warranty be special there is, of course, no breach if the covenantee be evicted under a title adverse to that of the covenantor. Sour Lake Co. v. Jackson, (Tex. Civ. App.) 130 S. W. 662.

[16] See Va. Code, 1887, § 2446.

[17] Platt Covts. 28; Rawle Covts. (5th ed.) § 22, notes. Johnson v. Hollensworth, 48 Mich. 140. Cole v. Lee, 30 Me. 392; citing 4 Cruise, 447, 449. Lant v. Norris, 1 Burr, 290. Buller's N. P. 156, and Cro. James, 391. Trutt v. Spott, 87 Pa. St. 339. In Midgett v. Brooks, Ired. L. (N. C.) 145; 55 Am. Dec. 405, the following language in the *habendum* of a deed, "free and clear from me, my heirs, etc., and from all other persons whatsoever," was held sufficient as a covenant for quiet enjoyment. The objection that a covenant of warranty is inoperative because the word "he" is omitted from the blank space in which it should have been written preceding the words " will forever defend," etc., is frivolous and untenable. Peck v. Houghtaling, 38 Mich. 127. But see Bowne v. Wolcott, (N. Dak.) 48 N. W. Rep. 426, and Thayer v. Palmer, 86 Ill. 477. An agreement to make a general warranty deed is performed by a deed containing a recital that the grantor " will forever warrant and defend the title," etc. 4 Kent Com. 492; Athens v. Nale, 25 Ill. 198; Caldwell v. Kirkpatrick, 6 Ala. 60; 41 Am. Dec. 36. The following language in a deed, " to have and to hold the said land unto the said grantee, his heirs and assigns forever as a good and indefeasible estate in fee simple," does not amount to a covenant of warranty. Wheeler v. Wayne Co., (Ill.) 24 N. E. Rep. 625.

§ 135. **CONSTRUCTION AND EFFECT.** In a number of the States the covenant of warranty includes by virtue of statutory provision or judicial construction all the other covenants for title.[19]

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[18] Gee v. Moore, 14 Cal. 472; Kimball v. Semple, 25 Cal. 452; Morrison v. Wilson, 30 Cal. 348. Cole v. Lee, 30 Me. 392. Newcomb v. Presbrey, 8 Met. (Mass) 406; Miller v. Ewing, 6 Cush. (Mass.) 34; Gibbs v. Thayer, 6 Cush. (Mass.) 33.

[19] So in Iowa, Funk v. Creswell, 5 Iowa, 62; Van Wagner v. Van Nostrand, 19 Iowa, 422, and in South Carolina, Evans v. McLucas, 12 S. C. 56. Butte v. Riffe, 78 Ky. 352; Smith v. Jones, (Ky.) 31 S. W. Rep. 475. Messer v. Oestrich, 52 Wis. 693, 10 N. W. Rep. 6. In Ohio a covenant of warranty is by statute made to include a covenant of seisin. But, if the deed contain a covenant of warranty and a covenant of seisin the covenantee cannot recover for a breach of the warranty without averring an eviction. Innes v. Agnew, 1 Ohio, 389. Mr. Rawle closes his discussion of what constitutes a breach of the covenant of warranty with the following observations, which will be found pertinent to the subject-matter of the text above: "In reviewing the numerous cases upon the subject of what constitutes an eviction within the covenant of warranty it seems proper to recur to the remark, which has elsewhere been made in the course of this treatise, that covenants for title should not and cannot be regulated in all cases by the artificial and technical rules which properly govern the law of real estate. Reference may be had, therefore, not only to the intention of the parties as expressed in the conveyance which contains the covenants, but also to the local practice of conveyancing itself. In those parts of this country, if any such exist, where the refinements of English conveyancing prevail and the covenants for title are inserted with exactness and fulness, the omission of a covenant for seisin or against incumbrances would justify the inference that the terms of the contract did not give the purchaser the peculiar benefit which such covenant strictly confers; and the more exactly and particularly the covenants were expressed the more rigid would be their construction. So far, however, from such being the practice of conveyancing in this country it is rarely, if ever, the case that covenants for title, which are inserted, are expressed otherwise than very briefly. So in some of the States long-settled usage has caused the omission of all the covenants for title except that of warranty, which, by common practice at least, is looked upon as containing all that is necessary to assure the title to the purchaser. Where such has become the settled practice of a State it is suggested with great deference that technical rules based upon a different custom of conveyancing lose, to some extent, their application, and to say that 'the purchaser should have protected himself by other covenants' is to apply a hard rule in States where those other covenants are never employed." Covenants for Title (5th ed.), § 154.

But in most of the States it is regarded only as a covenant against eviction by one claiming under a better title. It is not to be denied, however, that the popular notion of a covenant of warranty is that it is an ample protection against any imperfection in the grantor's title. But this covenant is not a warranty that the title is good. "It has been thought by country scriveners, and even by members of the profession, to contain the elements of all the rest; but the terms of it are too specific to secure the grantee against every disturbance by those who may have a better title. It binds the grantor to defend the possession against every claimant of it by right, and it is consequently a covenant against eviction only."[20] The purchaser should require, as a matter of abundant caution, all of the six covenants for title, for there may be occasions when he would be entitled to relief under some one of these when he would not be entitled to relief under the covenant of warranty.[21]

Independently of custom or statutory provision, the covenant of warranty includes a covenant against incumbrances, in the sense that an eviction under an incumbrance is as much a breach of the covenant of warranty as if the covenantee had been evicted by one claiming under a superior title. In such a case the purchaser is as fully protected by the covenant of warranty as he would be by a covenant against incumbrances.[22] But it seems that an agreement to execute a conveyance with a covenant against incumbrances would not be performed by executing a deed with general warranty.[23] A judgment for nominal damages for a breach of the covenant against incumbrances is no bar to a suit for breach of warranty after an eviction under the incumbrance.[24] The general rule, therefore, is, unless varied by statute or custom in particular localities, that the covenant of warranty does not include a covenant against incumbrances.[25] The ancient common-law warranty extended only to a freehold estate, that is, an estate of an indeterminate duration. The same rule has been recognized as applicable to the modern warranty.[26] Practically, however, it would seem unimportant, as a covenant for quiet enjoyment is always implied in a conveyance for years, the only estate less than freehold that is of any consequence.[27]

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[20] GIBSON, C. J., in Dobbins v. Brown, 12 Pa. St. 79. Oliver v. Bush, 125 Ala. 534; 27 So. Rep. 923.

[21] As in Wash. City Savings Bank v. Thornton, 83 Va. 157; 2 S. E. Rep. 193.

[22] King v. Kerr, 5 Ohio, 158; 22 Am. Dec. 777. Post, § 355.

[23] Bostwick v. Williams, 36 Ill. 65; 85 Am. Dec. 385. See, also, Findlay v. Toncray, 2 Rob. (Va.) 374, 379.

[24] Donnell v. Thompson, 1 Fairf. (Me.) 170; 25 Am. Dec. 216; Smith v. Wahl, 88 N. J. L. 623, 97 Atl. 261.

The effect of a covenant of warranty as an estoppel is elsewhere considered in this work.[28]

The covenant of warranty is intended as much for the protection of the purchaser against known defects of title as against those which are latent and unknown. It is, therefore, no defense to an action on the covenant that the purchaser knew, at the time it was taken, that there was an adverse claim to the land,[29] or that an easement in the land was being enjoyed by a third party.[30] But a covenant of warranty will not embrace incumbrances known to the grantor at the time of the purchase, and which he agreed to pay off as a part of the purchase money. Parol evidence will, in some of the States, be admitted to show such an agreement.[31] A mere sale and conveyance, however, with general warranty, subject to a prior mortgage, will not of itself be construed as an agreement by the grantee to pay the mortgage as a part of the purchase money.[32]

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[25] See ante, § 119.

[26] Co. Litt. 389a; Shep. Touch. 184; Mitchell v. Warner, 5 Conn. 497.

[27] Post, "Implied Covenants," § 137.

[28] Post, § 216.

[29] Barlow v. Delaney, 40 Fed. Rep. 97. Ballard v. Burroughs, 51 Iowa, 81; 50 N. W. Rep. 74. Osburn v. Pritchard, 104 Ga. 195; 30 S. E. Rep. 656; Goodwin v. Maxwell, 106 Ga. 194; 32 S. E. Rep. 114; McCall v. Wilkes, 121 Ga. 722; 49 S. E. Rep. 722; Allen v. Taylor, 121 Ga. 841; 49 S. E. Rep. 799; Bailey v. Murphy, (Colo. App.) 74 Pac. Rep. 798; Batterton v. Smith, 3 Kans. App. 419; 43 Pac. Rep. 275; Anthony v. Rockefeller, (Mo.) 74 S. W. Rep. 648. Rea v. Minkler, 5 Lans, (N. Y.) 196, where the covenant was taken with knowledge that there was a private right of way over the premises. Abernathy v. Boazman, 24 Ala. 189. In this case the grantor was himself already in possession under an adverse claimant. In Tallmadge v. Wallis, 25 Wend. (N. Y.) 115, the reason for the rule was thus explained by Chancellor WALWORTH: "It is a well-known fact that land is frequently conveyed with general warranty, which is warranty against eviction only, when both parties to the sale perfectly understand that the title is doubtful, or that there is some outstanding contingent interest which may, perhaps, at a future period, be the means of evicting the purchaser; and to protect the purchaser, and enable him to recover against the vendor in case of eviction, the covenant of warranty is inserted in the deed."

Recent cases. Callanan v. Keenan, 224 N. Y. 303, 121 N. E. 376; New York, etc., Coal Co. v. Graham, 226 Pa. 348, 75 Atl. 657; Smith v. Ward, 66 W. Va. 190, 66 S. E. 234, 33 L. R. A. (N. S.) 1030; Joiner v. Trust Co., 33 Okl. 266, 124 Pac. 1073; Sanders v. Boynton, (S. C.) 98 S. E. 854; Mayer v. Wooten, 46 Tex. Civ. App. 327, 102 S. W. 423; Coleman v. Luetcke (Tex. Civ. App.) 164 S. W. 1117; Scott v. Tanner (Mo. App.) 208 S. W. 264.

Want of consideration is no answer to an action for breach of the covenant of warranty.[33]

A covenantee who has been evicted from the demised premises, and who has recovered damages for breach of the warranty, is not bound to reconvey the title; if justice should require a reconveyance, it should be enforced by making the collection of the judgment conditional upon a reconveyance.[34]

It will be seen hereafter that the covenant of warranty does not amount to a covenant that the title is indefeasible, and that it is broken only by an eviction of the covenantee. Hence, it follows that the statute of limitations will not begin to run upon the covenant until an eviction has occurred, there being up to that time no cause of action on the covenant.[35]

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[30] Mahoney v. Simms, 148 N. Y. Supp. 1069, 86 Misc. Rep. 484.

[31] Post, §§ 181, 269; ante, § 121. Allen v. Lee, 1 Ind. 58; 48 Am. Dec. 352; Pittman v. Conner, 27 Ind. 237. In Ross v. Davis, 122 N. C. 265; 29 S. E. Rep. 338, it was held that one who took a deed with general warranty from a widow as life-tenant and her daughter as remainderman, with notice of the life-tenancy, and who was evicted after the expiration of the life-tenancy of the widow, could not recover on the warranty. In effect, the court held that her warranty extended only to her interest in the estate. In Menasha Woodenware Co. v. Nelson, 53 Wash. 160, 101 Pac. 720, parol evidence was admitted to show that the covenantee knew the condition of the title, and, as part of the consideration of the deed, undertook himself to remedy the defects.

[32] Aufricht v. Northrup, 20 Iowa, 61.

[33] Mather v. Corliss, 103 Mass. 568, 571; Comstock v. Son, 154 Mass. 389; 28 N. E. Rep. 296. The covenantor is estopped to set up the defense that there was no consideration for the warranty, and that he executed the deed merely as a matter of accommodation to others. Cornelius v. Kinnard, 157 Ky. 50, 162 S. W. 524.

[34] Ives v. Niles, 5 Watts (Pa.) 323.

[35] Crisfield v. Storr, 36 Md. 129; 11 Am. Rep. 480. Post, this ch., § 144.

As a consequence of the rule that all prior agreements of the parties respecting the title are merged in a conveyance with covenants for title, the grantor, when sued for a breach of the covenant of warranty, will not be permitted to show an agreement by the purchaser, prior to the conveyance, by which he was to share the expense of buying in an outstanding claim to a part of the premises, if it should be asserted.[36]

It is no defense to an action on the warranty that land to which the grantor had no title was, by mistake, included in the deed.[37]

The United States, claiming under a defective scrip entry of public lands, is a "person," within the meaning of a warranty against all persons lawfully claiming the land.[38]

Warranty does not extend to quantity. A covenant of warranty in a conveyance of lands by metes and bounds or within certain designated limits, and as containing a certain number of acres, is not broken if the lands described do not contain the number of acres mentioned.[39] The covenant of warranty does not extend to quantity. Such a case is obviously different from one in which the grantee is unable to get possession of, or is evicted from, a portion of the lands within the given bounds.[40] A deficiency in the acreage, when the sale was by the acre, is the result either of fraud by the vendor or mistake of the parties; in either of which cases the purchaser has his remedy in equity.[41] A breach of warranty can only be with respect to the precise lands conveyed by the deed, and parol evidence will be inadmissible to show that certain lands of which the plaintiff has been evicted were included in his purchase and should have been embraced in the deed.[42] And if a deed convey a lot with warranty

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[36] Post, § 181; ante, § 121. Beaseley v. Phillips, 10 Ind. App. 182; 50 N. E. Rep. 488.

[37] Thompson v. Hill, 137 Ga. 308, 73 S. E. 640.

[38] Giddings v. Holter, 19 Mont. 263; 48 Pac. Rep. 8.

[39] Rawle Covts. (5th ed.) § 297. Ricketts v. Dickens, 1 Murph. (N. C.) 343; 4 Am. Dec. 555; Powell v. Lyles, 1 Murph. (N. C.) 348, HALL, J., dissenting; Huntley v. Waddill, 12 Ired. L. (N. C.) 32. Dickinson v. Voorhees, 7 W. & S. (Pa.) 357. Here there was a deficiency of 445 acres out of a tract of 3,235 acres conveyed with warranty. Allison v. Allison, 1 Yerg. (Tenn.) 16; Miller v. Bentley, 5 Sneed (Tenn.), 674. Daughtrey v. Knolle, 44 Tex. 455; Doyle v. Hord, 67 Tex. 621; 4 S. W. Rep. 241. Sine v. Fox, 33 W. Va. 521; 11 S. E. Rep. 218; Burbridge v. Sadler, 46 W. Va. 39; 32 S. E. Rep. 1028; Adams v. Baker, 50 W. Va. 249; 40 S. E. Rep. 356; Maxwell v. Wilson, 54 W. Va. 495; 46 S. E. Rep. 349; Gerhart v. Spalding, 1 N. Y. Supp. 486; Gunn v. Moore, 61 N. Y. Supp. 519; 46 App. Div. 358; Fitzpatrick v. Crowther, 100 Kan. 355, 164 Pac. 300; Mosteller v. Astin, 61 Tex. Civ. App. 455, 129 S. W. 1136; Hannis v. Scholz (Tex. Civ. App.) 120 S. W. 1056; Holland v. Ashley, (Tex. Civ. App.) 158 S. W. 1032; Brown v. Yoakum (Tex. Civ. App.) 170 S. W. 803; Nicholson v. Slaughter Co., (Tex. Civ. App.) 217 S. W. 716; Gulf Coal Co. v. Musgrove, 195 Ala. 219; 70 So. 179. A covenant that the grantor was seized of the land, described in the deed as containing fifty acres, refers to the quantity and quality of the grantor's estate in the land, and not to the quantity of the land, and therefore, is not broken if the tract contain less than fifty acres. Austin v. Richards, 7 Heisk. (Tenn.) 665. A covenant of warranty is not qualified by a phrase

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such as "being the same land conveyed by A. to me;" such phrase is intended merely as an aid to identifying the land. Shaw v. Bisbee, 83 Me. 400; 22 Atl. Rep. 361. Where a conveyance is made by course and distance, and a covenant therein extends to the entire quantity of land, a further description of the land in the deed as a tract which had passed to the grantor by certain deeds will not restrain the warranty to the original bounds of the tract. Steiner v. Baughman, 12 Pa. St. 106. If the purchaser gets all of the land covered by the description in his deed, it is no breach of the covenant of warranty that the deed does not embrace all the land within the boundaries pointed out by the grantor. Littleton v. Green, 130 Ga. 692, 61 S. E. 593. Compare the following cases: Davis v. Fair, (Tex. Civ. App.) 152 S. W. 218; Withers v. Crenshaw, (Tex. Civ. App.) 155 S. W. 1189; Moore v. Johnson, 87 Ala. 220; Henofer v. Realty Co. (N. C.) 101 S. E. 265. It seems to have been assumed in Burton v. Cowles, 156 Ky. 435, 160 S. W. 782, that an action would lie to recover the purchase money paid, to the extent of the deficiency, as money paid under a mistake of fact. In Jeffords v. Driesbach, 168 Mo. App. 577, 153 S. W. 274, it was held that where property is conveyed as a numbered lot on a map or plat of an addition to a city, there is a breach of the covenant unless the grantee gets the full amount of land called for on the map or plat.

[40] Houston v. Cameron Co. (Tex. Civ. App.) 135 S. W. 699.

[41] Broadway v. Buxton, 43 Conn. 282. Smith v. Fly, 24 Tex. 345; O'Connell v. Duke, 29 Tex. 299. Bennett v. Latham, 18 Tex. Civ. App. 403; 45 S. W. Rep. 934; Stark v. Homuth, (Tex. Civ. App.) 45 S. W. Rep. 761; Barnes v. Lightfoot, (Tex. Civ. App.) 62 S. W. Rep. 564.

[42] Tymason v. Bates, 14 Wend. (N. Y.) 671. It seems that this rule does not apply in Texas. Where the grantor at the time of the sale, points out the boundaries of the tract sold, as established by natural or artificial monuments, the warranty in his deed applies to the very land so pointed out by him, though the calls in his deed to the covenantee do not include a strip on one of the sides of the land as pointed out. Meade v. Jones, (Tex. Civ. App.) 35 S. W. Rep. 310. Meade v. Boone, (Tex. Civ. App.) 35 S. W. 483. King v. Bressie, (Tex. Civ. App.) 32 S. W. Rep. 729. And in Kentucky it has been

without reference to or description of the buildings thereon, the fact that a house on the lot projects over, and is situated partly on an adjoining lot, so that the grantee is obliged to buy the adjoining lot to save the house, does not amount to a breach of the covenant of warranty.[43]

Nor, if the deed embraces all the land within the boundaries pointed out by the grantor to the grantee, is there a breach of the warranty if the description in the deed embraces other land in the possession of a third party to which the grantor had no title.[44]

§ 136. **QUALIFICATIONS AND RESTRICTIONS OF THE COVENANT OF WARRANTY.** The parties may, of course, so frame the covenant of warranty as to limit or restrict the liability of the covenantor. No difficulty arises where the only covenant in the conveyance is restricted and limited in express terms. But sometimes, and this may well happen where printed forms of conveyances are used and the blanks are filled by unskilled persons, a deed will be found to contain a general covenant, followed by a special covenant, or by language inconsistent with or restrictive of the general covenant. Under such circumstances the following rules have been formulated by Sir Edward Sugden for the construction of the instrument:[45] (1) An agreement in any part of a deed that the covenants shall be restrained to the acts of particular persons will be good, notwithstanding that the covenants themselves are general and unlimited. (2) General covenants will not be cut down unless the intention of the parties clearly appears.[46] (3) Where restrictive words are inserted in

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held that a material deficiency in the quantity of land conveyed, is a breach of the covenant of warranty. Patton v. Schneider, 23 Ky. L. Rep. 2190; 66 S. W. Rep. 1003.

[43] Burke v. Nichols, 34 Barb. (N. Y.) 430; S. C., 2 Keyes (N. Y.), 670.

[44] Morgan v. Godbee, 146 Ga. 352, 91 S. E. 117.

[45] 2 Sugd. Vend. (14th ed.) 279 (605); Rawle Covts. (5th ed.) § 289.

[46] 2 Sugd. Vend. (14th ed.) 605; Rawle Covts. (5th ed.) § 295. Everts v. Brown, 1 D. Chip. (Vt.) 96; 1 Am. Dec. 699. Black v. Barton, 13 Tex. 82. Where a deed of bargain and sale, written on a printed blank, contained a proviso, following immediately after the covenants, that the premises should be kept for the manufacture of lumber, it was held that the proviso applied to the grant only, and not to the intervening covenants for title. Reed v. Hatch, 55 N. H. 336.

the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct.[47] (4) Where the *first* covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent, or unless there appear something to connect the general covenant with the restrictive covenant, or unless there are words in the covenant itself amounting to a qualification.[48] As, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other, a preceding covenant will not enlarge a subsequent limited covenant. (6) Where the covenants are of divers natures and concern different things, restrictive words added to one will not control the generality of the others, although they all relate to the same land.

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[47] Browning v. Wright, 2 Bos. & Pul. 13; Howell v. Richards, 11 East, 633; Whallon v. Kauffman, 19 Johns. (N. Y.) 97. Davis v. Lyman, 6 Conn. 252. Duval v. Craig, 2 Wh. (U. S.) 45. See, also, Nind v. Marshall, 1 Brod. & Bing. 319. Dickinson v. Hoomes, 8 Grat. (Va.) 353. Campbell v. Watkins, 105 Va. 824, 54 S. E. 989. A formal covenant of warranty will not be cut down by the use of doubtful expressions. Thus, where such a covenant was followed by the words "according to a mortgage this day assigned" to the grantee, the meaning of which, upon all the facts of the case, was left in doubt, the court held that they did not limit or control the preceding covenant. Cornish v. Capron, 136 N. Y. 232; 32 N. E. Rep. 773. Where the grantees covenanted that they would "warrant specially the land hereby conveyed," and further, in the same clause, "that they have the right to convey the said land to said grantees," it was held that the special warranty limited the operation of the covenant of right to convey. Allemong v. Gray, 92 Va. 216; 23 S. E. Rep. 298.

[48] Sugd. Vend. (14th ed.) 606 (280); Rawle Covts. (5th ed.) § 291. Rowe v. Heath, 23 Tex. 619. Sheets v. Joyner, (Ind.) 38 N. E. Rep. 830. Morrison v. Morrison, 38 Iowa, 73. Peters v. Grubb, 21 Pa. St. 460. Atty.-Gen. v. Purmort, 5 Paige Ch. (N. Y.) 620. See, also, Cole v. Hawes, 2 Johns. Cas. (N. Y.) 203. Cornell v. Jackson, 3 Cush. (Mass.) 506; Phelps v. Decker, 10 Mass. 267. Joiner v. Trust Co., 33 Okl. 266, 124 Pac. 1073; Bender v. Fromberger, 4 Dallas (Pa.), 440, where it was held that a special warranty in a deed would not control a preceding general warranty, if it appeared from the face of the deed that a general warranty was intended. A special covenant to warrant and defend the premises against the grantor's taxes, and against the grantor's own acts, does not limit a prior general covenant implied from the words "convey and grant." Jackson v. Grun, 112 Ind. 341; 14 N. E. Rep. 89. The rule stated in the text has been held applicable to a case in which the general covenant was that implied from the operative words of conveyance "grant, bargain, and sell." Miller v. Bayless, 194 Mo. 637, 92 S. W. 483; Wright v. Boram, 190 Mo. App. 336, 177 S. W. 324.

If the grantor intends to limit his liability for the title conveyed, he must either convey without warranty, or insert special covenants in the deed restricting his liability. He cannot defend an action for breach of warranty on the ground that he purchased from one with whose title he was unacquainted, and intended to convey to the plaintiff only such title as he thus acquired.[49]

If the warranty be limited to a certain number of acres and the covenantee remains in peaceable possession of that number, it is no breach of the warranty that a part of the tract conveyed is in the possession of an adverse claimant.[50]

Where a deed conveys the grantor's right, title and interest, though it contains in general terms a covenant of general warranty, the covenant is regarded as restricted and limited to the estate conveyed, and not as warranting generally the title to the land described. The covenant of warranty is intended to defend only what is conveyed, and cannot enlarge the estate conveyed.[50a] But if the conveyance be of the "right, title and interest" of the grantor in certain lands, and the grantor covenants specially to warrant and defend the premises against all lawful claims arising under himself, the covenant will be construed to refer to the lands described in the deed, and not to the right and title of the grantor.[51] If general covenants are entered into contrary to the intention of the parties, special, limited or restricted covenants having been agreed upon, a court of equity will correct the mistake, and reform the instrument.[52]

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[49] Chitwood v. Russell, 36 Mo. App. 245.

[50] Folk v. Graham, 82 S. C. 66, 62 S. E. 1106, citing Morris v. Owens, 3 Strobh. (S. C.) Law 203 and Whalon v. Kauffman, 19 Johns. (N. Y.) 97.

[50a] Washb. Real Prop. 665; Rawle Covt. (5th ed.) § 298; Wait's Act. & Def. 391. Blanchard v. Brooks, 12 Pick. (Mass.) 67; Allen v. Holton, 20 Pick. (Mass.) 463; Sweet v. Brown, 12 Met. (Mass.) 175; 45 Am. Dec. 243; Stockwell v. Couillard, 129 Mass. 231. Ballard v. Child, 46 Me. 153; Bates v. Foster, 59 Me. 158; 8 Am. Rep. 406; Blanchard v. Blanchard, 48 Me. 174; Kimball v. Semple, 25 Cal. 452; Adams v. Ross, 30 N. J. L. 510. McNear v. McComber, 18 Iowa, 14; Young v. Clippinger, 14 Kans. 148; White v. Brocaw, 14 Ohio St. 339; Lamb v. Wakefield, 1 Sawy. (U. S.) 251; Hope v. Stone, 10 Minn. 141 (114); McDonough v. Martin, 88 Ga. 675, 16 S. E. 59, 18 L. R. A. 343; White v. Stewart & Co., 131 Ga. 460, 62 S. E. 590; Hull v. Hull, 35 W. Va. 155; 13 S. E. Rep. 49.

[51] Loomis v. Bedel, 11 N. H. 74; Mills v. Catlin, 22 Vt. 106. Here the language of the deed was "All the land which I own by virtue of a deed dated * * * from Asa S. Mills, recorded * * * being all my right and title

The covenant of general warranty implied from the use of the words "grant, bargain, and sell," will be restricted by a recital of an express understanding that the grantors warrant only against the claims of themselves, their heirs, or those through whom they claimed. In such case the warranty will be treated as special, and not general.[53] If the deed, by the granting clause, expressly provides that the grant is subject to the rights of grantees under previous deeds, such provision applies to and limits the operation of full covenants of warranty by which it is followed.[54]

§ 136-a. *Exception of incumbrance.* It has been held that the exception of an incumbrance, in a covenant against incumbrances, does not restrict the operation and effect of a subsequent covenant of warranty.[55] There is a conflict of authority upon the point, but the better opinion would seem to be that the exception extends to the covenant of warranty also,[56] in view of the rule that restrictive words inserted in the first of several covenants having the same object, will be construed to extend to all the covenants, though they are distinct;[57] at least such would be the fair con-

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to the land comprising 50 acres off of the east end of lot No. 75 in said town * * * to have and to hold the above-granted and bargained premises," etc. To this were added all the covenants for title, and it was held that the thing granted was the land itself, and not merely such title to the land as the grantor had, and that he was liable for a breach of the covenants. Clement v. Bank, 61 Vt. 298; 17 Atl. Rep. 717. In Texas it is held that words conveying all the grantor's "right, title, and interest" "to have and to hold the premises" followed by a general warranty, constitute a warranty deed. Garrett v. Christopher, 74 Tex. 453; Bumpass v. Anderson, (Tex. Civ. App.) 51 S. W. Rep. 1103; Kempner v. Lumber Co., (Tex. Civ. App.) 49 S. W. Rep. 412.

[52] 2 Sugd. Vend. (14th ed.) 609 (285); Rawle Covts. (5th ed.) § 296.

[53] Miller v. Bayless, 101 Mo. App. 487; aff'd. 74 S. W. Rep. 648.

[54] Koch v. Hustis, 113 Wis. 604; 89 N. W. Rep. 838.

[55] McLane v. Allison, (Kans. App.) 53 Pac. Rep. 781, citing Bennett v. Keehn, 67 Wis. 154; 30 N. W. Rep. 112; Manuf'g Co. v. Zellner, 48 Minn. 408; 51 N. W. Rep. 379; Welbon v. Welbon, 109 Mich. 356, 67 N. W. Rep. 338; Smith v. Hogue (N. D.) 123 N. W. 827.

[56] Jackson v. Hoffman, 9 Cow. (N. Y.) 271.

[57] 2 Sugd. Vend. (14th ed.) 279 (605).

struction of the exception where the purchaser expressly assumes the payment of the incumbrance. It is not reasonable to suppose that the parties having exempted the grantor from a liability by a provision to which their attention was specially directed, intended to reimpose that liability upon him by a subsequent warranty necessary for the protection of the grantee against other contingencies.

§ 136-b. *Merger of prior agreements in the covenant.* The general rule is that all prior or contemporaneous agreements between the parties respecting the title are merged in the covenants for title; and parol evidence is inadmissible to show that particular claims or incumbrances were excluded by the parties from the operation of the covenant of warranty.[58]

§ 137. **IMPLIED COVENANTS.** At common law certain covenants were implied from the word *"dedi"* (I have given) in a feoffment, and from the word *"demisi"* (I have demised) in a lease, but no covenant was implied from the words of grant in conveyances operating under the statute of uses, such as a deed of bargain and sale, or a lease and release.[59] In the United States, the feoffment is no longer in use, its place being supplied by the deed of bargain and sale. Hence, much of the learning upon the subject of implied covenants for title is with us practically obsolete. The general rule, in the absence of any statutory provision on the subject, is, that no warranty is implied in the conveyance of real property,[60] and, especially, no warranty is implied from a mere recital in a deed.[61] In many of the States there are statutes which give to certain words of conveyance, such as "grant, bargain and sell," effect as covenants of warranty.[62] In others, implied covenants are expressly abolished, except, perhaps, in the case of leases.[63] In others, where the common law remains unchanged by statute, it is apprehended that its rules in this regard are still law, but practically a dead letter by reason of the disuse of those conveyances from which the implication springs.[64]

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[58] Post, §§ 181, 269.

[59] Rawle Covts. for Title (5th ed.), § 282.

[60] 3 Washb. Real Prop. 447; Thompson v. Schenectady R. Co., 124 Fed. 274.

[61] O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873.

[62] So in Delaware (Rev. Stat. 1874, p. 500), Indiana (Rev. Stat. 1881, § 2927), Wisconsin (Rev. Stat. 1878, § 2208), and in Missouri; but the deed must purport to convey an indefeasible estate in fee simple. Wildemeyer v. Loebig, 222 Mo. 540, 121 S. W. 75. The statute does not apply where the deed contains a statement of claims against which the title is warranted. Doak v. Smith, 137 Ark. 509, 208 S. W. 795. No covenant of warranty is implied from the words "grant, bargain, and sell" in a quitclaim deed. Bald-

As to covenants implied by force of statute, it is deemed inexpedient to enter into any discussion of their form and incidents, since they vary in the different States, and the decisions respecting them must be chiefly of mere local application. It is to be observed, however, that if a deed contains covenants for title in the usual form, they will supersede those implied under the statute from the words "grant, bargain and sell," or from other words of like import.[65] A covenant of general warranty will not be implied from the recitals of a deed, when the deed contains an express covenant of special warranty.[66] A covenant of warranty will not be implied from the word "grant," where a statute

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win v. Drew, (Tex. Civ. App.) 180 S. W. 614. And in the absence of a statutory provision, no covenants for title are implied from those words. Mackintosh v. Stewart, 181 Ala. 328, 61 So. 956. In a number of the other States there are statutes which give to the words "grant, bargain and sell" or the like, the effect of covenants for seisin and against incumbrances.

[63] Mich. How. Amend. Stat. § 5656. Minn. Rev. St. 1881, p. 535. Oregon, Deady's Laws, p. 647. New York, 3 Rev. St. (5th ed.) p. 29, § 160.

[64] In North Carolina it is held that there is no implied warranty in the sale of realty, and hence that the vendee of standing timber, without express warranty of title, could not recover the purchase money on failure of the title. Zimmerman v. Lynch, 130 N. C. 61; 40 S. E. Rep. 841, citing Foy v. Houghton, 85 N. C. 168; Huntley v. Waddell, 34 N. C. 32. Neither is there any implied warranty of the title to mortgaged premises by the mortgagor on foreclosure sale. Barden v. Stickney, 130 N. C. 62; 40 S. E. Rep. 842.

[65] Douglas v. Lewis, 131 U. S. 75; Weems v. McCaughan, 7 Sm. & M. (Miss.) 472; 45 Am. Dec. 314; Finley v. Steele, 23 Ill. 56; Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127; Snider v. Van Petten, 180 Ill. App. 677; Covenants implied by statute from operative words of conveyance are to be harmonized, if possible, with express covenants in the deed, and allowed to stand, unless it clearly appears that the express covenants were intended to limit or restrict those implied by statute. Polak v. Matson, 22 Idaho, 727, 118 Pac. 89.

[66] Buckner v. Street, 15 Fed. Rep. 365. McDonough v. Martin, 88 Ga. 675; 16 S. E. Rep. 59, 18 L. R. A. 343; White v. Stewart, 131 Ga. 460, 62 S. E. 590.

gives that effect to the words "grant, bargain and sell,"[67] nor from the word "convey," when the words "grant, bargain and sell" are not employed,[68] nor from the words "warrant and defend" when the statutory form "fully warrant and defend" is not used.[69] The statutory covenants implied from the words "grant, bargain and sell," are as operative in a deed of trust to secure payment of a debt, as in an ordinary fee simple deed.[70]

No covenant for title to realty can be implied from the operative words of conveyance in a deed which purports to convey only personal property.[71]

If a decree for specific performance operates, by its terms, as a conveyance, such conveyance will have the effect of a warranty deed.[72]

Covenants implied in a lease. As to covenants implied at common law, it is believed that but three of them are of any practical use in the States in which the common law is preserved, namely: (1) Those implied in the case of a lease. (2) Those implied in the case of an exchange. (3) Those implied in the case of a partition. These are: (1) That the lessor has power to make the lease; and (2) That the lessee shall have quiet enjoyment of the premises.[73] The covenants will be implied wherever the relation of landlord and tenant is created by the instrument in writing, whether the word "demise" was or was not employed,[74] and the covenant for quiet enjoyment will be implied, though the lease was by parol.[75] The covenant so implied will, of course, be limited or restrained by any express covenant which the lease may contain.[76] So, also, by an express provision in the lease that nothing therein contained shall be construed to imply a covenant for quiet enjoyment.[77] If the estate out of which the lease was granted determines before the expiration of the lease, the implied covenant will be at an end.[78] A lease of the right to collect wharfage for a year is not a "conveyance of real estate," within the meaning of a statute forbidding the implication of covenants for title in such conveyances, and a covenant for quiet enjoyment will be implied in such a lease.[79]

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[67] Wheeler v. Wayne Co., 132 Ill. 599; 24 N. E. Rep. 625. See, also, Gee v. Phurr, 5 Ala. 586; Frink v. Darst, 14 Ill. 304; 58 Am. Dec. 575. Whitehill v. Gotwalt, 3 Pen. & W. (Pa.) 323.

[68] Heflin v. Phillips, (Ala.) 11 So. Rep. 729.

[69] Van Ness v. Royal Phosphate Co., 60 Fla. 284, 53 So. 381, 30 L. R. A. (N. S.) 833, Ann. Cas. 1912 C. 647.

[70] Cockrill v. Bane, 94 Mo. 444; Boyd v. Hazeltine, 110 Mo. 203; Blanchard v. Haseltine, 79 Mo. App. 248.

[71] Falls City Lumber Co. v. Watkins, 53 Oreg. 212, 99 Pac. 884.

[72] Paris v. Golden, 96 Kan. 668, 153 Pac. 528.

[73] Mayor v. Mabie, 3 Kern, (N. Y.) 151; Avery v. Dougherty, 102 Ind. 443; 52 Am. Rep. 680. Hyman v. Boston Chair Mfg. Co., 58 N. Y. Super. Ct. 282; 11 N. Y. Supp. 52.

[74] Bandy v. Cartright, 8 Exch. 913; Dexter v. Manley, 4 Cush. (Mass.) 14; Ross v. Dysart, 33 Pa. St. 453.

[75] Bandy v. Cartright, 8 Exch. 913.

Covenants implied in an exchange. The common-law deed of exchange is rarely, if ever, used in modern times, the parties usually executing separate conveyances, the one to the other. But wherever a common-law deed of exchange is executed and the word "exchange" is used as the word of conveyance, covenants for quiet enjoyment and further assurance are thereby implied, and also a condition that, in case of a failure of the title, the party injured may re-enter and be seised of his former estate in the property which he gave in exchange.[80]

Covenants implied in partition. General covenants of warranty are implied in a partition between co-parceners at common law, but not in a partition between joint tenants and tenants in common, the remedy in the latter case being by bill in equity against the co-tenant for contribution.[81] And though, in case of a deed of partition between co-parceners, covenants of warranty are implied wherever the common law remains unchanged, the existence of such covenants is of little practical importance, owing to the more convenient remedy by bill in equity for contribution.[82]

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[76] Rawle Covts. (5th ed.) § 275.

[77] Maeder v. Carondelet, 26 Mo. 114.

[78] Adams v. Gibney, 6 Bing. 656; Mayor v. Baggatt, 61 Miss. 383; McLowry v. Croghan, 1 Grant's Cas. (Pa.) 307, 311.

[79] Mayor v. Mabie, 3 Kern. (N. Y.) 151.

[80] Co. Litt. 51b. 384; Rawle Covts. (5th ed.) § 270; Gamble v. McClure, 69 Pa. St. 282, *obiter*, the parties having executed separate deeds of bargain and sale.

[81] Rawle Covts. (5th ed.) §§ 277, 278.

[82] Walker v. Hall, 15 Ohio St. 355; 86 Am. Dec. 482; Sawyers v. Cator, 8 Humph. (Tenn.) 256; 47 Am. Dec. 608.

Covenants implied from recitals in a deed. No covenants are implied from the mere recitals of a deed, such as that the premises contain a specified number of acres, though in some instances such recitals estop the grantor from asserting an after-acquired claim, or denying the existence of the facts recited.[83]

§ 138. **PARTIES BOUND AND BENEFITED.** No action can be maintained for breach of warranty of title against a person not a party to the covenant of warranty. In a case in which the vendor had only the equitable title, and the purchaser accepted a conveyance with warranty from a third person in whom was the legal title, without requiring the vendor to join in such conveyance, it was held that he could not maintain an action against the vendor for breach of warranty on eviction by a mortgagee.[84] It is no defense to the covenantor that he held the property merely as security for a debt.[85] No action can be maintained for a breach of the warranty except by the person holding under the warranty at the time of the eviction, actual or constructive, or by the legal representative of that person.[86] This rule, however, does not prevent an action by a warrantor against his warrantors for reimbursement of what he has been compelled to pay to his warrantee by reason of the breach.[87]

§ 138-a. **Married women.** At common law a married woman was not bound by her covenant of warranty, except by way of rebutter or estoppel. This rule has been affirmed in some of the American States by statute, while in others, under statutes giving her the power to contract with reference to her separate estate as if she were sole, she has been held liable upon her covenants for title, and in still other States there are statutes which provide in terms that she shall be so liable. Independent of statute, it is held in some of the States that the separate estate of a married woman may in equity be subjected to the satisfaction of her covenants for title, while in others such relief is denied the covenantee.[88] In a State in which she is bound by her covenants, it has been held that parol evidence is not admissible to show that she joined in the deed merely for the purpose of barring her inchoate marital estate in the land conveyed.[89]

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[83] Whitehill v. Gottwalt, 3 Pen. & W. (Pa.) 327. Ferguson v. Dent, 8 Mo. 673; Rawle Covts. (5th ed.) §§ 280, 297.

[84] Bowling v. Benge, (Ky.) 55 S. W. Rep. 422.

[85] Delco Holding Co. v. Rosenthal, 164 N. Y. Supp. 785.

[86] Alvord v. Waggoner, 88 Tex. 615, 32 S. W. 872; Hollingsworth v. Mexia, 14 Tex. Civ. App. 363, 37 S. W. 455; Penny v. Woody (Tex. Civ. App.) 147 S. W. 872.

[87] Penny v. Woody (Tex. Civ. App.) 147 S. W. 872.

It has been held that a widow who joined in a deed merely for the purpose of releasing her dower interest, was not bound by the warranty of title implied from the operative words of conveyance "grant, bargain, and sell."[90]

§ 139. **Heirs and devisees.** It was necessary at common law that an heir be expressly named in the covenant of the ancestor in order that he might be held liable for the breach.[91] In America, however, by virtue of generally prevalent statutory provisions, which make the real and personal estate of a decedent assets for the payment of his debts, and charge the heir therewith to the extent of assets received by him from the estate of the ancestor,[92] he is, under such circumstances, liable for the breach of his ancestor's covenants for title, whether he was or was not specially named in the covenant. In some of the States, however, he cannot be held liable until the personal estate has been exhausted.[93] At common law covenant might be maintained against the heir upon the warranty of the ancestor, and such, it is apprehended, is the law to-day in most of the American States. The enforcement of such a liability, however, is peculiarly appropriate to courts of equity which are charged with the administration of the estates of decedents and equipped with all the machinery, such as account and discovery, needed to ascertain the *quantum* of assets descended to the heir, the want of other assets applicable to the satisfaction of the breach of covenant, and other matters necessary for the determination of the precise sum in which the heir is liable. In some of the States there are statutes which provide that an heir shall be liable only in equity for the debt of his ancestor, and under such a statute it has been held that covenant could not be maintained against an heir on the warranty of the ancestor.[94] A judgment against the heir in a State in which there are no assets descended to him will not bar an action against him in another State where such assets are found.[95]

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[88] The subject of a married woman's liability upon her covenants for title is too extensive to admit of consideration in the limited space that can be devoted to it in this work. The student is referred to Mr. Rawle's excellent work on Covenants for Title (Ch. 13), and to the various treatises on the contract liabilities of married women for the cases and authorities upon that subject. In Minnesota, under a statute allowing a married woman to contract in reference to her separate estate as if she were a *feme sole*, it has been held that she is bound by her covenants for title. Sandwich Manfg. Co. v. Zellmer, 48 Minn. 408; 51 N. W. Rep. 379; Security Bank v. Holmes, 68 Minn. 538; 71 N. W. Rep. 699. But a married woman signing a deed merely to release her inchoate dower right will not be liable upon a covenant of warranty contained in the deed. Semple v. Wharton, 68 Wis. 626; 32 N. W. Rep. 690. Pyle v. Gross, 92 Md. 132; 48 Atl. Rep. 713; Webb v. Holt, 113 Mich. 338; 71 N. W. Rep. 637.

[89] Security Bank v. Holmes, 68 Minn. 538; 71 N. W. Rep. 699.

[90] Waldemeyer v. Loebig, 222 Mo. 540, 121 S. W. 75.

[91] Co. Litt. 209a.

[92] See the statutes of the several States. Whitten v. Krick, 31 Ind. App. 577; 68 N. E. Rep. 694. An heir or devisee is liable on the covenants of the ancestor or testator to the extent of the personal as well as the real estate which has come to his hands. Ross v. Perry, 49 N. H. 549. Where a breach of covenant has occurred after the death of the covenantor, and his estate has been fully administered, the covenantee will not be driven to a new administration and suit against the administrator *d. b. n.*, but may sue the heirs direct, and have judgment against them to the extent of assets received by them from their ancestor. Walker v. Deaver, 79 Mo. 664. If an heir apparent convey with warranty and then dies before the ancestor, the heirs

Where a father, having an interest only by way of contingent remainder, conveyed the fee with general warranty, under the impression that his estate vested, and afterwards his estate was determined by the happening of the contingency, his children, who took the estate under a limitation over, were held not bound by his warranty, because they were in by purchase and not by descent.[96]

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of such heir apparent will not be bound by the warranty, since they take, not as his heirs, but as heirs of his ancestor. Habig v. Dodge, 127 Ind. 31; 25 N. E. Rep. 182. Where the grantor conveys with special warranty his heirs or devisees can, of course, be held liable only for his acts, and not for claims to which the covenant did not extend. Gittings v. Worthington, 67 Md. 139; 9 Atl. Rep. 228.

[93] Royce v. Burrell, 12 Mass. 399. See, also, cases cited Rawle Covts. for Title (5th ed.), p. 520, note 3.

[94] Rex v. Creel, 22 W. Va. 373.

[95] Beall v. Taylor, 2 Grat. (Va.) 532; 44 Am. Dec. 398.

[96] Whitesides v. Cooper, 115 N. C. 570; 20 S. E. Rep. 295.

No action can be maintained at common law against a devisee upon the covenant of his testator. This rule, having been found to encourage fraudulent devises, was altered by the statute 3 and 4 W. & M. c. 14, § 3, which gives the covenantee an action on the covenant against the devisee, provided, according to judicial construction, the breach occurred in the testator's lifetime. And by subsequent statutes the action was extended so as to embrace breaches occurring after the testator's death.[97] These statutes, or others of similar import, are in force, it is apprehended, in all of the American States.

Joint covenantors — Bankrupts. If a covenant of warranty be executed by two or more persons jointly, it will be presumed that their liability is joint, that is, that both are fully liable for the breach,[98] and words of severance will be required to render one liable only for his own acts.[99] A covenant by A. and B. that "they will warrant generally the land," etc., is a joint and several covenant, and both will be liable for the full amount of the damages in case of eviction.[1] The general rule is that if two or more persons join in a conveyance with warranty all are bound as joint warrantors, although some of them received no part of the consideration and joined in the deed as a matter of convenience.[2] The mere signing, however, of a deed by a party not named therein, does not make him a warrantor of the title.[3] If two persons convey each an undivided moiety of certain premises, and one of them enters into limited or restricted covenants, and the other covenants generally, the latter, in case of an eviction under a title not embraced by the limited covenants, can be held liable only to the extent of his interest in the premises, that is, the undivided moiety, or one-half of the damages resulting from the breach.[4]

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[97] Rawle Covts. (5th ed.) ch. 13. If it be uncertain whether a person is bound on a covenant of warranty as devisee or as a personal representative, it is error to enter up judgment against him in both capacities. Johns v. Hardin, (Tex.) 16 S. W. Rep. 623.

[98] Platt on Covts. 117; Rawle on Covts. (5th ed.) § 304; 1 Wms. Saunders, 154, n. Donohue v. Emery, 9 Met. (Mass.) 67; Comings v. Little, 24 Pick. (Mass.) 266. But see Redding v. Lamb, 81 Mich. 318; 45 N. W. Rep. 947.

[99] As in Evans v. Saunders, 10 B. Mon. (Ky.) 291, where the conveyance was by four heirs, and each covenanted for his separate and undivided share separately to defend. See, also, Fields v. Squires, 1 Deady (C. C.), 366; Bardell v. Trustees, 4 Bradw. (Ill.) 94.

[1] Click v. Green, 77 Va. 827; Donohue v. Emery, 9 Met. (Mass.) 67; Platt on Covts. part 1, ch. 3, § 2.

[2] Ashburn v. Watson, 8 Ga. App. 566, 70 S. E. 19.

[3] Tilghman Lumber Co. v. Matheson, 88 S. C. 432, 70 S. E. 1033, a case in which a mortgagee, on receiving payment of his debt, signed the deed with the mortgagor.

A discharge in bankruptcy will, of course, relieve the bankrupt from liability for a breach of a covenant of warranty occurring before the discharge. But the bankrupt is not relieved where the breach occurs after the discharge.[5]

§ 140. **Personal representatives. Fiduciaries. Agents. Cestui que trust.** We have seen that warranty was a covenant real at common law, one consequence of which was that a personal action of covenant could not be maintained, in case of a breach, either against the covenantor or his personal representative. Real actions having been long since abandoned both in England and America, covenant may be maintained against the personal representative of the covenantor, whether named in the covenant or not, and whether the breach occurred before or after the death of the testator or intestate.[6] We have also seen that if fiduciaries choose to insert general or unlimited covenants in any conveyance they may make, they will be held personally liable thereon.[7] In one of the States, at least, a trustee, empowered to convey with warranty, has the right to insert in his conveyance covenants binding the original grantor, and upon a breach of those covenants such grantor, the creator of the trust, will be held liable in damages.[8] A *cestui que trust* cannot be sued upon the covenants of the trustee.[9]

A grantor who held the legal title merely for the purpose of conveying according to the direction of other persons, and who did not receive the consideration recited in the deed, is not liable for a breach of the covenants of title therein contained.[10] But where the vendor conveyed with warranty to a third person, at the request of and pursuant to an agreement with the vendee, it was held that he was liable on his covenant to the grantee.[11]

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[4] Sutton v. Bailey, 65 Law Times Rep. 528.

[5] Bush v. Cooper, 18 How. (U. S.) 82; Waggle v. Worthy, 74 Cal. 266; 15 Pac. Rep. 831; Wight v. Gottschalk (Tenn.), 48 S. W. Rep. 140; 43 L. R. A. 189. There has been some diversity of opinion upon this point. See Rawle Covts. (5th ed.) § 303.

[6] Townsend v. Morris, 6 Cow. (N. Y.) 123; Tabb v. Binford, 4 Leigh (Va.), 132; 26 Am. Dec. 317; Rawle Covts. (5th ed.) ch. 13.

[7] Ante, § 69.

[8] Thurmond v. Brownson, 69 Tex. 597; 6 S. W. Rep. 778.

[9] Haran v. Stratton, 120 Ala. 145; 23 So. Rep. 81.

In a case in which real property was conveyed to the agent of a corporation, with covenants of general warranty and of seisin, the grantor having knowledge that the purchase was made for the corporation, and that the purchase money was paid by it, the property being afterwards conveyed by the agent to the corporation, it was held that the corporation was entitled to the benefit of the covenants.[12]

In a case in Texas, it appeared that an agent bought land and conveyed it with warranty in his own name to one who was ignorant of the agency. It also appeared that the agent was not authorized to convey the land and warrant the title. Nevertheless it was held that the principal, by collecting the purchase-money notes, ratified the transaction, and thereby became liable on the warranty in the agent's deed.[13]

§ 140-a. **Municipal corporations.** It has been held in one of the States, upon principles applicable everywhere, that, in the absence of statutory authority, a municipal corporation has no power to execute a deed with covenants of warranty, such power not being essential to the purposes and objects of the corporation; and hence, that the grantee in a deed of swamp lands executed by a county with covenants of warranty, could not recover against the county on failure of the title.[14]

§ 141. **Who may sue for breach of warranty.** For a breach of the covenant of warranty occurring in the lifetime of the covenantee, his personal representative alone can sue. The right to recover damages for the breach is a chose in action, which passes, like other personal assets, to the executor or administrator.[15] But if the breach occur after the death of the covenantee, the right of action accrues to the heir, devisee, or assignee, according to whether the premises have passed into the hands of the one or the other.[16] An assignee of the covenantee may, of course, sue for a breach of the covenant of warranty where he himself is evicted, or where he has been held liable upon his own warranty of the same premises to a subsequent grantee.[17] The covenant of warranty, in form, undertakes to warrant and defend the grantee, "his heirs and assigns," against the claims of all persons, etc., but it is not necessary that either the heirs[18] or assigns[19] be mentioned in order to give them the benefit of the covenant. The right of a subsequent grantee of the premises to sue upon the covenant of a remote grantor is hereafter considered in this chapter. Tenants in common, holding under the same deed as grantees, have several freeholds, and may sue separately for breach of the covenant of warranty.[20] A tenant in dower, who is evicted, cannot maintain an action on a warranty in the conveyance to her husband. The right of action passes to the husband's representatives, and her remedy is by a new assignment of dower.[21]

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[10] Deaver v. Deaver, 137 N. C. 240; 49 S. E. Rep. 113.

[11] Hunt v. Hay, 214 N. Y. 578, 108 N. E. 851.

[12] Cent. Appalachian Co. v. Buchanan, 90 Fed. Rep. 454.

[13] Rutherford v. Montgomery, 14 Tex. Civ. App. 319; 37 S. W. Rep. 625. See also, Efta v. Swanson, 115 Minn. 373, 132 N. W. 335.

[14] Harrison v. Palo Alto Co., 104 Iowa, 383; 73 N. W. Rep. 872.

§ 142. **WHAT CONSTITUTES BREACH. Tortious disturbance or eviction. Collusion.** The covenant of warranty is broken by an eviction only, and the covenant for quiet enjoyment by an eviction, or by a substantial disturbance of the covenantee in the enjoyment of the estate, though such disturbance does not amount to an eviction.[22] In either case, the breach must result from the acts of one having a better title to the premises than the covenantor. An unsuccessful attack upon his title by a third person [23] or an eviction or disturbance of the possession by a trespasser, a mere wrongdoer, or a person having a defeasible claim to the premises, does not amount to a breach of either covenant. In other words, as has been frequently said, the covenant of warranty and the covenant for quiet enjoyment are not broken by a tortious disturbance or eviction.[24]

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[15] Grist v. Hodges, 3 Dev. L. (N. C.) 201; Wilson v. Peele, 78 Ind. 384.

[16] Pence v. Duval, 9 B. Mon. (Ky.) 48.

[17] See post, §§ 153, 160.

[18] 2 Sugd. Vend. 577. Lougher v. Williams, 2 Lev. 92.

[19] 2 Sugd. Vend. 577, and cases cited; Platt Covt. 523; 3 Law Lib. 234. Redwine v. Brown, 10 Ga. 318; Leary v. Durham, 4 Ga. 603. See Colby v. Osgood, 29 Barb. (N. Y.) 339. The contrary has been held in North Carolina, Smith v. Ingram, 130 N. C. 100; 40 S. E. Rep. 984.

[20] Lamb v. Danforth, 59 Me. 322; 8 Am. Rep. 426.

[21] St. Clair v. Williams, 7 Ohio, 396.

[22] Kent Com. 558 (473), *et seq.;* 3 Washb. Real Prop. ch. 5, § 5; Rawle Covt. for Title (5th ed.), ch. 8. Durbin v. Shenners, 133 Wis. 134, 113 N. W. 421. If the grantee with covenant for quiet enjoyment be let into possession, the covenant is not broken merely because the grantor turns out to have had

Neither are they broken by a collusive eviction; [25] as where

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only a life estate instead of a fee. Wilder v. Ireland, 8 Jones L. (N. C.) 88. But if the life estate fall in and the covenantee be evicted, the covenant for quiet enjoyment is of course broken. Parker v. Richardson, 8 Jones L. (N. C.) 452.

[23] Burke v. Timber Co., 224 Fed. 591; Stearns v. Jewel, 27 Colo. App. 390, 149 Pac. 386.

[24] 2 Sugd. Vend. (8th Am. ed.) 271 (600); Washb. Real Prop. 427; Rawle Covts. (5th ed.) § 127; Taylor Landlord & Tenant, § 304, *et seq.* Wotton v. Hele, 2 Saund. 177, leading case; Howell v. Richards, 11 East, 633, 642, *dictum;* Hayes v. Bickerstaff, Vaugh, 118; Andrus v. Smelting Co., 130 U. S. 643. Hoppes v. Cheek, 21 Ark. 585; Playter v. Cunningham, 21 Cal. 232; Branger v. Manciet, 30 Cal. 624; Davis v. Smith, 5 Ga. 274; 47 Am. Dec. 279; Kimball v. Grand Lodge, 131 Mass. 59; Folliard v. Wallace, 2 Johns. (N. Y.) 395; Beddoe v. Wadsworth, 21 Wend. (N. Y.) 120; Kelly v. Dutch Church, 2 Hill (N. Y.), 105; Spear v. Allison, 20 Pa. St. 200; Schuylkill & Dauphin R. Co. v. Schmoele, 57 Pa. St. 275. Underwood v. Birchard, 47 Vt. 305; Mackintosh v. Stewart, 181 Ala. 328, 61 So. 956; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759; Morgan v. Davis, 78 W. Va. 270, 88 S. E. 847; Smith v. Moore, 31 Ky. L. R. 838, 104 S. W. 265; Pierce v. Coryn, 126 Ill. App. 244. The covenantee cannot recover in an action for breach of warranty the value of timber wrongfully taken from the land by one having no valid claim to the land. McInnis v. Lyman, 62 Wis. 191. Compare Thomas v. West, etc., Inc., 64 Wash. 344; 116 Pac. 1074, where held, disapproving Lamb v. Willis, 109 N. Y. Supp. 75; 125 App. Div. 183, that it is no defense to the covenantor that the holder of a timber right in the land was, by reason of his failure to record the conveyance of that right to him, a trespasser in taking the timber. An illegal tax sale and redemption therefrom constitutes no breach of the covenant against incumbrances, nor, it is apprehended, of the covenant of warranty. Cummings v. Holt, 56 Vt. 384. Evidence that certain persons are in possession of the warranted premises, claiming under a grantee of one who purchased at a sheriff's sale under judgment against the covenantor without showing a conveyance from such grantee is insufficient evidence of an eviction under paramount title, since, for aught that appears to the contrary, those in possession may be mere trespassers. Jenkins v. Hopkins, 8 Pick. (Mass.) 346.

[25] Davis v. Smith, 5 Ga. 247; 48 Am. Dec. 279.

the title was outstanding in the United States for want of proper entry, and the grantee procured a third person to enter the land and take the title for his use, and thereafter suffered a pretended eviction by the patentee.[26]

The cases deciding that a tortious disturbance is no breach of the covenant for quiet enjoyment have, in most instances, arisen between landlord and tenant. It is clear that in a lease a general covenant for quiet enjoyment extends only to entries and interruptions by those who have lawful right, for the tenant has his remedy by action against all trespassers and wrongdoers.[27] Therefore, where the leased premises had formerly been a house of ill-repute, and the lessee was so constantly disturbed by the calls of obnoxious persons that he was compelled to leave the premises, it was held that there was no breach of the covenant for quiet enjoyment, and that he could not recover damages.[28] And to constitute a breach of this covenant, the person who disturbs the tenant must have some lawful interest or right in the realty and not merely a title to some chattel that may be upon it.[29] The fact that leased premises were, at the time of the lease, in the adverse possession of a stranger, is no breach of the covenant for quiet enjoyment, if the person in possession was there without lawful right.[30] The paramount title under which the covenantee is evicted need not be a title in fee simple. The covenant of warranty applies as well to the possession as to the title, and if the covenantee be evicted by one having a term of years in the premises, or, in fact, any estate less than a fee simple, the covenant is broken, and a right of action ensues.[31] Upon the principle that the covenant of warranty is not broken by a tortious disturbance, the covenantor, as will hereafter be seen, is not liable for expenses incurred by the covenantee in defending the title against an unfounded claim.[32]

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[26] Frix v. Miller, 115 Ala. 476; 22 So. 146. See post § 202.

[27] Kimball v. Grand Lodge, 131 Mass. 59, 63, citing Ellis v. Welch, 6 Mass. 246; 4 Am. Dec. 122; Shearman v. Williams, 113 Mass. 481. Gardner v. Keteltas, 3 Hill (N. Y.), 330; 38 Am. Dec. 637. Howell v. Richards, 11 East, 633, 642. Dudley v. Folliott, 3 T. R. 584; Nash v. Palmer, 5 M. & S. 374.

[28] Meeks v. Bowerman, 1 Daly (N. Y.), 99.

[29] Kimball v. Grand Lodge, 131 Mass. 59, 63, where the breach complained of was the removal of certain fixtures from the demised premises by a prior tenant. But if a prior tenant remove a building from the premises under an agreement with the grantor or lessor, this will constitute a breach. West v. Stewart, 7 Pa. St. 123.

[30] University v. Joslyn, 21 Vt. 52.

[31] Rickert v. Snyder, 9 Wend. (N. Y.) 420.

But the rule that a covenant for quiet enjoyment is not broken by a tortious disturbance does not apply where the disturbance was by the covenantor or those acting under his authority or direction, provided his acts amounted to an assumption of right and title,[33] and were not mere trespasses.[34] The failure of the landlord to keep the premises in repair, by reason of which the tenant is compelled to abandon the premises, is no breach of the covenant for quiet enjoyment. The lessee should protect himself by a covenant to repair.[35] If the covenant be against the claims of all persons whatsoever, it will, as we have seen, be restricted to the acts of persons having lawful claims,[36] but if the covenant be expressly against all pretending to claim,[37] or against the acts of designated persons,[38] it will embrace tortious disturbances by such pretenders or persons named.

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[32] Post, § 142. Butterworth v. Volkening, 4 Thomp. & C. (N. Y.) 650.

[33] 2 Sugd. Vend. (6th Am. ed.) 272 (600); Rawle Covt. (5th ed.) § 128. Corus Case, Cro. Eliz. 544. Crosse v. Young, 2 Show. 415. Sedgewick v. Hollenback, 7 Johns. (N. Y.) 376; Dyett v. Pendleton, 8 Cow. (N. Y.) 727; Mayor v. Mabie, 3 Kern. (N. Y.) 131. Surget v. Arighi, 11 Sm. & M. (Miss.) 87; 49 Am. Dec. 46. If the landlord permits a building to be erected on his own land so as to encroach on the enjoining demised premises, this is a breach of the covenant for quiet enjoyment. Sherman v. Williams, 113 Mass. 481. Giving out that the covenantee has no right to premises, and bringing suits against him and his tenants, in consequencee of which the tenant quits the premises, and the covenantee is unable to rent them, amounts to an eviction on the part of the covenantor. Levitsky v. Canning, 36 Cal. 299. Held, also, in the same case, that the entry of the lessor upon the roof of the demised premises, and converting the same into a wash house or place of drying clothes, was a breach of the covenant for quiet enjoyment. If the wrongful acts of the lessor upon the demised premises are such as permanently to deprive the lessee of the beneficial enjoyment of them, and the lessee, in consequence thereof, abandons the premises, it is an eviction, and the intent to evict is conclusively presumed. Skally v. Shute, 132 Mass. 367.

[34] Mayor v. Mabie, 13 N. Y. 151; Loundsbery v. Snyder, 31 N. Y. 514; Edgerton v. Page, 20 N. Y. 281; Randall v. Albertis, 1 Hilt. (N. Y.) 285; Drake v. Cockroft, 4 E. D. Smith (N. Y.) 34; Levy v. Bond, 1 E. D. Smith (N. Y.), 169; Campbell v. Shields, 11 How. Pr. (N. Y.) 564; Ogilvie v. Hall, 5 Hill (N. Y.), 52; Doupe v. Genin, 1 Sweeny (N. Y. S. C.), 25, 30, *obiter*. Cassada v. Stabel, 90 N. Y. Supp. 533; 98 App. Div. 600; Bennett v. Bittle, 4 Rawle (Pa.), 339; Avery v. Dougherty, 102 Ind. 443; 2 N. E. Rep. 123; Slayback v. Jones, 9 Ind. 470, *semble*. Hayner v. Smith, 63 Ill. 430; 14 Am. Rep. 124. Bartlett v. Farrington, 120 Mass. 284.

[35] Codrington v. Denham, 35 N. Y. Super. Ct. 412. Moore v. Weber, 71 Pa. St. 429; 10 Am. Rep. 708. A covenant for quiet enjoyment is not broken by the refusal of the lessor to shore up the walls of the leased premises to prevent them from falling while an adjoining building is being removed, by

§ 143. **Eminent domain and acts of sovereignty.** The covenants of warranty and for quiet enjoyment do not embrace acts of sovereignty,[39] such, for example, as the exercise of the right of eminent domain.[40] The organic law of each State provides that pri-

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reason of which refusal the premises are rendered uninhabitable. Such refusal would be a breach only of a covenant of seisin. Howard v. Doolittle, 3 Duer (N. Y.), 464; Johnson v. Oppenheim, 34 N. Y. Super. Ct. 416.

[36] Ante, p. 336. KENT, C. J., in Folliard v. Wallace, 2 Johns. (N. Y.) 395.

[37] Chaplain v. Southgate, 10 Mod. 383.

[38] 2 Sugd. Vend. (8th Am. ed.) 271 (600); Rawle Covts. (5th ed.) § 128, pl. 2. Nash v. Palmer, 5 Maule & S. 374, the court saying: "The covenantor is presumed to know the person against whose acts he is content to covenant, and may, therefore, reasonably be expected to stipulate against any disturbance from him, whether from lawful title or otherwise. If the warranty be against the claim of a particular person, and the covenantee be evicted by that person, it is not necessary, in an action for the breach, to aver an eviction by title paramount. Patton v. Kennedy, 1 Marsh. (Ky.) 389; 10 Am. Dec. 744; Pence v. Duval, 9 B Mon. (Ky.) 49. But see Gleason v. Smith, 41 Vt. 293, where it was said that a covenant against the claims of persons named is a covenant against their valid claims, and not against such claims as they make without legal foundation or right.

[39] Philips v. Evans, 38 Mo. 305, a case in which it was held that governmental emancipation of a slave, who had been sold with warranty, was no breach of the warranty. Osborn v. Nicholson, 13 Wall. (S. C.) 655. Dyer v. Wightman (Legal Tender Cases), 12 Wall. (U. S.) 549. In Cooper v. Bloodgood, 32 N. J. Eq. 209 (1880), it was questioned whether a riparian owner, conveying premises including land between high and low-water mark, would, in the absence of an express warranty to that effect, be held by the usual covenants to have warranted against the notorious, sovereign title of the State to such lands under water. See Barre v. Flemings, 29 W. Va. 314; 1 S. E. Rep. 731, where it was held that a covenant of warranty in a conveyance of premises extending to "low-water mark" was not broken by the fact that the public had an easement therein, and that the public authorities had enjoined the covenantee from building a wharf below high-water mark. The lessor of a market stall is not liable in damages to the lessee for an eviction under a municipal authority. Barrere v. Bartet, 23 La. Ann. 722.

[40] Ellis v. Welch, 6 Mass. 246; 4 Am. Dec. 122, leading case; Bumnier v. Boston, 102 Mass. 19; Boston Steamboat Co. v. Manson, 117 Mass. 34, *semble.* Weeks v. Grace, 194 Mass. 296; 80 N. E. 220. Patterson v. Arthur, 9 Watts (Pa.), 152; Bellinger v. Society, 10 Pa. St. 135; Dobbins v. Brown, 12 Pa.

vate property shall not be taken for public purposes without compensation, and the covenantee is protected by provisions for the indemnity of the owners of the appropriated lands made in pursuance of this law.[41] When the parties enter into covenants for title it will be presumed that they had in view only existing rights under a paramount title, and the power of the State to appropriate the premises for public uses cannot be regarded as such a right.[42] In one case it was held that the covenant of warranty was not broken by condemnation of the premises to public uses, though the covenantor had, before the execution of the deed, released all claim to damages.[43] The purchaser must also take

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St. 75, distinguished in Peters v. Grubb, 21 Pa. St. 455; Workman v. Mifflin, 30 Pa. St. 362; Bailey v. Miltenberger, 31 Pa. St. 37; Schuylkill, etc., R. Co. v. Schmoerle, 57 Pa. St. 271. See, also, Maule v. Ashmead, 20 Pa. St. 483; Ross v. Dysart, 33 Pa. St. 452. Cooper v. Bloodgood, 32 N. J. Eq. 209. See elaborate note to this case. Kuhn v. Freeman, 15 Kans. 423; Gammon v. Blaisdell, 45 Kans. 221; 25 Pac. Rep. 580. Stevenson v. Loehr, 57 Ill. 509; 11 Am. Rep. 36. Dobbins v. Brown, 12 Pa. St. 79, where it was said by GIBSON, C. J.: "It will scarcely be thought that a covenant of warranty extends to an entry by the authority of the State in the exercise of its eminent domain. Like any other covenant, it must be restrained to what was supposed to be the matter in view; and no grantor who warrants the possession dreams that he covenants against the entry of the State to make a railroad or a canal; nor can it be a sound interpretation of the contract that would make him liable for it. An explicit covenant against all the world would bind him; but the law is not so unreasonable as to imply it. The entry of the public agents, and the occupancy of the ground, were not a breach of the warranty." But see Scott v. Tanner (Mo. App.) 208 S. W. 264, where it was held that the covenant of warranty was broken by the existence of a drainage ditch constructed under proceedings in eminent domain.

[41] Frost v. Earnest, 4 Whart. (Pa.) 86. Ellis v. Welch, 6 Mass. 246; 4 Am. Dec. 122. Folts v. Huntley, 7 Wend. (N. Y.) 210.

[42] Ellis v. Welch, 6 Mass. 246; 4 Am. Dec. 122. Frost v. Earnest, 4 Whart. (Pa.) 86.

[43] Dobbins v. Brown, 12 Pa. St. 75. This is a doubtful case. The release was executed in 1829. The conveyance with warranty was made in 1839. The actual appropriation of the premises to public use took place in 1840. Regarding the release as a conveyance of an interest in the estate, there was no exercise of the right of eminent domain, and the appropriation of the premises was tantamount to an eviction under a prior title derived from the grantor. Such a case obviously stands upon different ground from one in which the covenantee has recourse upon the appropriator for indemnity. In Stevenson v. Loehr, 57 Ill. 509; 11 Am. Rep. 36, it was held that if the condemnation transpired after the sale but before the conveyance, the vendor would hold the damages in trust for the vendee, and would be accountable therefor.

notice of public statutes restricting the use of the granted premises; and such restrictions constitute no breach of the covenant of warranty.[44] Upon a somewhat similar principle, it has been held that the covenant does not extend to the acts of a newly formed State in restricting the ownership of shore proprietors to the line of ordinary high tide, the warranty having been made before the formation of the State when the owner, under the territorial government, was permitted to extend his structures out to navigable depth.[45]

§ 144. **Eviction.** *General rule.* The covenant of warranty is a covenant against eviction only. It is not a covenant that the estate conveyed is indefeasible. Except in those States in which the law in express terms gives to a warranty the effect of a covenant of seisin, a general covenant of warranty in a deed does not imply a covenant of seisin, and, therefore, is not broken by the existence of a better title in a stranger. No rule or principle of the law of warranty has been more frequently declared than this.[46] Nor does the covenant of warranty, independently of statute, include a cove-

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[44] Neeson v. Bray, 19 N. Y. Supp. 841. In Richardson-Kellett Co. v. Kline, 70 Fla. 23; 69 So. 203, it was held that, in a conveyance of a part of the "Everglades" swamp land, a reservation of a right in favor of the State to construct a drainage canal through the land, would not be a breach of a covenant against incumbrances; the right in question being also secured to the State by statute.

[45] Feurer v. Stewart, 83 Fed. Rep. 793.

[46] Kent Com. 472; 2 Lom. Dig. 762; Rawle Covts. (5th ed.) § 131. Barlow v. Delaney, 40 Fed. Rep. 97. Northern Pac R. Co. v. Montgomery, 86 Fed. Rep. 251. Caldwell v. Kirkpatrick, 6 Ala. 62; 41 Am. Dec. 36. Oliver v. Bush, 125 Ala. 534; 27 So. Rep. 923; Gulf Coal Co. v. Musgrove, 195 Ala. 219; 70 So. 179. Beebe v. Swartwout, 3 Gil. (Ill.) 180; Moore v. Vail, 17 Ill. 185; Owen v. Thomas, 33 Ill. 320; Bostwick v. Williams, 36 Ill. 65; 85 Am. Dec. 385. Wilson v. Irish, 62 Iowa, 260; S. C., 57 Iowa, 184. Emerson v. Minot, 1 Mass. 464; Lothrop v. Snell, 11 Cush. (Mass.) 453. Wilty v. Hightower, 12 Sm. & M. (Miss.) 478. Troxell v. Johnson, 52 Neb. 46; 71 N. W. Rep. 968; Troxell v. Stevens, 57 Neb. 329; 77 N. W. Rep. 781; Merrill v. Suing, 66 Neb. 404; 92 N. W. Rep. 618. Kent v. Welch, 7 Johns. (N. Y.) 258; 5 Am. Dec. 266, leading case; Vanderkarr v. Vanderkarr, 11 Johns. (N. Y.) 122; Kelly v. Dutch Church, 2 Hill (N. Y.), 105; Greenvault v. Davis, 4 Hill (N. Y.), 643; Fowler v. Poling, 6 Barb. (N. Y.) 165; Blydenburg v. Cotheal, 1 Duer (N. Y.), 195. Inderlied v. Honeywell, 84 N. Y. Supp. 333; 88 App. Div. 144. Bender v. Fromberger, 4 Dall. (Pa.) 436; Clarke v. McAnulty, 3 S. & R. (Pa.) 364; Patton v. McFarlane, 3 P. & W. (Pa.) 422; Dobbins v. Brown, 12 Pa. St. 75; Stewart v. West, 14 Pa. St. 336. Allison

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v. Allison, 1 Yerg. (Tenn.) 16; Ferris v. Harshea, Mart. & Yerg. (Tenn.) 54; 17 Am. Dec. 782; Stuart v. Nelson, 4 Hayw. (Tenn.) 200; Crutcher v. Stump, 5 Hayw. (Tenn.) 100; Young v. Butler, 1 Head (Tenn.) 648. Contra, Talbot v. Bedford, Cooke (Tenn.) 447. Findlay v. Toncray, 2 Rob. (Va.) 374, 379; Marbury v. Thornton, 82 Va. 374; 1 S. E. Rep. 909; Jones v. Richmond, (Va.) 13 S. E. Rep. 414. Osburn v. Pritchard, 104 Ga. 145; 30 S. E. Rep. 656; Bedell v. Christy, 62 Kan. 760; 64 Pac. Rep. 629. Kuntzman v. Smith, 77 N. J. Eq. 30; 75 Atl. 1009. Grant v. McArthur, 153 Ky. 356; 155 S. W. 732. An encroachment of 14 inches on an adjoining lot was held no ground for relief where the grantee had not been disturbed in his possession. Tepper v. Niemier, 32 Ky. L. R. 407; 105 S. W. 896. In Clarke v. McAnulty, 3 Serg. & R. (Pa.) 364, it was said by GIBSON, J.: "The covenant of warranty protects only against an ouster from the possession, and there can, therefore, be no breach of it assigned without alleging an actual eviction. It is true that evidence of a paramount title in a stranger, and that the warrantee in consequence yielded up the possession, will support such an allegation, for the law does not require the idle and expensive ceremony of being turned out by legal process when that result would be inevitable. It is unnecessary to cite cases to this point, the difference between a covenant of warranty and of seisin, being recognized as existing in England and our sister States." An apparent exception to the rule stated in the text will be found in Daggett v. Reas, 70 Wis. 60; 48 N. W. Rep. 127, where it was held that a covenant of warranty was broken by an out-standing tax title in a stranger. This, however, was upon the ground that recording the tax deed constructively vested the possession in the tax purchaser. In South Carolina, the courts, following the civil law, have held in a number of cases that an eviction is not necessary to a breach of the covenant of warranty, and that the covenant is broken by a superior title outstanding in a stranger. Pringle v. Witten, 1 Bay (S. C.), 254; 1 Am. Dec. 612; Bell v. Higgin, 1 Bay (S. C.), 326; Sumter v. Welch, 2 Bay (S. C.), 558; Mackay v. Collins, 2 Nott & McC. (S. C.) 186; 10 Am. Dec. 586; Moore v. Lanham, 3 Hill L. (S. C.) 304; Mitchell v. Vaughan, 2 Brev. L. (S. C.) 100. But see Jeter v. Glenn, 9 Rich. L. (S. C.) 377, and, post, § 190. The same rule existed in Texas, with this qualification, namely, that the purchaser must have bought without notice of the out-standing title. Doyle v. Hord, 67 Tex. 662; 4 S. W. 241; Groesbeck v. Harris, 82 Tex. 411; 19 S. W. Rep. 850; since overruled in Land Co. v. North, 92 Tex. 72; 45 S. W. 904. See, also, Huff v. Reilly, (Tex. Civ. App.) 64 S. W. 387. In Pence v. Gabbert, 63 Mo. App. 302, it was held that the covenantee, who had not been actually evicted, could not recover substantial damages though judgment establishing a paramount title to an undivided half of the property, and also a judgment for mesne profits, had been recovered against him, and he had paid the latter judgment. In the State of Kentucky also the action may be maintained without showing an eviction if the defendant is about to remove his property from the State or is insolvent, or a non-resident. Knight v. Schroader, 148 Ky. 610; 147 S. W. 378.

nant against incumbrances,[47] though of course it is broken as well by an eviction under an incumbrance as by the enforcement of the rights of one having the better title.[48] The statute of limitations does not run upon a covenant of warranty until there has been an eviction.[49] For the purpose of this rule, a decree of court, in a suit to which the covenantee was a party, declaring title to be in a third person was treated as an eviction.[50] For the same purpose, possession of the premises by an adverse claimant at the time of the covenant, is an eviction.[51] An action upon a covenant of warranty is an action upon a specialty, and governed by the statute of limitations applicable to specialties.[52] The cause of action accrues at the time of the breach of the warranty, and not at the time of the contract of sale.[53] It has been held that an action may be maintained before eviction on a bond "to indemnify and make the vendee safe and secure in the title."[54] Such a bond imposes a greater obligation than a covenant of seisin, or for quiet enjoyment, and, it has been intimated, is not merged or extinguished by the acceptance of a deed.[55]

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[47] Leddy v. Enos, (Wash.) 33 Pac. Rep. 508. Boreel v. Lawton, 90 N. Y. 293; Hebler v. Brown, 41 N. Y. Supp. 441; Lennig v. Land Co., 107 Va. 458; 59 S. E. 400.

[48] Jackson v. McCauley, 13 Wash. 298; 43 Pac. 41. Shelton v. Johnston, (W. Va.) 95 S. E. 958. Judgment of foreclosure of a vendor's lien on the land is not a breach of the covenant of warranty in a conveyance of the land, until there has been a sale of the land under the judgment. Davis v. Teal (Tex. Civ. App.) 200 S. W. 1166.

[49] Crisfield v. Storrs, 36 Md. 129; 11 Am. Rep. 480; N. Pac. R. Co. v. Montgomery, 86 Fed. 251; Foshay v. Shafer, 116 Iowa, 302; 89 N. W. Rep. 1106; Wiggins v. Pender, 132 N. C. 628; 44 S. E. Rep. 362; Shankle v. Ingram, 133 N. C. 254; 45 S. E. 578. Chenault v. Thomas, 26 Ky. Law R. 1029; 83 S. W. Rep. 109. Cheney v. Straube, 35 Neb. 521; 53 N. W. Rep. 479. Brooks v. Mohl, 104 Minn. 404; 116 N. W. 931; 124 Am. St. Rep. 629; 17 L. R. A. (N. S.) 1195; Rennie v. Gibson, (Okl.) 183 Pac. 483; Whatcom v. Wright. 102 Wash. 566; 173 Pac. 724; McDonald v. Ward, 99 Wash. 354; 169 Pac. 851; L. R. Ann. 1918 F. 662. The statute begins to run, not from the time of the assertion of the paramount title, but from the time of the adjudication of the validity of that title against the covenantee. Gardiner v. McPike (Mo. App.) 184 S. W. 956. In Texas, it seems that the statute is held to run on a covenant of warranty from the time of institution of a suit by an adverse claimant to recover the land, regardless of the precise time of the eviction. Alvord v. Waggoner, (Tex. Civ. App.) 29 S. W. Rep. 797. Where a remote grantee was evicted upon disaffirmance of the conveyance to the original grantee by a minor, the statute did not begin to run until such disaffirmance and judgment against the defendant in a suit by the sometime minor to quiet his title. Pritchett v. Redick, 62 Neb. 296; 86 N. W. Rep. 1097.

[50] Foshay v. Shafer, 116 Iowa, 302; 89 N. W. Rep. 1106. For the like purpose; the fact that the title is outstanding in the United States, has been held an eviction at the time of the covenant. Quinn v. Lee, 137 Ark. 69; 207 S. W. 211.

[51] Whatcom Timber Co. v. Wright, 102 Wash. 566; 173 Pac. 724.

[52] Kern v. Kloke, 21 Neb. 529; 32 N. W. Rep. 574.

The rule that the covenant of warranty is not broken by the existence of a superior outstanding title in another where there has been no actual eviction, has been held not to apply where the outstanding title is in the State;[56] or in the United States.[57] As the covenant is broken only by an eviction, it follows that no suit can be maintained on the warranty until an eviction, actual or constructive, occurs.[58]

§ 145. *Entry by adverse claimant. Legal process.* Eviction of a grantee of lands, with warranty, is of two kinds, actual and constructive. Actual eviction is an amotion or expulsion of the grantee from the warranted estate, either by a peaceable entry and disseisin on the part of him who has the superior title,[59] or by the officers of the law in pursuance of process issued on a judgment or decree, establishing the title of an adverse claimant. In a few early cases it has been held that to constitute an eviction, the right of the evictor must have been established by judicial decision, and the covenantee expelled from the premises by possessory process.[60] But the weight of authority establishes the rule that a lawful expulsion of the covenantee from the premises by one having a better right, operates a breach of the covenant of warranty, whether the expulsion was or was not in pursuance of judicial sanction.[61] An eviction or ouster *in pais* must, of course, be established by parol evidence.[62] But if there has been an actual eviction in pursuance of a judgment in ejectment against the covenantee, the record thereof will be the only proper evidence of the fact.[63]

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[53] Crawford Co. Bank v. Baker, 95 Ark. 438; 130 S. W. 556.

[54] Anderson v. Washabaugh, 43 Pa. St. 118.

[55] Rawle Covts. (5th ed.) 289, note 2. See post, § 269.

[56] Post, § 149. Kans. Pac. R. Co. v. Dunmeyer, 19 Kan. 543; Brown v. Allen, 10 N. Y. Supp. 714; McGary v. Hastings, 39 Cal. 360; 2 Am. Rep. 456. This exception does not apply where the grantee is in possession under title derived through a defective railroad grant of public lands, and has taken steps to perfect his title as a *bona fide* purchaser by procuring a patent from the government, under an act passed for the relief of such purchasers. Burr v. Greeley, 52 Fed. Rep. 926.

[57] Lenz v. Hobart, 112 Minn. 8; 127 N. W. 494.

[58] Dennis v. Long, 128 Ark. 420; 194 S. W. 237. Albright v. Schwabland, 98 Neb. 190; 152 N. W. 301, where held that the cancellation of the covenantor's entry and final receipt of the receiver, was a constructive eviction of the covenantee.

[59] As in Hodges v. Latham, 98 N. C. 239; 3 S. C. Rep. 495. Here the covenantee left the premises for a short time, and upon his return found them in the possession of one claiming under a paramount title.

An entry by mortgagee upon demised premises for condition broken and a threat to expel the lessee unless he will attorn to him (the mortgagee) amounts to an eviction under a statute giving the mortgagee a right to enter for condition broken.[64] And a delivery of seisin by the sheriff to a judgment creditor of the grantor in satisfaction of an execution on the judgment is an eviction and breach of the covenant of warranty.[65]

Of course there will be no breach of the covenant of warranty if the grantee be evicted under an incumbrance which he assumed to pay as part of the purchase price, even though, by reason of some defect in the title, the grantee was unable to effect a loan on the warranted premises with which to discharge the incumbrance.[66] An assignment of dower by metes and bounds in the warranted premises and the placing of the widow in possession is, of course, an eviction and breach of the covenant of warranty.[67] It has even been held that a conveyance of lands which were at the time subject to dower was a breach of this covenant.[68] The eviction of a covenantee by foreclosure sale under a mortgage is a breach of a covenant of warranty though the judgment of foreclosure be afterwards reversed, since the reversal does not affect the title or possession of the purchaser.[69]

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[60] Stewart v. Drake, 4 Halst. (N. J. L.) 141. Lansing v. Van Alsytne, 2 Wend. (N. Y.) 563, *obiter;* Hunt v. Amidon, 4 Hill (N. Y.) 345; 40 Am. Dec. 283, *obiter.* See, also, Walker v. Robinson, 163 Ky. 618; 174 S. W. 503.

[61] Booker v. Bell, 3 Bibb (Ky.), 173; 6 Am. Dec. 641. Fowler v. Poling, 6 Barb. (N. Y.) 165. See, also, case cited post, "Constructive Eviction," §146. A decree in equity, by which the covenantee loses the land, is equivalent to eviction by process of law. Martin v. Martin, 1 Dev. (N. C.) L. 413.

[62] Booker v. Bell, 3 Bibb (Ky.), 173; 6 Am. Dec. 641. Randolph v. Meeks, Mart. & Yerg. (Tenn.) 58.

[63] Booker v. Bell, 3 Bibb (Ky.), 173; 6 Am. Dec. 641.

[64] Tuft v. Adams, 8 Pick. (Mass.) 547; Smith v. Shepard, 15 Pick. (Mass.) 147; 25 Am. Dec. 432; White v. Whitney, 3 Met. (Mass.) 81. The recording of a certificate of entry by a mortgagee for condition broken shows a breach of the covenant of warranty. Furnas v. Durgin, 119 Mass. 500; 20 Am. Rep. 341. In Collier v. Cowger, 52 Ark. 322; 12 S. W. Rep. 702, it was held that a judgment foreclosing a prior mortgage on the land in the possession of the mortgagee was a constructive eviction. In Kidder v. Bork, 33 N. Y. Supp. 663, it was held that a mere allegation of a "decision" establishing a lien on the warranted premises was not sufficient as an allegation of a judgment or eviction. It seems to have been assumed in this case that a judgment establishing the lien would have been equivalent to an eviction.

[65] Gore v. Brazier, 3 Mass. 523; 3 Am. Dec. 182; Wyman v. Brigden, 4 Mass. 150; Bigelow v. Jones, 4 Mass. 512; Barrett v. Porter, 14 Mass. 143.

The term "eviction" does not mean, in all cases, an absolute expulsion of the covenantee from the land. The existence and exercise of a private right of way over the premises, have been held an eviction of the grantee, and, consequently, a breach of the covenant of warranty and for quiet enjoyment.[70] But the mere existence of an easement in the granted premises, which has not been asserted so as to affect the use of the premises, is not a breach of the warranty.[71]

§ 146. **Constructive eviction.** *Inability to get possession.* A constructive eviction of a grantee, with warranty, occurs (1) Where the premises are in the adverse possession of one holding under a superior title, and (2) Where the grantee surrenders the possession to one having a better title, in order to avoid an inevitable expulsion from the premises. (3) Where the covenantor refuses, whether tortiously or not, to deliver possession of the premises to the covenantee.[72] Without the one or the other of these conditions there cannot be a constructive eviction.[73] Where, at the time of a conveyance, the grantee finds the land in the possession of one claiming under a paramount title, the covenant of warranty or for quiet enjoyment will be held to be broken, without any other act on the part of either the grantee or the claimant. The claimant can do no more towards the assertion of his title than to hold possession, and as to the covenantee, the law will not compel him to commit a trespass in order to establish a lawful right in another action.[74]

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[66] Lamb v. Baker, (Neb.) 52 N. W. Rep. 285.

[67] Johnson v. Nyce, 17 Ohio, 66; 49 Am. Dec. 444. Davis v. Logan, 5 B. Mon. (Ky.) 341. Lewis v. Lewis, 4 Rich. L. (S. C.) 12. Compare, Combs v. Combs, 130 Ky. 827; 114 S. W. 334.

[68] Blanchard v. Blanchard, 48 Me. 174.

[69] Smith v. Dixon, 27 Ohio St. 471.

[70] Rea v. Minkler, 5 Lans. (N. Y.) 196; Eller v. Moore, 63 N. Y. Supp. 88; 48 App. Div. 403.

[71] Diseker v. Eau Claire Land Co., 86 S. C. 281; 68 S. E. 529. The action of a village in laying out a street over the granted premises, is an eviction of the grantee. Baker v. Johnson, 165 N. Y. Supp. 225; 178 App. Div. 230.

[72] Dexter v. Manly, 4 Cush. (Mass.) 14; Casada v. Stræbel, 90 N. Y. Supp. 533; 98 App. Div. 600; Atler v. Erskine, 50 Tex. Civ. App. 576; 111 S. W. 186.

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[73] Boreel v. Lawton, 90 N. Y. 293; 43 Am. Rep. 170; Mead v. Stackpole, 40 Hun (N. Y.), 473.

[74] Platt Covts. 327; 2 Lom. Dig. 269; Rawle Covts. (5th ed.) § 138. Clark v. Harper, 6 Vin. 427; Hacket v. Glover, 10 Mod. 143; Ludwell v. Newman, 6 Term Rep. 453. Duval v. Craig, 2 Wh. (U. S.) 45. Banks v. Whitehead, 7 Ala. 83; Crawford v. Pendleton, cited 7 Ala. 84. Prestwood v. McGowan, 128 Ala. 267; 29 So. Rep. 386; McMullan v. Butler, 117 Ga. 845; 45 S. E. Rep. 258. Moore v. Vail, 17 Ill. 185. Small v. Rives, 14 Ind. 164. Barnett v. Montgomery, 6 T. B. Mon. (Ky.) 328. Curtis v. Deering, 12 Me. 499. Fritz v. Pusey, 31 Minn. 368. Wilty v. Hightower, 12 Smed. & M. (Miss.) 478. Murphy v. Price, 48 Mo. 247; Blondeau v. Sheridan, 81 Mo. 545. Rickets v. Dickens, 1 Murph. (N. C.) 343. Shrago v. Gulley, 174 N. C. 135; 93 S. E. 458, a case in which the granted premises encroached upon an adjoining lot by leaning out four inches at the top of the building. Shankle v. Ingram, 133 N. C. 254; 45 S. E. Rep. 578. Wetzel v. Richcreek, (Ohio) 40 N. E. Rep. 1004. Randolph v. Meek, Mart. & Yerg. (Tenn.) 524; Bradley v. Dibrell, 3 Heisk. (Tenn.) 524. Park v. Bates, 12 Vt. 381; 36 Am. Dec. 347; Pitkin v. Leavitt, 13 Vt. 379; Brown v. Taylor, 13 Vt. 631; 37 Am. Dec. 618; Clark v. Conroe, 38 Vt. 469; University v. Joslyn, 21 Vt. 52; Smith v. Scribner, 59 Vt. 96; 7 Atl. Rep. 711. Sheffey v. Gardener, 79 Va. 313. Rex v. Creel, 22 W. Va. 373. McDonald v. Ward, 99 Wash. 354; 169 Pac. 851; L. R. Ann. 1918 F. 662, where the breach consisted in the existence of a railway right of way through the premises. McConaughay v. Bennett, 50 W. Va. 172; 40 S. E. Rep. 540. Shattuck v. Lamb, 65 N. Y. 499; 22 Am. Rep. 656, citing *dicta* from Withers v. Powers, 2 Sandf. Ch. (N. Y.) 350, and Winslow v. McCall, 32 Barb. (N. Y.) 241. See, also, Gardner v. Keteltas, 3 Hill (N. Y.), 332; 38 Am. Dec. 637; Grannis v. Clark, 8 Cow. (N. Y.) 36. Hunt v. Hay, 214 N. Y. 578; 108 N. E. 851; Olmstead v. Rawson, 188 N. Y. 517; 81 N. E. 456; Richstein v. Welch, 197 Mass. 224; 83 N. E. 417; Whatcom Co v. Wright, 102 Wash. 566; 173 Pac. 724; Hoyt v. Rothe, 95 Wash. 369; 163 Pac. 925; N. Y. &c. Coal Co. v. Graham, 226 Pa. 348; 75 Atl. 657; Ackley & Co. v. Hunter Co., 154 Ala. 416; 45 So. 909; Croom v. Allen, 145 Ga. 347; 89 S. E. 199; Larkin v. Trammell, 47 Tex. Civ. App. 548; 105 S. W. 552; Shannon v. Childers (Tex. Civ. App.) 202 S. W. 1030. At one time a contrary doctrine prevailed in the State of New York. Kortz v. Carpenter, 5 Johns. (N. Y.) 120; St. John v. Palmer, 5 Hill (N. Y.), 601.

But an adverse possession in a stranger will not amount to a breach of warranty unless he holds under a title superior to that of the covenantee.[75] Nor is there a breach of the warranty where the lands in the adverse possession of another, were, by mistake, included in the deed.[76] An inchoate possessory title, which may ripen into a perfect title under the statute of limitations, will not amount to a constructive eviction. The covenant of warranty is, as we have seen, against the claims only of those who have lawful right. The covenantee must show that he was in fact unable to get possession from one holding under color of title. The mere occupancy of the premises by a stranger without showing under whom he claims, nor what efforts had been made to obtain possession from him, is insufficient.[77] And if the covenantee by his own laches, suffer an imperfect and inferior title in one occupying the land adversely to ripen into a perfect title under the statute,

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but the rule there now is that stated in the text. Shattuck v. Lamb, supra. Where land conveyed was described as bounded "by land of M., by a line through the center of the wall," and the wall was wholly on M.'s land, it was held that the covenant or warranty was broken. Cecconi v. Rodden, 147 Mass. 164; 16 N. E. Rep. 749. As to whether party wall is a breach of covenant against incumbrances, see ante, p. 326. Ejectment brought by the covenantee against the adverse claimant, and a successful defense by the latter, will give the covenantee the same right to an action on the warranty that an eviction would. Cummins v. Kennedy, 3 Litt. (Ky.) 118; 14 Am. Dec. 45. But the fact that a suit to establish title to leased premises, in which the lessor is plaintiff, is decided adversely to him, is no breach of a covenant for quiet enjoyment, there being no disturbance of the lessee's possession. Hayes v. Ferguson, 15 Lea (Tenn.), 1; 54 Am. Dec. 398. For *dicta* or intimations contrary to the rule stated in the text, see Holder v. Taylor. Hob. 12, and Day v. Chism, 10 Wh. (U. S.) 452, and the early New York cases cited, supra, this section.

[75] Noonan v. Lee, 2 Bl. (U. S.) 499, 507. Phelps v. Sawyer, 1 Aik. (Vt.) 157. Playter v. Cunningham, 21 Cal. 232, a case in which a lessee of the property refused to give up the possession at the expiration of his term. It devolved upon the covenantee to eject him.

[76] Maxwell v. Bank, 175 N. C. 180; 95 S. E. 147. Pinckard v. Mortgage Co., 143 Ala. 571; 39 So. 350; Prestwood v. Carlton, 162 Ala. 327; 50 So. 254.

[77] Barry v. Guild, 126 Ill. 439; 18 N. E. Rep. 759. In this case there was a derrick and tool house on the premises which were occupied by a stone company, but it did not appear that the company laid any claim to the land or that the plaintiff had made any effort to get possession and judgment was rendered for the defendant.

he cannot recover on the warranty.[78] It is not necessary to constitute a breach of warranty that the person in possession shall hold under a title in fee simple. The covenant of warranty goes to the possession as well as to the title. Therefore, if a stranger be in possession of the premises, holding as tenant for life[79] or for a term of years,[80] and the grantee is unable to get possession, the covenant is broken and a right of action ensues.

A decree of court permanently enjoining the covenantee from removing any part of a party-wall erected partly on the granted premises and partly on the adjoining premises, as a protection against freshets, is a constructive eviction of the covenantee from that part of the warranted premises occupied by the wall.[81]

§ 147. *Vacant and unoccupied lands.* There is no opportunity for an application of the doctrine of constructive eviction by inability to get possession where the warranted premises consist of wild and uncultivated lands which are vacant and unoccupied. The legal title draws after it constructive possession which will continue till actual eviction,[82] and the grantee may maintain trespass against any one entering on the land.[83] If the title is defective the grantee will have no right of action on the grantor's covenant of warranty until the true owner or some one claiming under him has actually entered upon and taken possession of the premises,[84] or until his rights have been judicially established against the grantee.[85] A mere sale of the premises to a stranger by the true owner will not amount to a constructive eviction.[86]

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[78] Rindskop v. Trust Co., 58 Barb. (N. Y.) 49.

[79] Blanchard v. Blanchard, 48 Me. 174, a case in which a widow was entitled to part of the land as dower. Dower had not, it seems, been actually assigned in this case, and the broad proposition was laid down that if the warranted premises be subject to dower at the time of the conveyance, the warranty is broken as soon as made. Citing Porter v. Noyes, 2 Greenl. (Me.) 26; 11 Am. Dec. 30, and Sherman v. Ranger, 22 Pick. (Mass.) 447. In Tuite v. Miller, 10 Ohio, 382, it was held that a decree against the covenantee to pay a certain sum to a widow in lieu of dower was not a breach of the covenant of warranty. It would be a breach of a covenant against incumbrances.

[80] Rickert v. Snyder, 9 Wend. (N. Y.) 420. Leonard v. Cary, 23 Ky. Law R. 1325; 65 S. W. Rep. 124. Anthony v. Rockefeller, 102 Mo. App. 326; aff'd 76 S. W. Rep. 491, though the grantee had knowledge of the lease. Bass v. Starns, 108 Ark. 357; 158 S. W. 136; Fortescue v. Real Est. Co., 75 N. J. L. 272; 67 Atl. 1024; Sheldon v. Crane, 146 Iowa 461; 125 N. W. 238. Compare Simonds v. Diamond Match Co., 159 Mich. 241; 123 N. W. 1132; Baldwin v. Smith, (Tex. Civ. App.) 119 S. W. 111. It has been held that inability to get possession of the premises from a lessee, is no breach of the warranty if the grantee purchased with notice of the outstanding lease. Hammond v. Jones, 41 Ind. App. 32; 83 N. E. 257.

[81] Ensign v. Colt, 75 Conn. 111; 52 Atl. Rep. 829.

[82] Moore v. Vail, 17 Ill. 190. Wood v. Forncrook, 3 Thomp. & C. (N. Y.) 303. Steiner v. Baughman, 12 Pa. St. 106. Chandler v. Brown, 59 N. H. 370. Smith v. Lumber Co., 131 Ark. 22; 198 S. W. 107. In McLennan v.

§ 148. *Surrender of possession.* A grantee with warranty may surrender the possession of the premises to a holder of the paramount title, and this will be a constructive eviction and breach of the covenant of warranty. He is not obliged to defend himself against a title which he is satisfied must ultimately prevail,[87] or to

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Prentice, 85 Wis. 427, it appeared that the premises were vacant and there was nothing to prevent the covenantee from taking possession, except the occupation of a part of the premises by a railroad embankment used by the company in rolling logs from its cars. It did not appear that such use was adverse or hostile to the title conveyed, nor that the company had attempted to acquire any title to the part of the premises so used. It was held that the facts stated did not amount to a constructive eviction of the covenantee.

[83] Jackson v. Sellick, 8 Johns. (N. Y.) 262; Van Rensselaer v. Van Rensselaer, 9 Johns. (N. Y.) 377. Mather v. Tremty, 3 S. & R. (Pa.) 514; 8 Am. Dec. 663.

[84] Wood v. Fornerook, 3 Thomp. & C. (N. Y.) 303; St. John v. Palmer, 5 Hill, (N. Y.) 601. Moore v. Vail, 17 Ill. 190. But see McInnis v. Lyman, 62 Wis. 191; 22 N. W. 405, where it was held that a conveyance of unoccupied lands to which the grantor had no title, is of itself a constructive eviction and breach of warranty. See, also, Koepke v. Winterfield, 116 Wis. 44; 92 N. W. Rep. 437. Scott v. Kirkendall, 88 Ill. 465; 30 Am. Rep. 562. Snider v. Van Petten, 180 Ill. App. 677.

[85] Smith v. Lumber Co., 131 Ark. 22; 198 S. W. 107. Allis v. Nininger, 25 Minn. 525, where it was held that a judgment in ejectment against a grantee of unoccupied lands and an abandonment of all further claim to the premises by him, constituted a breach of the covenant of warranty. In Williams v. Shaw, N. C. Term. Rep. 197; 7 Am. Dec. 106, it was held that a recovery of damages in trespass against the grantee for cutting down timber on the warranted premises, which were unoccupied, amounted to a breach of the covenant of warranty.

[86] Hamilton v. Lusk, 88 Ga. 520; 15 S. E. Rep. 10. Green v. Irving, 54 Miss. 450; 28 Am. Rep. 360. Matteson v. Vaughn, 38 Mich. 373. Loomis v. Bedel, 11 N. H. 74.

[87] 2 Wait's Act. & Def. 389; Rawle Covts. (5th ed.), § 134; 2 Greenl. Ev., § 244; 7 Am. & Eng. Encyc. of L. 36. Dupuy v. Roebuck, 7 Ala. 484, 488; Davenport v. Bartlett, 9 Ala. 179; Griffin v. Reynolds, 17 Ala. 198; Gunter v. Williams, 40 Ala. 572; Heflin v. Phillips, (Ala.) 11 So. Rep. 729. Prestwood v. McGowan, 128 Ala. 267; 29 So. 386. McGary v. Hastings, 39 Cal.

wait until the true owner forcibly ejects him, or until he is turned out by the shoulders under legal process.[88] "The law does not require the idle and expensive ceremony of being turned out by legal process, when that result would be inevitable."[89] There is no

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360; 2 Am. Rep. 456; Booth v. Starr, 5 Day (Conn.), 282; 5 Am. Dec. 149. Lowery v. Yawn, 111 Ga. 61; 36 S. E. Rep. 294. McMullen v. Butler Co., 117 Ga. 845; 45 S. E. 258. Moore v. Vail, 17 Ill. 185; Brady v. Spruck, 27 Ill. 478; Owen v. Thomas, 33 Ill. 320; Harding v. Larkin, 41 Ill. 422; Claycomb v. Munger, 51 Ill. 378. Reasoner v. Edmundson, 5 Ind. 395; Mason v. Cooksey, 51 Ind. 519; Axtel v. Chase, 83 Ind. 546; Bever v. North, 107 Ind. 544; 8 N. E. Rep. 576. Funk v. Creswell, 5 Clarke (Io.), 62; Thomas v. Stickle, 32 Iowa, 76. Radcliff v. Ship, Hard. (Ky.) 279. Hamilton v. Cutts, 4 Mass. 349; 3 Am. Dec. 222, leading case. Ogden v. Ball, 40 Minn. 94; 41 N. W. Rep. 453. Wagner v. Finnegan, 65 Minn. 115; 67 N. W. Rep. 795. Hall v. Bray, 51 Mo. 288; Morgan v. R. Co., 63 Mo. 129; Ward v. Ashbrook, 78 Mo. 515; Lambert v. Estes, 99 Mo. 604; 13 S. W. Rep. 284. Snyder v. Jennings, 15 Neb. 372; Real v. Hollister, 17 Neb. 661. Drew v. Towle, 10 Fost. (N. H.) 531; 64 Am. Dec. 309. Greenvault v. Davis, 4 Hill (N. Y.), 643; Fowler v. Poling, 6 Barb. (N. Y.) 165; Stone v. Hooker, 9 Cow. (N. Y.) 157; Home Life Ins. Co. v. Sherman, 46 N. Y. 373; Hyman v. Boston Chair Manfg. Co., 58 N. Y. Super. 282; 11 N. Y. Supp. 52. Parker v. Dunn, 2 Jones L. (N. C.) 204. Patton v. McFarlane, 3 Pen. & W. (Pa.) 422; Poyntell v. Spencer, 6 Pa. St. 254; Steiner v. Baughman, 12 Pa. St. 106. Collis v. Cogbill, 9 Lea (Tenn.), 137. Peck v. Hensley, 20 Tex. 673. Herbert v. Handy, 29 R. I. 543; 72 Atl. 1102; Eaker v. Harvey (Mo.) 179 S. W. 985. In Davenport v. Bartlett, 9 Ala. 187, the court said that: "In Roebuck v. Dupuy, 7 Ala. 487, we intimated that the plaintiff might recover in an action upon a covenant of warranty, though he had voluntarily yielded to a dispossession, provided the title to which he yielded was a good title and paramount to that of the warrantor; and, upon mature reflection and examination of the authorities, we are satisfied that such is the law. Why should the vendee be compelled to involve himself in a law suit, when it is self evident he must be defeated? What conceivable public or private good is to be accomplished by such a course? None that we can conceive of, and we are, therefore, of opinion that the covenantee has the right to purchase in the incumbrance or outstanding title, and sue the warrantor upon his covenant." In Allis v. Nininger, 25 Minn. 525, the court observed: "Although the name eviction is still used to characterize the fact or facts which are allowed to constitute a breach of the covenant, an eviction in fact is no longer necessary;" and, continuing, laid down this rule: "If, at the date of the covenant, there is a superior title in a third person, whenever that title is actually asserted against the covenantee and the premises claimed under it, and the covenantee is obliged to yield and does yield his claim to such superior title, the covenant to warrant and defend is broken. To such circumstances, we may, for the sake of convenience, apply the term eviction."

[88] Stewart v. West, 14 Pa. St. 336.

[89] Clark v. McAnulty, 3 S. & R. (Pa.) 372.

reason why such a surrender without the trouble and expense of a law suit should deprive him of a remedy on the covenant. The grantor is not injured by such an amicable ouster. On the contrary, it is a benefit to him, for he thus saves the expense incurred by the grantee in defending the title.[90] And if he may surrender the possession without a legal contest, *a fortiori,* may he yield to the true owner after judgment against himself in ejectment; the law having settled the title, he need not wait for its officers to enforce the sentence; it is not for the court to discourage a ready acquiescence in its decisions.[91] A few cases may be found inclining to the view that a voluntary surrender of the possession to an adverse claimant is not such an eviction as amounts to a breach of the covenant of warranty.[92] But the rule as stated above may be regarded as settled law in nearly every State of the Union. An attornment by the covenantee to the true owner, or to one having the right to sell the premises under a lien or incumbrance, is a constructive eviction.[93]

The surrender of possession must be made to the adverse claimant. The covenantee cannot, on failure of title, return the premises to the covenantor and maintain an action for breach of the covenant of warranty.[94]

A mere judgment in ejectment against the covenantee, unaccompanied by a surrender of the possession, is not an eviction, and, therefore, not a breach of the covenant of warranty.[95] In some cases it has been said, in a general way, that a judgment in ejectment amounts to an eviction, but upon examination it will be found that in most, if not all of the cases, the covenantee had either yielded up the possession to the plaintiff in ejectment, or had purchased his rights and remained in possession under his title.[96] Of course, a mere action of ejectment cannot amount to a breach of the covenant of warranty until it results in an action or virtual eviction of the grantee.[97] A voluntary abandonment of possession by the covenantee after judgment in ejectment will not be construed an eviction, unless possession of the premises be thereafter taken by the plaintiff in ejectment.[98] It has been held that if the covenant be to defend the right and title against the claims of all persons a judgment in ejectment against the covenantee will amount to a breach of the warranty, though it has not resulted in an actual ouster.[99] But a covenantee who voluntarily paid off such a judgment, pending proceedings by the covenantor to have it set aside, is not entitled to recover on the warranty.[1] A judgment in ejectment for the alternative value of the premises, without improvements, if the plaintiff should elect to accept the same instead of possession, has been held a constructive eviction and breach of warranty.[2] A judgment in ejectment against the covenantee where he remains in possession under the "occupying claimants act" pending assessment of the value of his improvements, will not amount to a constructive eviction.[3] Nor will such a judgment, entered by consent of parties, have that effect.[4] A money judgment against the covenantee, in an action by him against a stranger to quiet title to the land, has been held equivalent to an eviction of the covenantee.[5]

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[90] BROWNSON, J., in Greenvault v. Davis, 4 Hill (N. Y.), 643.

[91] Sterling v. Peet, 14 Conn. 254. Meeks v. Meeks, 5 Ga. App. 394; 63 S. E. 270.

[92] Dennis v. Heath, 11 Sm. & M. (Miss.) 206; 49 Am. Dec. 51; Heath v. Newman, 11 Sm. & M. (Miss.) 201. In Kentucky, it seems that the covenantee cannot surrender the possession to an adverse claimant and recover as for a breach of the covenant of warranty, unless there has been a judicial determination of the superiority of the adverse claimant's title, even though the covenantee can show that such title was in fact paramount. Huff v. Cumberland Val. Land Co., (Ky.) 30 S. W. Rep. 660 (not officially reported).

[93] Poyntell v. Spencer, 6 Pa. St. 254. An execution levied on land under a judgment against the covenantor and seisin and possession delivered to the judgment creditor is an eviction and a breach of the covenant of warranty, though there be no actual amotion of the covenantee from the premises by reason of his attorning to the creditor. Gore v. Brazier, 3 Mass. 523; 3 Am. Dec. 182. An entry upon a mortgaged estate to foreclose upon breach of condition is, without actual ouster, an eviction for which a warrantor can recover upon his covenant. Furnas v. Durgin, 119 Mass. 500; 20 Am. Rep. 341.

[94] Axtel v. Chase, 83 Ind. 546.

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[95] Clement v. Collins, 59 Ga. 124; Davis v. Smith, 5 Ga. 274; 47 Am. Dec. 279; McDowell v. Hunter, Dudley (Ga.) 4; Burns v. Vereen, 132 Ga. 349; 64 S. E. 113. Dennis v. Heath, 11 Sm. & M. (Miss.) 206; 49 Am. Dec. 51; Heath v. Newman, 11 Sm. & M. (Miss.) 201. Ferris v. Harshea, Mart. & Yerg. (Tenn.) 48; Stipe v. Stipe, 2 Head (Tenn.), 169, *semble.* Kerr v. Shaw, 13 Johns. (N. Y.) 236. Knepper v. Kurtz, 58 Pa. St. 480; Paul v. Witman, 3 Watts & S. (Pa.) 407. Such, also, is the rule of the civil law. Fowler v. Smith, 2 Cal. 568, citing Pothier Cont. 89.

[96] In Drury v. Shumway, 1 D. Chip. (Vt.) 110; 1 Am. Dec. 704, it was held that a judgment in ejectment against the covenantee was an eviction. The covenant of warranty was broken by the covenantor's failing to defend the title. See, also, Chandler v. Brown, 59 N. H. 370; Hubbard v. Stannaford, 30 Ky. L. R. 1044; 100 S. W. 232. And in Woodward v. Allen, 3 Dana (Ky.), 164, it was broadly declared that a judgment against the covenantee in ejectment, without any other fact, was equivalent to eviction, but in all these cases it seems that the covenantee had actually attorned to the ejectment plaintiff, or purchased his title. But see Boyd v. Bartlett, 36 Vt. 9, where the broad rule that a recovery in ejectment against the covenantee by virtue of an older and paramount title, was a breach of the covenant of warranty without actual eviction, was laid down. So, also, in King v. Kilbride, 58 Conn. 109; 19 Atl. Rep. 519, *obiter,* and Clark v. Whitehead, 47 Ga. 516. Such, also, seems to be the rule in Texas, the covenantee being there permitted, when sued in ejectment, to implead the covenantor, and have judgment over against him, as in case of breach of warranty, if the adverse claim be established. Kirby v. Estill, 75 Tex. 485; 12 S. W. Rep. 807; Johns v. Hardin, 81 Tex. 37; 16 S. W. Rep. 623. In Finton v. Eggleston, 61 Hun (N. Y.), 246; 16 N. Y. Supp. 121, it was held that the Statute of Limitations began to run upon a covenant of warranty as soon as judgment in ejectment against the covenantee was entered, which necessarily gives to the judgment the effect of an eviction. A judgment in ejectment against the covenantor, who was impleaded with the covenantee, is an eviction. Gibbons v. Moore, 98 Ark. 501, 136 S. W. 937. The reversal of a decree in favor of the covenantee, in a suit by him to quiet title to the land, is a constructive eviction of the covenantee. Beach v. Nordman, 90 Ark. 59; 117 S. W. 785. A judgment in ejectment against the covenantee where the lands conveyed were wild and uncultivated, is a breach of the covenant for quiet enjoyment. Smith v. Lumber Co., 131 Ark. 22; 198 S. W. 107.

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[97] Miller v. Avery, 2 Barb. Ch. (N. Y.) 582. Hooker v. Folsom, 4 Ind. 90. Schuylkill & Dauphin R. Co. v. Schmoele, 57 Pa. St. 271. Park v. Bates, 12 Vt. 381; 36 Am. Dec. 347, in so far as it holds that a suit commenced by an adverse claimant against the grantee to recover the possession, is a breach of the covenant of warranty, is disapproved in Beebe v. Swartwout, 3 Gilm. (Ill.) 168. The lessee of a right to drill oil and gas wells, who was enjoined by a grantee of the coal under the land, the grant reserving to the grantor the right to drill oil and gas wells, and who compromised the injunction by payment of a sum of money, was held not entitled to recover on the lessor's covenant for quiet enjoyment. Chambers v. Smith, 183 Pa. St. 122; 38 Atl. Rep. 522; citing Duff v. Wilson, 69 Pa. St. 316.

[98] Hagler v. Simpson, 1 Busbee (N. C.), 384.

[99] Leary v. Durham, 4 Ga. 593.

[1] Tuggle v. Hamilton, 100 Ga. 292.

[2] Mason v. Kellogg, 38 Mich. 132.

[3] Lundgren v. Kerkow, (Neb.) 95 N. W. Rep. 501.

[4] Vincent v. Hicks, 23 Ky. Law R. 859; 64 S. W. 456.

[5] Sarlls v. Beckman, 55 Ind. App. 638; 104 N. E. 598; where held, also, that the right to recover for the breach was not affected by the fact that the adverse claimants would not have known of their interests but for the suit to quiet the title.

The mere endorsement of the word "cancelled" on a patent for public lands by the commissioner of the general land office fifty-five years after the patent issued, is not a constructive eviction of a person claiming title under the patent.[6]

§ 149. *Hostile assertion of adverse claim.* The rule that a surrender of the premises to an adverse claimant operates a constructive eviction and a breach of the covenant of warranty is to be taken with this qualification, namely, that the surrender must have been in consequence of a hostile assertion of the rights of the adverse claimant.[7] In this respect the covenant of warranty has been distinguished from the covenant of seisin or the covenant against incumbrances. These are broken as soon as made if the title be bad, or the estate encumbered, and the purchase of an adverse claim, or an incumbrance, or surrender of the possession to the claimant, adds nothing to the breach.[8] It has been held that a sale of the premises by the adverse claimant does not amount to a hostile assertion of his title.[9] An exception to this rule has been declared to exist where the sale is by the State while holding the paramount title. In such a case persons in possession under defective titles may abandon the premises and sue for a breach of the covenant of warranty as if actually evicted.[10] It has also been held that the rule that there must have been a hostile assertion of the better title to justify a voluntary surrender of the premises, or the purchase of such title, does not apply where the title is outstanding in the United States.[11] A sale of the premises under a prior deed of trust or mortgage, is such hostile assertion of the paramount title as will justify the grantee in surrendering the premises.[12] So, also, the cancellation of a defective entry of the premises under the public land laws.[13]

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[6] Ellis v. John Crossley's Sons, 119 Fed. 779.

[7] Morgan v. Hannibal & St. J. R. Co., 63 Mo. 129. Funk v. Creswell, 5 Clarke (Io.), 62. Fritz v. Pusey, 31 Minn. 368; 18 N. W. Rep. 94. Moore v. Vail, 17 Ill. 185. Brown v. Corson, 16 Oreg. 388; 19 Pac. Rep. 66. Joyner v. Smith, 132 Ga. 779; 65 S. E. 68; Shaw Bros. v. Guthrie, 14 Ga. App. 303; 80 S. E. 735. As the tenant cannot dispute the title of his landlord, the covenantee is not justified in surrendering the title to his tenant. Bedell v. Christy, 62 Kans. 760; 64 Pac. Rep. 629.

[8] Funk v. Creswell, 5 Cl. (Iowa) 62.

[9] Green v. Irving, 54 Miss. 450; 28 Am. Rep. 360. Matteson v. Vaughn, 38 Mich. 373. Loomis v. Bedel, 11 N. H. 74. In Hoy v. Taliaferro, 16 Miss. 727, it was held that a sale of the granted premises under execution against the grantor was not equivalent to an actual eviction, though the grantee abandoned the possession after the sale.

[10] Glenn v. Thistle, 23 Miss. 42; Green v. Irving, 54 Miss. 450; 28 Am. Rep. 360. Brown v. Allen, 57 Hun (N. Y.), 219; 10 N. Y. Supp. 714. McGary v. Hastings, 39 Cal. 368; 2 Am. Rep. 456. Dillahunty v. Little Rock & Fort S. R. Co., (Ark.) 27 S. W. Rep. 1002; Abbott v. Rowan, 33 Ark. 593. In analogy, Schulenberg v. Harriman, 21 Wall. (U. S.) 44.

The covenantee, surrendering the possession and suing for a breach of the covenant of warranty, must not only show that the title to which he yielded had been hostilely asserted against him, but that it was in fact superior to that of the covenantor. When he surrenders or suffers the possession to pass from him without a legal contest he takes upon himself the burden of showing that the person who entered had a title paramount to that of his grantor,[14] unless the surrender was made after judgment in ejectment against himself which the grantor was requested to defend.[15] A contrary rule would subject the defendant to much hardship, and encourage fraud and collusion on the part of the purchaser and adverse claimants. The covenantee cannot recover on the warranty if he surrenders the premises to one against whom he could have successfully pleaded the statute of limitations if he had been sued in ejectment. In such a case the surrender will be regarded as having been made to one who had no title to the premises.[16]

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[11] Ante, § 144. Kans. Pac. R. Co. v. Dunmeyer, 19 Kans. 543. Barr v. Greeley, 52 Fed. Rep. 926, *obiter*. Herington v. Clark, 56 Kans. 644; 44 Pac. Rep. 624; Holloway v. Milder, 84 Miss. 776; 36 So. Rep. 531. Crawford Co. Bank v. Baker, 95 Ark. 438; 130 S. W. 556; Seldon v. Jones Co., 74 Ark. 348; 85 S. W. 778; Dillahunty v. Railway Co., 59 Ark. 699; 27 S. W. 1002; 28 S. W. 657.

[12] Harr v. Shaffer, 52 W. Va. 207; 43 S. E. Rep. 89.

[13] Giddings v. Holter, 19 Mont. 263; 48 Pac. Rep. 8.

[14] Hamilton v. Cutts, 4 Mass. 349, 353; 3 Am. Dec. 222. Greenvault v. Davis, 4 Hill (N. Y.), 643. Lambert v. Estes, 99 Mo. 604; 13 S. W. Rep. 284. Freymoth v. Nelson, 84 Mo. App. 293. Snyder v. Jennings, 15 Neb. 372; 19 N. W. Rep. 501; Cheney v. Straube, 35 Neb. 521; 53 N. W. Rep. 479, and 62 N. W. Rep. 234. Westrope v. Chambers, 51 Tex. 178. Moore v. Vail, 17 Ill. 190. Crane v. Collenbaugh, 47 Ind. 256. Brandt v. Foster, 5 Clarke (Io.), 287; Funk v. Creswell, 5 Clarke (Io.), 62; Thomas v. Stiele, 32 Iowa, 71. McKillip v. Post, 82 Vt. 403; 74 Atl. 78; Smith v. Keeley, 146 Iowa 660; 125 N. W. 669. Hester v. Hunnicutt, (Ala.) 16 So. Rep. 162. In this case the covenantee had incited the surrenderee to set up a claim to the premises.

[15] Post, § 175. A judgment against the covenantor in an action against him by the covenantee, is not conclusive on the original covenantor. McCrillis v. Thomas, 85 S. W. Rep. 673; 110 Mo. App. 679 aff'd.

We have seen that a mere judgment in ejectment or other possessory action against the covenantee is not equivalent to eviction.[17] It is sufficient, however, as a hostile assertion of the title of the adverse claimant to justify the covenantee in surrendering possession to him, or in buying in his claim. No duty devolves upon the covenantee to appeal from the judgment.[18]

In several early cases it has been held that a voluntary abandonment of the premises by the covenantee after judgment against him in ejectment is not an eviction,[19] but they have been frequently overruled or disapproved, and are no longer regarded as authority.[20]

§ 150. *Purchase of outstanding title.* The purchase of a superior title to the premises from a stranger by the covenantee is in effect a surrender of the possession, and a surrender of the possession to him who has the better right amounts, as we have seen, to a constructive eviction from the premises. The law does not require either that the covenantee shall go through the useless ceremony of removing from the premises and immediately re-entering under his newly acquired better title, or that he should submit to an actual forcible expulsion with or without legal process in order that he may have an action on the covenant of warranty. The ouster by purchase of the superior title without actually leaving the premises is as effectual as it could be by peaceably leaving them or by suffering an actual expulsion. The covenantor's interests are in no way subserved by requiring evidence of an actual dispossession of the grantee. On the contrary he is benefitted by the purchase, for thereby he is saved the expense which would be incurred by the grantee in defending the title.[21]

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[16] Britton v. Ruffin, 122 N. C. 113; 28 S. E. Rep. 963.

[17] Ante, § 148.

[18] Bever v. North, 107 Ind. 545; 8 N. E. Rep. 576. Wiggins v. Pender, 132 N. C. 628; 44 N. E. Rep. 362; McCrillis v. Thomas, 85 S. W. Rep. 673, 110 Mo. App. 699, aff'd.; Meeks v. Meeks, 5 Ga. App. 394; 63 S. E. 270.

[19] Webb v. Alexander, 7 Wend. (N. Y.) 286; Lansing v. Van Alstyne, 2 Wend. (N. Y.) 563, note; Waldron v. McCarthy, 3 Johns. (N. Y.) 473.

[20] Greenvault v. Davis, 4 Hill (N. Y.), 645. See, ante, p. 396.

[21] Loomis v. Bedel, 11 N. H. 74. Lane v. Fury, 31 Ohio St. 574.

Therefore it has been frequently held that the covenantee in possession of the estate may, to avoid an inevitable eviction, buy in the paramount title or take a lease thereunder without actual change of the possession.[22] This he may do without violating any duty which he owes to the covenantor. Accordingly, where the warranted premises, while in the possession of the grantee, were sold under decree of court against the grantor to a stranger, the report of sale returned to and confirmed by the court and a deed ordered to be made to the purchaser, and the grantee, without leaving the possession, bought in the title of the purchaser under the decree, it was held that nothing more could in reason or in justice be required to show an eviction. The covenantee was not bound to wait until he was forced out of possession by an order of the court.[23] While the covenantee may buy in an outstanding right or interest in order to protect his interest, there is no obligation upon him so to do,[24] and it is no defense to an action on the covenant that he knew of the outstanding right at the time he took the conveyance and might have acquired such right for a trifling sum.[25]

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[22] Rawle Covts. (5th ed.), § 142; 2 Greenl. Ev., § 244. Barlow v. Delaney, 40 Fed. Rep. 97. McGary v. Hastings, 39 Cal. 361; 2 Am. Rep. 456. Amos v. Cosby, 74 Ga. 793. Davenport v. Bartlett, 9 Ala. 179; Roebuck v. Dupuy, 7 Ala. 487. Sisk v. Woodruff, 15 Ill. 15; McConnell v. Downs, 48 Ill. 271; Claycomb v. Munger, 51 Ill. 378. Mooney v. Burchard, 84 Ind. 285. Richards v. Homestead Co., 44 Iowa, 304; 24 Am. Rep. 745; Royer v. Foster, 62 Iowa, 321; Thomas v. Stickle, 32 Iowa, 76. Sprague v. Baker, 17 Mass. 586, leading case; Leffingwell v. Elliot, 10 Pick. (Mass.) 204; 19 Am. Dec. 343; Estabrook v. Smith, 6 Gray (Mass.), 577; 66 Am. Dec. 445; Kramer v. Carter, 136 Mass. 504. Petrie v. Folz, 54 N. Y. Super. Ct. 223. King v. Kerr, 5 Ohio, 158; 22 Am. Dec. 777. Brown v. Dickerson, 12 Pa. St. 372. Austin v. McKinney, 5 Lea (Tenn.), 499. Denson v. Love, 58 Tex. 468. Haffey v. Birchetts, 11 Leigh (Va.), 83, 88. Turner v. Goodrich, 26 Vt. 708. Potwin v. Blasher, 9 Wash. 460; 37 Pac. Rep. 710. Pritchett v. Redick, 62 Neb. 296; 86 N. W. Rep. 1091; Craven v. Clary, 8 Kan. App. 295; 55 Pac. 679. Leet v. Gratz, 92 Mo. App. 422. Hayden v. Patterson, 39 Colo. 15; 88 Pac. 437; Morgan v. Haley, 107 Va. 331; 58 S. E. 564; 13 L. R. A. (N. S.) 732; 122 Am. St. Rep. 846; Allen v. Miller, 99 Minn. 75; 54 So. 731; Fassler v. Streit, 100 Neb. 722; 161 N. W. 172.

[23] Hanson v. Buckner, 4 Dana (Ky.), 254. But in a case in which the granted premises had been sold as property inherited by the grantor and liable for the debts of the ancestor, in a proceeding to which the grantee was no party, it was held that such sale was not binding on him, and hence that he was not entitled to recover, as upon a breach of warranty, the amount paid by him for a quit claim from the purchaser at such sale. Pritchard v. Smith, 107 Ky. 483; 54 S. W. Rep. 717.

[24] Cong. of Sisters v. Jane, 110 Miss. 612; 70 So. 818.

The purchase of the outstanding paramount title amounts to a constructive eviction, whether that title has or has not been established by judgment or decree. The covenantee simply takes the risk of an ability to show that the title so acquired is in fact superior to that of the covenantor.[26] The burden is on him to show that fact.[27] A few early cases in New York and elsewhere decide that the covenant of warranty is broken only by an actual eviction, and that the purchase of an outstanding superior title, or a surrender to the holder thereof, is insufficient to establish an eviction;[28] but the rule as stated prevails now, it is believed, in that State;[29] and generally throughout the entire country. If a lessee under a defective title is disturbed by a party having a paramount title, he will not be restrained by his lease from purchasing the paramount title without the consent of his lessor, though he has not been evicted or ousted from the possession. The rule that a tenant cannot deny the title of his landlord has no application to such a case.[30] It is not necessary for the covenantee to show that he has actually paid the price of the outstanding title. It is sufficient if an obligation to pay, and the time and manner in which payment is to be made, appear.[31] It has been held, however, that the purchase of the outstanding title must have been made in the interest of the grantee, and against the interest of the grantor, for the purpose of extinguishing the title theretofore held by the grantee, and for the purpose of asserting the new title thus acquired against the grantor.[32]

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[25] Kimball v. Saguin, (Iowa) 53 N. W. Rep. 116. Brawley v. Copelin, 106 Ark. 256; 153 S. W. 101.

[26] Rawle Covts. for Title (5th ed.), § 146. Turner v. Goodrich, 5 Deane (Vt.), 709. Walker v. Deane, 79 Mo. 664. Kramer v. Carter, 136 Mass. 504.

[27] Copwood v. McCandless, 99 Miss. 364; 54 So. 1007.

[28] Waldron v. McCarty, 3 Johns. (N. Y.) 471; Kerr v. Shaw, 13 Johns. (N. Y.) 236; Kinney v. McCulloch, 1 Sandf. Ch. (N. Y.) 370; Cowdrey v. Coit, 44 N. Y. 382; 4 Am. Rep. 690. Shelton v. Pease, 10 Mo. 482; Caldwell v. Bower, 17 Mo. 564. Hannah v. Henderson, 4 Ind. 174; Reasoner v. Edmundson, 5 Ind. 393.

[29] Beyer v. Schulze, 54 N. Y. Super. Ct. 212; Petrie v. Folz, 54 N. Y. Super. Ct. 223; Bordewell v. Colie, 1 Lans. (N. Y.) 146. Wright v. Phipps, 90 Fed. 556. Rawle Covts. (5th ed.), § 144, note. In Mississippi a covenantee who buys in an outstanding paramount title cannot have an action for breach of the covenant of warranty; there must have been an actual dispossession, either by actual eviction or surrender of the possession. But he can recover from the covenantee in *assumpsit* the money so expended in perfecting the title, or have a decree in equity against the vendor for reimbursement, either of which accomplishes precisely the same purpose as an action for breach of the covenant of warranty. Wilty v. Hightower, 12 Sm. & M. (Miss.) 478; Dennis v. Heath, 11 Sm. & M. 206; Burruss v. Wilkinson, 31 Miss. 537; Kirkpatrick v. Miller, 50 Miss. 521; Dyer v. Britton, 53 Miss. 270; Green v. Irving, 54 Miss. 450; 28 Am. Rep. 360.

The discharge of a prior incumbrance in order to prevent an inevitable eviction, is also a constructive breach of the covenant of warranty.[33] This covenant is broken by lawful eviction, whether under an incumbrance or a paramount title, and the discharge of the incumbrance to prevent eviction, is as much a constructive eviction as a purchase of the outstanding title for the same purpose.[34] The covenantor will not, in an action on the warranty, be permitted to show that the purchaser agreed, by parol, to take subject to the incumbrance. The rule permitting the true consideration of a deed to be shown does not extend thus far.[35]

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[30] George v. Putney, 4 Cush. (Mass.) 355; 50 Am. Dec. 788; Greeno v. Munson, 9 Vt. 37; 31 Am. Dec. 605. Chambers v. Pleak, 6 Dana (Ky.), 429; 32 Am. Dec. 78; Lunsford v. Turner, 5 J. J. Marsh. (Ky.) 104; 20 Am. Dec. 248. Jackson v. McAuley, 13 Wash. 298; 43 Pac. Rep. 41.

[31] Hooper v. Sac Co. Bank, 72 Iowa, 280; 33 N. W. Rep. 681; Royer v. Foster, 62 Iowa, 322; 17 N. W. Rep. 516.

[32] Wright v. Phipps, 90 Fed. Rep. 556, the court saying: if it appear that grantee and grantor have defended against the claim of a third person to the land; that they have, through several years, co-operated to settle such claim; that they have agreed to share in the expense thereof, and do so share; and pursuant thereto a release of the outstanding title is made to the grantee, upon the payment of a sum bearing a slight relation to the value of the land by the grantee and grantor; it must be concluded that the release was obtained and taken by amicable arrangement, for the purpose of protecting the existing interests of the grantor as well as those of the grantee.

[33] Estabrook v. Smith, 6 Gray (Mass.), 557; 66 Am. Dec. 443; Whitney v. Densmore, 6 Cush. (Mass.) 128 Bemis v. Smith, 10 Met. (Mass.) 194. Collier v. Cowger, 52 Ark. 322; 12 S. W. Rep. 702. Stipe v. Stipe, 2 Head (Tenn.), 171; Kinney v. Norton, 10 Heisk. (Tenn.) 388. Brown v. Dickenson, 12 Pa. St. 372, disapproving Waldron v. McCarty, 3 Johns. (N. Y.) 471. Stewart v. Drake, 4 Halst. (N. J. L.) 139. Cole v. Lee, 30 Me. 392; Kelly v. Lowe, 18 Me. 244. McLean v. Webster, (Kans.) 26 Pac. Rep. 10. Brown v. Thompson, 81 S. C. 380; 62 S. E. 440; Dignan v. West, 71 W. Va. 296; 76 S. E. 561; Tukey v. Foster, 158 Iowa 311; 138 N. W. 862. Where an incumbrance has ripened into an eviction and worked a breach of the covenant of warranty, the liability upon that covenant and the covenant against incumbrances, is substantially identical; the damages recovered under either are for the eviction. Kramer v. Carter, 136 Mass. 504; Harrington v. Murphy, 109 Mass. 299. In Kelly v. Lowe, 18 Me. 244, it was held that the covenantee might recover the amount paid by him to remove an incumbrance, under which he was liable to be evicted, though the payment was not made until after his suit on the warranty was begun. The covenantee may pay off a judgment binding the land, and hold the same as a set-off against

The purchase of an outstanding tax-title will not entitle the grantee to recover on a covenant of warranty or a covenant of seisin, if the tax-title be incapable of enforcement against the land. The mere fact that the tax-title creates a cloud upon the title of the covenantee affecting the market or loan value of the land, is no ground on which he can recover.[36]

§ 151. *Hostile assertion of adverse claim.* We have seen that a surrender of the premises to an adverse claimant will not amount to a constructive eviction unless the adverse claim has been hostilely asserted. The same rule applies to a purchase of the outstanding title. The covenantee cannot search out adverse claims to the land and buy them up in order to acquire a right of action against the covenantor. Some particular act by which the covenantee is disturbed must be shown. If he voluntarily buys an adverse claim or discharges an incumbrance, without previous demand upon him having been made, he cannot recover as for a

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the purchase money, though, at the time of such payment, an execution had been issued on the judgment, and levied on other lands subject to the lien. Dunkleburger v. Whitehall, 70 Ind. 214.

[34] Bricker v. Bricker, 11 Ohio St. 240. Martin v. Atkinson, 7 Ga. 228; 50 Am. Dec. 403. Warren v. Stoddart (Idaho), 59 Pac. Rep. 540. The proposition in the text seems clearly supported by the weight of authority in the United States. But in New York it has been held that the redemption of land by the covenantee from a tax sale, in order to prevent consummation of title in the purchaser at the tax sale, did not amount to an eviction, and that the covenantee could not recover back the money so paid, either in covenant or in assumpsit for money paid to the grantor's use. McCoy v. Lord, 19 Barb. (N. Y.) 18.

[35] Bever v. North, 107 Ind. 545; 8 N. E. Rep. 576. Beach v. Packard, 10 Vt. 96; 33 Am. Dec. 185.

[36] Bruington v. Barber, (Kan.) 64 Pac. Rep. 963, where the tax-title bought in by the grantee, having been on record for two years, could not be enforced against the land (Gen. Stats. Kans., 1899, ch. 80).

breach of warranty.[37] But practically this rule is of little importance if the deed contains also a covenant of seisin, for this covenant is absolutely broken as soon as made if the title be outstanding; and in an action for the breach the purchaser is entitled to recover as substantial damages, the amount paid by him to get in the outstanding title.[38] So also where the deed contains a covenant against incumbrances, and the covenantee discharges or buys in an incumbrance on the estate.[39]

The burden, of course, devolves upon the covenantee to show, in an action on the warranty, that the title thus purchased in, was paramount to that of the covenantor,[40] unless the purchase was made after judgment against the covenantee in ejectment, or other possessory action, which the covenantor was requested to defend.[41]

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[37] Rawle Covts. (5th ed.), §§ 55, 150. Sprague v. Baker, 17 Mass. 586, 590. Musgrove v. Cordova Imp. Co., 191 Ala. 419; 67 So. 582; Githens v. Barthill, (Mo. App.) 184 S. W. 145; Sievert v. Underwood, 58 Tex. Civ. App. 421; 124 S. W. 721. The cancellation of a homestead entry made by one under whom the covenantor claims, is a hostile assertion of title to the premises by the United States. Efta v. Swanson, 115 Minn. 373; 132 N. W. 335. The voluntary payment of taxes by the covenantee assessed upon the warranted land at the time of the conveyance, before any attempt is made to collect the same, does not operate a breach of the covenant of warranty. Leddy v. Enos, (Wash.) 33 Pac. Rep. 508. McGary v. Hastings, 39 Cal. 360; 2 Am. Rep. 456. Morgan v. Hannibal & St. J. R. Co., 63 Mo. 129. Turner v. Goodrich, 26 Vt. 708. In Coble v. Willborn, 2 Dev. L. (N. C.) 390, this rule was carried to its furthest extent. Judgment in ejectment had been recovered against the covenantee, and before the issuing of a writ of possession, or any actual disturbance of the possession, he purchased the rights of the plaintiff in ejectment, and it was held that this constituted no breach of the covenant of warranty.

[38] Ante, "Covenant of Seisin," § 116. Anderson v. Knox, 20 Ala. 161. Rawle Covts. (5th ed.), § 192.

[39] Id. Ante, § 130.

[40] Beyer v. Schulze, 54 N. Y. Super. Ct. 212. Richards v. Iowa Homestead Co., 44 Iowa, 304; Thomas v. Stickle, 32 Iowa, 76. Turner v. Goodrich, 26 Vt. 708. Davenport v. Bartlett, 9 Ala. 187. Sprague v. Baker, 17 Mass. 586. Furman v. Elmore, 2 Nott & McC. (S. C.) 189. Allen v. Miller, 99 Miss. 75; 54 So. 731. In Lane v. Fury, 31 Ohio St. 574, the covenantee was compelled to proceed in equity to obtain a decree correcting a defective acknowledgment of a conveyance by a married woman under whom the covenantor held. Such a decree was rendered, and judgment was also rendered in favor of the covenantee in ejectment against her by the heirs of the woman who had executed the defective deed. These facts were held sufficient to show a breach of the covenant of warranty. The proceeding to reform the defective deed was treated as in substance a purchase or getting in of the outstanding title. This case stands upon narrow grounds. The covenant of warranty is against lawful claims only, and judgment having been rendered both at law and

The measure of damages which the purchaser may recover where he buys in the outstanding title is hereafter considered.[42]

§ 152. **Loss of incorporeal hereditament. Adverse easements.** The covenant of warranty extends to and embraces not only the granted premises themselves, but all rights, easements and incorporeal hereditaments incident or appurtenant thereto, so that if the covenantee be deprived of any of these by one having lawful right, the covenant is broken, and a right of action accrues. The early case of Mitchell v. Warner[43] decided that the covenant of warranty was not broken by the loss of an easement appurtenant to the premises, but this decision has been frequently overruled, expressly or substantially, and the rule just stated may be regarded as established by the weight of authority in America.[44] If, however, at the time of the grant there is an apparent easement over adjoining lands belonging to another, not necessarily attached as an appurtenance to the land conveyed, and the grantor has no right or title to such easement, an interruption of the use thereof by the adjoining owner does not make the grantor liable for damages under covenants of warranty and quiet enjoyment, although

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equity against the heirs of the married woman seeking to take advantage of the defective acknowledgment of her deed, it is difficult to perceive an eviction, actual or constructive, by any one having a lawful claim.

[41] Post, § 177.

[42] Post, this chapter, § 168.

[43] 5 Conn. 497.

[44] Rawle Covts. (5th ed.) § 152, n. Wilson v. Cochran, 46 Pa. St. 233. Kramer v. Carter, 136 Mass. 507. Adams v. Conover, 87 N. Y. 422. A covenant for quiet enjoyment in a deed is broken where an adjoining owner raises a dam on his land by virtue of a paramount right, to a height that causes the warranted lands to be overflowed. Scriver v. Smith, 100 N. Y. 471; 53 Am. Rep. 224, distinguishing Green v. Collins, 86 N. Y. 246; 40 Am. Rep. 531. A covenant for quiet enjoyment is as much implied in the lease of an incorporeal right as in the lease of tangible property. Mayor v. Mabie, 3 Kern. (N. Y.) 151. A perpetual injunction against the use of an easement by the grantee is equivalent to an eviction. Scheible v. Slagle, 89 Ind. 323. The use and enjoyment of the full width of a street upon which the granted premises abut is within a covenant for quiet and peaceable enjoyment of the premises and their appurtenances. Moliter v. Sheldon, 37 Kans. 246; 15 Pac. Rep. 231.

the grant was "with appurtenances."[45] And where a right to construct a mill race across a lot of land is granted with warranty, the warranty is not broken by action on the part of an adjoining riparian proprietor that deprives the grantee of the right to flow water through the race.[46]

The covenants of warranty and for quiet enjoyment will also be broken if a stranger establish a right to an easement in the warranted premises.[47] Actual expulsion of the grantee from the whole and every part of the land is not essential to a breach of these covenants; it is sufficient if there is a disturbance of the free and uninterrupted use of the land by one having paramount title.[48] It is true that the existence of an adverse easement in the granted premises is a breach of the covenant against incumbrances, but it is equally a breach of the covenants of warranty and for quiet enjoyment.[49] Notice of the existence of the easement at the time of the conveyance does not affect the right of the covenantee to recover for the breach.[50]

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[45] Green v. Collins, 86 N. Y. 246; 40 Am. Rep. 531.

[46] Griswold v. Allen, 22 Conn. 89. As to whether a covenant of warranty is broken by the absence of a right in the grantee of a mill dam to flow land adjacent to the dam, see Swasey v. Brooks, 30 Vt. 692.

[47] Giles v. Dugro, 1 Duer (N. Y.), 234; Scriver v. Smith, 100 N. Y. 471; 53 Am. Rep. 224. Russ v. Steele, 40 Vt. 310; Clark v. Conroe, 38 Vt. 469. Haynes v. Young, 36 Me. 557; Lamb v. Danforth, 59 Me. 322; 8 Am. Rep. 426. The existence and use of a private right of way over the granted premises is a breach of the covenant of warranty. Rea v. Minkler, 5 Lans. (N. Y.) 196. Browning v. Canal Co., 13 La. Ann. 541. Russ v. Steele, 40 Vt. 310; Clark v. Conroe, 38 Vt. 469. Butt v. Riffe, 78 Ky. 353. The covenant for quiet enjoyment embraces an adverse claim to the use of the water of a stream on the warranted premises. Peters v. Grubb, 21 Pa. St. 455. The covenant of warranty is not broken by the existence of a right in an adjoining proprietor to draw water through underground pipes from a spring on the warranted premises. McMullan v. Wooley, 2 Lans. (N. Y.) 395.

[48] Rea v. Minkler, 5 Lans. (N. Y.) 196.

[49] Russ v. Steele, 40 Vt. 310. Scott v. Tanner, (Mo. App.) 208 S. W. 264. In Kramer v. Carter, 136 Mass. 504, the breach of the covenant of warranty complained of was the existence of a building restriction in a deed under which the plaintiff's grantor held, by which the plaintiff was deprived of the full and complete enjoyment of the premises. This was held a breach of the covenant of warranty if enforced, the court saying: "But the easement was not only an incumbrance which worked a present breach of the covenant against incumbrances; it was also a paramount right, which might work a breach of the covenant of warranty. It was an incorporeal hereditament, a part of and taken out of the warranted premises, and annexed and appurtenant to adjoining lands, and forming a part of the estate in them. The covenant

The warranty does not extend to a right to take water from an irrigating ditch or canal, unless the right is appurtenant to the land. If the right is not described in the deed as appurtenant to the land, parol evidence is admissible to determine the question. It is not so appurtenant where the water rights are represented by shares in an irrigation company which may be sold and transferred independently of the land, no share of stock representing any one particular part of the land.[51]

§ 153. **COVENANTS OF WARRANTY AND QUIET ENJOYMENT RUN WITH THE LAND. General rule.** The covenants of warranty and for quiet enjoyment [52] are prospective in their operation and run with the land until they are broken; that is, they enure to the benefit of the last purchaser of the land, upon his eviction, actual or constructive, by one claiming under an adverse title.[53]

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of warranty extends to such a right, and the right may be so exercised as to work a breach of the covenant. * * * if the plaintiff had erected a building upon the land which is subject to the restriction, and the owners of the adjoining tenements had lawfully demolished it, it would have been an eviction, and equally so whether done by an act *in pais*, or by action at law, or by a suit in equity."

[50] Rea v. Minkler, 5 Lans. (N. Y.) 196.

[51] George v. Robison (Utah), 63 Pac. Rep. 819.

[52] The covenant for quiet enjoyment, as a covenant running with the land, is subject to the same construction as the covenant of warranty. Henry v. McEntyre, 1 Hawk. (N. C.), 410. Hence, whenever the latter covenant is spoken of in that respect in the following pages, it is to be understood that the covenant for quiet enjoyment is also intended.

[53] Co. Litt. (Thomas' ed.) 381 n.; 4 Kent Com. 459; Platt on Covts. 304; Rawle Covt. § 213; 3 Washb. Real Prop. (3d ed.) 399. Beddoe v. Wadsworth, 21 Wend. (N. Y.) 120; Ford v. Walworth, 19 Wend. (N. Y.) 334; Cunningham v. Knight, 1 Barb. (N. Y.) 399; Blydenburgh v. Cotheal, 1 Duer (N. Y.), 176. Carter v. Denman, 3 Zab. (N. J. L.) 260. Blackwell v. Atkinson, 14 Cal. 470. Brown v. Metz, 33 Ill. 339; 85 Am. Dec. 277; Crisfield v. Storr, 36 Md. 129; 11 Am. Rep. 480. Butler v. Barnes, 21 Atl. Rep. 419. Shelton v. Codman, 3 Cush. (Mass.) 318; Whitney v. Dinsmore, 6 Cush. (Mass.) 128. Swasey v. Brooks, 30 Vt. 692. Saunders v. Flaniken, 77 Tex. 664; 14 S. W. Rep. 236; Flaniken v. Neal, 67 Tex. 629; 4 S. W. Rep. 212. Rutherford v. Montgomery, 14 Tex. Civ. App. 319; 37 S. W. Rep. 625. Meade v. Boone (Tex. Civ. App.), 35 S. W. Rep. 483. Tucker v. McArthur, 103 Ga. 409; 30 S. E. Rep. 283. McConaughey v. Bennett, 50 W. Va. 172; 40 S. E. Rep. 540.

Hence, a purchaser is not only protected by the covenants of his immediate grantor, but, in case he loses the estate, may look for his indemnity to the covenants of those under whom his grantor claims,[54] and this, though the covenant of the remote grantor does not in terms warrant the title to the "assigns" of the covenantee.[55]

After breach the covenant can no longer run with the land, nor have any existence except for the purpose of supporting an action for damages on the part of the person having the right of action at the time of the breach.[56]

The covenants in a void deed, for example, that of a married woman who was not examined privily and apart from her husband, do not enure to the benefit of a remote grantee; a void conveyance cannot operate as an assignment.[57]

If the grantor holds under a conveyance from a minor, his covenant of warranty is not broken when made by reason of the fact

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Wesco v. Kern (Oreg.), 59 Pac. Rep. 548. Libby v. Hutchinson, 72 N. H. 190; 55 Atl. 547. Mitchell v. Warner, 5 Conn. 497. Scoffin v. Grandstaff, 12 Kans. 365. Susquehanna Coal Co. v. Quick, 61 Pa. St. 339. Williams v. Beeman, 2 Dev. (N. C.) 483. Nunnally v. White, 3 Met. (Ky.) 584. Asher Lumber Co. v. Cornett, 23 Ky. L. Rep. 602; 63 S. W. Rep. 974. In a State in which conveyances by persons out of possession are held valid, such a deed has been held sufficient as an assignment of the grantor's right of action on a warranty in a deed under which he claimed title. Allen v. Kennedy, 91 Mo. 324; 2 S. W. Rep. 142.

Recent Cases. Kuntzman v. Smith, 77 N. J. Eq. 30; 75 Atl. 1009; Tanzer v. Bankers &c. Corp. 144 N. Y. Supp. 613; 159 App. Div. 351; Jacobs v. Fowler, 119 N. Y. Supp. 647; 135 App. Div. 713; Simonds v. Diamond Match Co., 159 Mich. 241; 123 N. W. 1132; Thompson v. Richmond, 102 Me. 335; 63 Atl. 649; Williams v. O'Donnell, 225 Pa. 321; 74 Atl. 205; 26 L. R. A. (N. S.) 1094; Quick v. Walker, 125 Mo. App. 257; 102 S. W. 33; Staed v. Rossier, 157 Mo. App. 300; 137 S. W. 901; Snadon v. Salmon, 135 Ky. 47; 121 S. W. 970; Arnold v. Joines, 50 Okl. 4; 150 Pac. 130; Newman v. Sevier, 134 Ill. App. 544. In Crawford Co. Bank v. Baker, 95 Ark. 438; 130 S. W. 556, it is said that a covenant of warranty does not run with the land. What was meant, apparently, was that a covenant of seisin, implied in a warranty deed, does not run with the land. See Arkansas cases cited ante, § 111.

[54] Co. Litt. 384a; 2 Sugd. Vend. (8th Am. ed.) 196, 237. Beaseley v. Phillips, 20 Ind. App. 182; 50 N. E. 488.

[55] Wiggins v. Pender, 132 N. C. 628; 44 N. E. Rep. 362.

[56] McConaughey v. Bennett, 50 W. Va. 172; 40 S. E. Rep. 540. De Long v. Improvement Co., 74 N. J. L. 250; 66 Atl. 591.

[57] Smith v. Ingram, 132 N. C. 959; 44 S. E. Rep. 643; 61 L. R. A. 878.

that the minor may disaffirm the deed on reaching his majority. The deed being valid unless disaffirmed within the time allowed by law, the covenant of warranty is not broken until the disaffirmance of the deed and eviction of the covenantee, or his assignee. Hence, the covenant enures to the benefit of a remote grantee.[58]

The covenant is inseparable from the land with respect to which it is made, and passes to the grantee of the covenantee as incident to the land, and not by way of assignment separate and distinct from the conveyance.[59] Hence, the benefit of the covenant cannot be assigned separate and apart from the land; that is, to a person not a grantee or transferee of the land.[60]

The rule that a covenant does not run with the land after a breach has occurred does not apply in the case of an assignee for whose benefit the land was purchased by the covenantee, and to whom it was subsequently conveyed by the latter. In such a case the covenantee is a mere trustee to receive and hold the title and the covenants for the use of the true owner.[61] As a general rule, however, it seems that a mere equitable owner of the premises, such as one who has paid the purchase money, but has not received a conveyance, is not entitled at law to the benefit of covenants that run with the land.[62]

§ 154. **Assignee may sue in his own name.** The rights of an assignee of covenants running with the land are cognizable in a court of law by reason of the privity of estate existing between him and the covenantor. He may, therefore, bring an action in his own name to recover damages for a breach of the covenant.[63] This, in fact, seems to be the only substantial difference between the rights of assignees of the covenant of warranty and that of seisin in those States in which it is held that the latter covenant does not run with the land; for there seems to be no doubt of the right of one who has been evicted by paramount title to maintain an action in the name of his grantee on a covenant of seisin contained in a conveyance by the latter.[64]

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[58] Pritchett v. Redick, 62 Neb. 296; 86 N. W. Rep. 1091.

[59] McConaughey v. Bennett, 50 W. Va. 172; 44 S. E. Rep. 540.

[60] Ravenel v. Ingram, 131 N. C. 549; 42 S. E. Rep. 967.

[61] Hall v. Plaine, 14 Ohio St. 417. Harper v. Perry, 28 Iowa, 57.

[62] Dart on Vendors (5th ed.), 780. As to rights of a mortgagee, see post, § 160.

[63] Suydam v. Jones, 10 Wend. (N. Y.) 181; 25 Am. Dec. 552. McConaughey v. Bennett, 50 W. Va. 172; 40 S. E. Rep. 540; where held, also, that the assignee could not sue in a court of equity.

§ 155. **Actions against original covenantor.** If the estate warranted be subdivided and pass into the hands of separate grantees, any one of the latter, or his remote assignee, if evicted, may maintain an action on the original covenant in his own name. For every eviction a separate cause of action accrues and may be enforced, though the effect be to subject the warrantor to numerous suits, and possibly to a greater liability than he would have incurred if he had been sued by the original covenantee.[65] Where a covenant running with the land is divisible in its nature, if the entire interest in the land passes by assignment to separate and distinct individuals, the covenant will attach to each parcel, *pro tanto*.[66] Whether heirs or devisees may maintain separate actions on a covenant of warranty has been made a question in a case which decides that they may maintain a joint action on the covenant.[67] If the warranted premises be subdivided by the grantee, and the several lots conveyed to different persons, a remote grantee of one of the lots may maintain an action on the covenant of the original grantor without joining the vendees of the other lots. In such a case the rights of the plaintiff are not affected by the fact that the other grantees have failed to sue, or have suffered their rights of action to become barred by the statute.[68]

§ 156. **Release of covenant by immediate covenantee.** While a legal devolution of the title, either by deed, will or descent, is necessary to give to the owner of the land the benefit of the covenant of warranty,[69] it is not by virtue of any assignment of a right of action that the subsequent grantee takes the place of the original covenantee, though he is commonly called "assignee," as a convenient designation; for until a breach of the covenant has occurred there is no right of action and nothing to be assigned. It is because he takes the same estate and stands in the place of the original covenantee, by means of which a privity of estate is created, that he is entitled to an action against the original covenantor.[70] Hence, it follows that the covenantee cannot separate the covenant from the land by assigning the benefit thereof without transferring the land; [71] nor can he release the covenantor from liability after he has transferred the land; [72] though it seems that such a release will be valid, even as against an assignee, if executed by the covenantee before the land is transferred.[73] When the covenantee parts with the land he loses all control of the covenants that run with it, and can maintain no action for a breach occurring thereafter, even though it be instituted and pursued for the benefit of the transferee,[74] unless he has made good the breach to the party evicted.[75]

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[64] Ante, § 110.

[65] 3 Com. Dig. 262; Dart Vend. (5th ed.) 780; 2 Co. Litt. on p. 309; 2 Washb. Real Prop. 662, citing 2 Sugd. Vend. (Hamm. ed.) 508. Dickinson v. Hoomes, 8 Grat. (Va.) 353. Kane v. Sanger, 14 Johns. (N. Y.) 94. See, also, Dougherty v. Duval, 9 B. Mon. (Ky.) 57. Field v. Squires, Deady (U. S.), 366. Schofield v. Homestead Co., 32 Iowa, 317. Contra, 3 Prest. Abst. 57. Perkins v. Hadley, 4 Hayw. (Tenn.) 148. McClure v. Gamble, 27 Pa. St. 288.

[66] Co. Litt. 385a; Touch. 199. Astor v. Miller, 2 Paige (N. Y.), 78; Van Horne v. Crain, 1 Paige (N. Y.), 455. Allen v. Little, 36 Me. 170.

[67] Paul v. Witman, 3 W. & S. (Pa.) 407.

[68] Whitzman v. Hirsh, 3 Pick. (Tenn.) 513; 11 S. W. Rep. 421.

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[69] Rawle Covt. § 213. In Beardsley v. Knight, 4 Vt. 471; 33 Am. Dec. 193, it was held that possession under an instrument inoperative as a deed for want of a sufficient seal, would not entitle the intended grantee to the benefit of a covenant of warranty running with the land.

[70] Ante, §§ 110, 152. 4 Cruise's Dig. 316; 4 Kent Com. 472, n. It is not because of the delivery of the deed that the subsequent grantee becomes entitled to the benefit of the covenant which it contains. It is bcause he takes the estate and stands in the place of his vendor. Hopkins v. Lane, 9 Yerg. (Tenn.) 84.

[71] Ely v. Hergesell, 46 Mich. 325. Lewis v. Cook, 13 Ired. L. (N. C.) 193. Lawrence v. Senter, 4 Sneed (Tenn.) 52.

[72] Middlemore v. Goodale, Cro. Car. 503. Suydam v. Jones, 10 Wend. (N. Y.) 183; 25 Am. Dec. 552. Field v. Snell, 4 Cush. (Mass.) 504. Crooker v. Jewell, 29 Me. 527; Littlefield v. Getchell, 32 Me. 392. Cooper v. Granberry, 33 Miss. 117. Abby v. Goodrich, 3 Day (Conn.), 433; but see Clark v. Johnson, 5 Day (Conn.) 273. After the covenantee has conveyed the land he cannot release the covenantor until he has paid damages to the party evicted, thereby satisfying the claims of the latter to the benefit of the covenant. Brown v. Staples, 28 Me. 497; 48 Am. Dec. 504. Thompson v. Shattuck, 2 Met. (Mass.) 615. Chase v. Weston, 12 N. H. 413.

[73] Rawle Covts. for Title, §§ 221, 223. But see post, § 162.

[74] Griffin v. Fairbrother, 1 Fairf. (Me.) 91; Crooker v. Jewell, 29 Me. 527.

[75] Post, § 158.

§ 157. Release or quit claim will pass benefit of covenants. The right of a subsequent grantee to recover on the warranty of a remote grantor, is, of course, unaffected by the fact that the immediate conveyance to him, or any intermediate conveyance was without warranty, since a mere quit claim or release is as effectual to pass the rights of the original covenantee as a conveyance with unlimited covenants for title.[76] The covenant of warranty attaches to and passes with the land without regard to the nature of the conveyance by which the transfer of the land is effected.[77] An assignee by act of the law, such as one holding under the deed of a sheriff or a commissioner is entitled to the benefit of covenants held by the person last seised. In fact any person to whom the land and the legal title thereto passes, whether by descent, devise or conveyance, succeeds to all the rights of the covenantee,[78] except perhaps, in the single instance, of a purchaser at a tax sale.[79] It has been held that a tax deed will not pass the benefit of covenants for title, and the covenantee's right of action is not barred by his having permitted the land to be sold for taxes.[80]

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[76] Bac. Abr. Letter N.: 1 Co. Inst. 384b. Spencer's Case, 5 Coke, 17. Cummins v. Kennedy, 3 Litt. (Ky.) 118, 122; 14 Am. Dec. 45. This case contains an able exposition of common-law reasons for the rule stated in the text. Young v. Triplett, 5 Litt. (Ky.) 248; Hobbs v. King, 2 Met. (Ky.) 139; Hunt v. Orwig, 17 B. Mon. (Ky.) 84; 66 Am. Dec. 144; Thomas v. Bland (Ky.), 14 S. W. Rep. 955. Brown v. Staples, 28 Me. 502; 48 Am. Dec. 504. Beddoe v. Wadsworth, 21 Wend. (N. Y.) 120; Andrews v. Wolcott, 16 Barb. (N. Y.) 23; Hunt v. Amidon, 4 Hill (N. Y.), 345; 40 Am. Dec. 283; Jenks v. Quinn, 137 N. Y. 223; 33 N. E. Rep. 376. De Chaumont v. Forsyth, 2 Pa. St. 514. Gunter v. Williams, 40 Ala. 572. Hopkins v. Lane, 9 Yerg. (Tenn.) 83. Redwine v. Brown, 10 Ga. 319. Hodges v. Saunders, 17 Pick. (Mass.) 470. Scoffins v. Grandstaff, 12 Kans. 365. Saunders v. Flanniken, 77 Tex. 662; 14 S. W. Rep. 236. Walton v. Campbell, 51 Neb. 788; 71 N. W. Rep. 737. Troxell v. Stevens, 57 Neb. 329; 77 N. W. Rep. 781. Ravenel v. Ingram, 131 N. C. 549; 42 S. E. Rep. 967. Pence v. Rhonemus, 58 Ind. App. 268, 108 N. E. 129; Diggs v. Henson, 181 Mo. App. 34, 163 S. W. 565. But where A., B. and C. conveyed with general warranty to D., as trustee, with power to convey with covenant only against his own acts, and D. so conveys, his grantee can maintain no action as assignee on the covenant in the deed from A., B. and C. upon eviction under a paramount title derived from A., B. and C. Abbott v. Hills (Mass.), 33 N. E. Rep. 392. The proposition in the last head note (prepared by the court) to the case of Beardsley v. Knight, 4 Vt. 471, that a subsequent grantee claiming the benefit of a covenant of warranty running with the land, must show an assignment *by deed of warranty*, seems an *obiter dictum*. The action was by an assignee claiming under a quit-claim deed, and the case was adjudged against him on the ground that he did not show or claim that he was ever in possession under that deed. The point that he was not entitled to recover because his assignment was by deed without warranty, does not appear to have been made.

[77] Thus, in Hobbs v. King, 2 Met. (Ky.) 139, it was held that the conveyance of a *feme covert*, incompetent to bind herself by covenants of warranty, was sufficient to pass to her grantee the benefit of covenants contained in the conveyance to her. And in Taylor v. Lane, 18 Tex. Civ. App. 545, it was held that a deed by a sheriff, on foreclosure of a vendor's lien, passes the right to recover for breach of a covenant of warranty or a covenant against incumbrances.

§ 158. **Intermediate covenantee must have been damnified.** If there be several successive grantees of the land, an intermediate grantee can maintain no action for breach of the covenant unless he has been damnified; that is, unless he has been compelled to satisfy a grantee subsequent to himself for loss of the land.[81] Hence, it follows that if the intermediate grantee conveyed without warranty, so that no liability could devolve upon him for a subsequent eviction from the premises, he can maintain no action against the original covenantor for the breach.[82] It has been held that the acceptance of a conveyance with warranty deprived the intermediate covenantee of any right of action against the original covenantor, and confined him to his remedy upon the immediate covenant of his grantor.[83] But this decision has been overruled in the State in which it was rendered,[84] and frequently disapproved in others,[85] and the rule established that an intermediate covenantee who has been compelled to make good the loss of the premises to a subsequent grantee, may recover against the original covenantor.[86] In order to be "damnified" it is not necessary that a judgment shall have been recovered against the intermediate covenantee. He may voluntarily satisfy his grantee who has been evicted, and then recover on the covenant of his grantor, taking, however, the risk of having the latter establish the superiority of his title.[87]

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[78] Shep. Touch. ch. 7, p. 572. Appowel v. Monnoux, Moore's Rep. 97. White v. Whitney, 3 Met. (Mass.) 81. Streaper v. Fisher, 1 Rawle (Pa.) 155; Hurst v. Lithgrow, 2 Yeates (Pa.), 24; 1 Am. Dec. 326. White v. Presly, 54 Miss. 313. Lewis v. Cook, 13 Ired. L. 193. Williams v. Burg, 9 Lea (Tenn.), 455.

[79] Rawle Covts. (5th ed.) § 213. Kingdon v. Nottle, 4 Maule & S. 53. Smith v. Perry, 26 Vt. 279.

[80] Bellows v. Litchfield, 83 Iowa, 36; 48 N. W. Rep. 1062; Crum v. Cotting, 22 Iowa, 411.

[81] Allen v. Little, 36 Me. 170; Fairbrother v. Griffin, 10 Me. 96. Thompson v. Richmond, 102 Me. 335, 64 Atl. 649. Baxter v. Ryerss, 13 Barb. (N. Y.) 267. Wheeler v. Sohier, 3 Cush. (Mass.) 219, disapproving *dicta* in Bickford v. Page, 2 Mass. 460, and Kane v. Sanger, 14 Johns. (N. Y.) 93. Thompson v. Sanders, 5 T. B. Mon. (Ky.) 358; Birney v. Hann, 3 A. K. Marsh. (Ky.) 322; 13 Am. Dec. 167. Hampton v. Pool, 28 Ga. 514. Jones v. Richmond (Va.), 13 S. E. Rep. 414. Clement v. Bank, 61 Vt. 298; 17 Atl. Rep. 717. Hammerslough v. Hackett, 48 Kans. 700; 29 Pac. Rep. 1079. A palpable reason why an intermediate covenantee who has not been damnified, cannot sue for a breach of the covenant of warranty is, that if he were permitted to do so, it would be possible for him to speculate in the misfortunes of the covenantor without himself incurring any liability. For if he conveyed without warranty his grantee could have no recourse against him for indemnity, though he might himself have recovered full damages from the covenantor. A grantor who subsequently reacquires the title under foreclosure of a mortgage which it was his duty to discharge, cannot avail himself of the title so acquired when sued on his warranty by the grantee. Crosby v. Evans (Mo. App.), 195 S. W. 514.

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[82] Hunt v. Middlesworth, 44 Mich. 448. Cases cited in last note, and Kane v. Sanger, 14 Johns. (N. Y.) 89. The converse of this proposition, namely, that if the covenantee himself conveyed with warranty he would be entitled to recover against the covenantor on the ground that he (the covenantee) was liable over to his grantee, was decided in this case. It has been, however, disapproved on this point. See cases cited, n. 85 below.

[83] Kane v. Sanger, 14 Johns. (N. Y.) 89.

[84] Withey v. Mumford, 5 Cow. (N. Y.) 137; Suydam v. Jones, 10 Wend. (N. Y.) 184; Preiss v. Poidevin, 19 Abb. N. Cas. (N. Y.) 123.

[85] Williams v. Wetherbee, 1 Aik. (Vt.) 233. Wheeler v. Sohier, 3 Cush. (Mass.) 219. Redwine v. Brown, 10 Ga. 319. Hopkins v. Lane, 9 Yerg. (Tenn.) 79; Lawrence v. Senter, 4 Sneed (Tenn.), 52.

[86] Cases cited supra, n. 65 p. 412. Garlock v. Cross, 5 Cow. (N. Y.) 143; Withey v. Mumford, 5 Cow. (N. Y.) 137. Markland v. Crump, 1 Dev. & Bat. (N. C.) 94; 27 Am. Dec. 230. Mayer v. Wooten, 46 Tex. Civ. App. 327, 102 S. W. 423. In Booth v. Starr, 1 Conn. 248; 6 Am. Dec. 233, a leading case on this point, the court said: "The last assignee can never maintain an action on the covenant of warranty till he has been evicted. Though the title may be defective, though he may be constantly liable to be evicted, though his warrantor may be in doubtful circumstances, yet he can bring no action on the covenant till he is actually evicted, for till then there has been no breach of the covenant, no damages sustained. By a parity of reason the intermediate covenantees can have no right of action against their covenantors till something has been done equivalent to an eviction, for till then they have sustained no damage. As the last assignee has the election to sue all or any of the covenantors, as a recovery and satisfaction by an intermediate covenantee against a previous covenantor would bar a suit by a subsequent assignee, such intermediate assignee ought not to be allowed to sustain his action till he has satisfied the subsequent assignee; for otherwise every intermediate covenantee might sue the first covenantor; one suit would be no bar to another; they might all recover judgment and obtain satisfaction, so that a man might be liable to sundry suits for the same thing, and be compelled to pay damages to sundry different covenantees for the same breach of covenant."

§ 159. **Remote assignee may sue original covenantor.** The last grantee or assignee may maintain simultaneous actions against each prior successive grantor who conveyed with warranty and recover a several judgment against each;[88] but satisfaction of one of the judgments will be satisfaction of all, and may be pleaded in bar of any other action on the covenant by the same plaintiff, or by any subsequent covenantee to whom the party making satisfaction may be liable,[89] even though the judgment satisfied be less in amount than one recovered against such subsequent covenantee by the last grantee.[90] If the land came to the party evicted through several successive conveyances with warranty, he is not obliged to sue first his immediate covenantor, but may maintain an action against any other of the prior grantors, and a judgment against any one of these, so long as it remains unsatisfied, will be no bar to an action against the others.[91]

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[87] Herrin v. McIntyre, 1 Hawkes (N. C.), 410. The case of Kane v. Sanger, 14 Johns. (N. Y.) 89, in so far as it decides that the intermediate covenantee is "damnified," within the meaning of the rule stated in the text, by a loss of the right to recover the unpaid purchase money from his evicted grantee, is overruled, it is apprehended, by the case cited supra, notes 84, 85, 86, p.416.

[88] Rawle Covt. § 214. Winders v. Sutherland, 174 N. C. 235, 93 S. E. 726; Croom v. Allen, 145 Ga. 347, 89 S. E. 199; Keys &c. Realty Co. v. Trustees, 131 N. Y. Supp. 527, 146 App. Div. 796; Big Bend Land Co. v. Hutchings, 71 Wash. 345, 128 Pac. 652.

[89] King v. Kerr, 5 Ohio, 155; 22 Am. Dec. 777; Foote v. Burnett, 10 Ohio, 317; 36 Am. Dec. 90; Wilson v. Taylor, 9 Ohio St. 595; 75 Am. Dec. 488.

[90] Wilson v. Taylor, 9 Ohio St. 595; 75 Am. Dec. 488. This case presented a novel question. The last grantee brought separate actions and recovered a separate judgment against three successive grantors with warranty, each judgment being for a different amount. The first grantor having satisfied the judgment against himself, which was the smallest in amount, the question arose whether such satisfaction was a bar to an action over against him by his grantee and covenantee; the second grantor, who had paid the judgment, larger in amount, recovered against him by the last grantee. The question was presented by demurrer to a plea of the first grantor setting up this defense in an action against him by his covenantee, the second grantor. The court, by BRINKERHOFF, C. J., said: "The question seems to be one of first impression, and our minds are not free from difficulty in regard to it; but, on the whole, we are unanimously of opinion that the plea is good. As before remarked, Weis, the last covenantee, and who suffered damage by reason of partial eviction, was entitled to his several action against all the prior covenantors. Not only was his right of action perfect against all, but the same rule of damages would apply as to all; and although he could

The measure of damages recoverable by a remote covenantee is not controlled by what he paid for the land, but is governed by the consideration received by the particular covenantor to whom he elects to look for damages for breach of the warranty.[92]

The remote covenantee settling with and releasing the original covenantor without the consent or participation of the intermediate covenantors, thereby releases them also.[93]

§ 160. **Mortgagee entitled to benefit of covenant of warranty.** The general rule is that a mortgagee is at law entitled, as assignee, to the benefit of a covenant of warranty contained in any conveyance under which the mortgagor claims title, so far as may be necessary to preserve unimpaired the security intended by the mortgage.[94] In equity,[95] however, and at law in such of the Amer-

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have but one satisfaction, yet he was clearly entitled to recover the full amount of his damages against each. If he failed to make the proper showing in order to recover the full amount of his damages against each, it was his own fault; and having collected and received the amount recovered against the first covenantor, who occupied the position in law of a guarantor of all the subsequent grantees, it seems to us that Weis' claim under all the covenants must be held satisfied; and that all enforcement of the judgments against the other intermediate covenantors was wrongful and in violation of the principle that he could have but one satisfaction." The court then suggested that the plaintiff had mistaken his remedy, and that he should have enjoined the collection of the judgment against himself, or have sued to recover back the money paid thereon as money had and received to his use by the last grantee.

[91] Withey v. Mumford, 5 Cow. (N. Y.) 137; Garlock v. Cross, 5 Cow. (N. Y.) 143. King v. Kerr, 5 Ohio, 158; 22 Am. Dec. 777. Booth v. Starr, 1 Conn. 248; 6 Am. Dec. 233.

[92] Penney v. Woody, (Tex. Civ. App.) 147 S. W. 872. See post § 166.

[93] Hollingsworth v. Mexia, 14 Tex. Civ. App. 363, 37 S. W. 455; Penney v. Woody, (Tex. Civ. App.) 147 S. W. 872.

[94] Lockwood v. Sturdevant, 6 Conn. 373; Cross v. Robinson, 21 Conn. 387. Lloyd v. Quinby, 5 Ohio St. 262. Andrews v. Wolcott, 16 Barb. (N. Y.) 21; Astor v. Miller, 2 Paige Ch. (N. Y.) 68; Varick v. Briggs, 6 Paige Ch. (N. Y.) 324. Ill. Land Co. v. Boomer, 91 Ill. 114. Lane v. Woodruff (Kans. App.), 40 Pac. Rep. 1079. Harper v. Perry, 28 Iowa, 57; Rose v. Schaffner, 50 Iowa, 486; Devin v. Hendershott, 32 Iowa, 192. This was an action by the grantee

ican States as maintain the rule that a mortgage is a mere security for the payment of money and that the legal title remains in the mortgagor,[96] a purchaser from the mortgagor is treated as an assignee of the covenant, subject to the satisfaction of the mortgage. Doubtless in those States in which the mortgagee is still treated as the holder of the legal title, the rights of the mortgagor in the covenant of warranty would not be recognized in a court of law, and he would be driven to a court of equity for relief.[97]

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or beneficiary in a deed of trust on a covenant of warranty contained in a conveyance to his grantee. The defense was that defendant, the covenantor, had satisfied the covenantee (grantor in the deed of trust) for the breach before action brought. There was a judgment for the defendant which was reversed on appeal, the court holding that the covenant passed with the land to the grantee in the deed of trust and that he alone could sue for the breach. In McGoodwin v. Stephenson, 11 B. Mon. (Ky.) 21, the covenantee mortgaged the land and was afterwards evicted; whereupon he brought an action for breach of the covenant and recovered a judgment for damages. This was reversed on appeal, the court holding that the legal title and with it the right to the benefit of the covenant remained in the mortgagee, and that so long as the mortgage remained in full force and unsatisfied the mortgagor could maintain no action on the covenant. A mortgagor who remains in possession by right, or by consent of the mortgagee, may maintain an action for breach of a covenant of warranty in the deed from his grantor. Pence v. Gabbert, 70 Mo. App. 201. (Contra, Devin v. Hendershott, 32 Iowa, 192.)

[95] Dart Vendors (5th ed.), 780; Rawle Covt. § 219. Wesco v. Kern (Oreg.), 59 Pac. Rep. 548.

[96] Davidson v. Cox, 11 Neb. 250; 9 N. W. Rep. 95. White v. Whitney, 3 Met. (Mass.) 81. DOWNER, J., in Wright v. Sperry, 21 Wis. 334. Ely v. Hergesell, 46 Mich. 325; 9 N. W. Rep. 435.

[97] In Kavanagh v. Kingston, 39 Upp. Can. Q. B. 415, and Claxton v. Gilben, 24 Upp. Can. C. B. 500, it was decided that where the purchaser of land took a conveyance with warranty from the vendor and executed a mortgage to secure the purchase money, the benefit of the covenants would at law vest in the mortgagee notwithstanding the fact that he was the party bound by them. The same result would, of course, follow in those States in which the legal title is held to be in the mortgagee. There could be no doubt however, that in such a case the covenants would be enforced in equity for the benefit of the mortgagor. In Brown v. Staples, 28 Me. 497; 48 Am. Dec. 504, it was held that the covenants in the mortgage would not prevent the maintenance of an action on the covenants in the original deed. One who purchases under a foreclosure of a purchase-money mortgage, is entitled to the benefit of a covenant of warranty in the original conveyance from the mortgagee to the mortgagor. In such a case the execution of the purchase-money mortgage by the covenantee does not extinguish the covenants in the mortgagee's contemporaneous conveyance to him. Town v. Needham, 3 Paige Ch. (N. Y.) 545; 24 Am. Dec. 246.

If one holding under a conveyance with warranty execute a purchase-money mortgage with like warranty, he will not be thereby estopped from maintaining an action on the original warranty.[98]

§ 161. **The original covenantor must have been actually seized.** It has been held in America, following an early English decision,[99] that if one unlawfully in possession of an estate convey it with warranty against the claims of the true owner and put his grantee in possession, a subsequent grantee could not recover at law on the warranty since no estate having passed by the original covenantor's conveyance there was nothing with which the covenant could run.[1] Obviously such a doctrine would destroy the usefulness of the covenant of warranty as an assurance of the title to those claiming under the covenantee, for, as a general rule, it is only in case of an eviction under a paramount title that the assignee has any occasion to call upon the covenantor for indemnity. Accordingly the decision in question has not been followed to any important extent in America. The rule generally prevailing here is that if possession of the land actually passed from the covenantor to the covenantee the subsequent assignee will be entitled to the benefit of the covenant whether the original covenantor was rightfully or wrongfully seised of the land.[2] It is a rule, however, supported by the weight of American authority, that a covenant of warranty does not enure to the benefit of an assignee unless the original covenantor *was actually seized* and possession passed from him to his grantee.[3] Upon a somewhat similar principle it has been held that if A. convey an easement in the lands of B. with covenants for title, a grantee of the covenantee could not have the benefit of the covenants, for, no land having been conveyed, the covenants could not "run with the land" in favor of the assignee.[4]

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[98] Hubbard v. Norton, 10 Conn. 433. Haynes v. Stevens, 11 N. H. 28.

[99] Noke v. Awder, Cro. Eliz. 373. This was an action on a covenant for quiet enjoyment contained in a lease brought by an assignee of the lessee against the original covenantor. Judgment was about to be entered for the plaintiff, when it was objected by Sir Edward Coke, counsel for the defendant, that the plaintiff could not recover without showing an eviction under a paramount title, and that, if he showed such an eviction, he established the fact that the original covenantor was wrongfully in possession and that no estate passed from him except a lease by estoppel, and consequently there was nothing with which the covenant could run so as to benefit an assignee. Judgment was entered for the defendant. Mr. Rawle says that this case has not been followed by recent decisions in England, and regrets that the decision, "which was a mere professional triumph of Sir Edward Coke upon a question of pleading, should have disturbed the courts of last resort upon both sides of the Atlantic for more than a century." Rawle Covt. §§ 232, 236, citing Cuthbertson v. Irving, 4 Hurl. & Norm. 755; S. C., 1 Smith's L. Cas. 136.

[1] Nesbit v. Nesbit, Conf. Rep. (N. C.) 403; Nesbit v. Brown, 1 Dev. Eq. (N. C.) 30. BENNING, J., in Martin v. Gordon, 24 Ga. 533.

[2] Wilson v. Widenham, 51 Me. 566. Dickinson v. Hoomes, 8 Grat. (Va.)

If a person without any title or claim of title join in a conveyance of land with covenants of warranty, *e. g.,* where the husband joins with the wife in a conveyance of her land, he will of course

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353; Randolph v. Kinney, 3 Rand. (Va.) 397. Wallace v. Pereles, 109 Wis. 316; 85 N. W. Rep. 371. In Beddoe v. Wadsworth, 21 Wend. (N. Y.) 120, it was held that if possession was taken under the deed and transferred by a subsequent conveyance, an action might be maintained by the last grantee upon the covenants, because such possession would carry the covenants annexed to the land although no title was in fact in the grantor at the time of the conveyance. Without such possession there can be no eviction, which is indispensable for laying the ground of any action upon the covenant of warranty. Moore v. Merrill, 17 N. H. 75; 43 Am. Dec. 593. One cannot be evicted if he has never had either actual or constructive possession of the premises. Matteson v. Vaughn, 38 Mich. 373. The remote grantee cannot recover on the warranty if he knew, at the time of the conveyance to him, that the original deed was not intended to pass the title — as in the case of a deed absolute in form but in fact a mortgage. Snadon v. Salmon, 135 Ky. 47, 121 S. W. 970.

[3] Slater v. Rawson, 1 Met. (Mass.) 455. Hacker v. Storer, 8 Gr. (Me.) 228; McConaughey v. Bennett, 50 W. Va. 172; 40 S. E. Rep. 540, and cases cited in last note. The last grantee, whose grantor was in actual possession, may sue the original grantor upon a breach of the covenant, though the latter was not in possession at the time of his conveyance. Tillotson v. Prichard, 60 Vt. 94; 14 Atl. Rep. 302. The case of Wead v. Larkin, 54 Ill. 489; 5 Am. Rep. 149, contains a vigorous attack upon the proposition stated in the text. In that case the land conveyed was vacant and unoccupied, and it appeared that the original covenantors had never been in possession. Possession was taken by the grantee, who reconveyed the premises to the plaintiff, who, upon eviction, brought an action on the covenant of the original grantor. Judgment was rendered for the plaintiff, the court disapproving the decision in Slater v. Rawson, supra. As to the effect of "constructive possession" by the original covenantor, see Solberg v. Robinson, 34 S. D. 55, 147 N. W. 87.

[4] Wheelock v. Thayer, 16 Pick. (Mass.) 68. Disapproved in Wilson v. Cochran, 46 Pa. St. 233. See Rawle Covts. (5th ed.) 207, n.

be bound upon his covenants to the grantee; but it has been held that for want of privity of estate, those covenants will not run with the land, and that he will not be liable thereon to a remote grantee of the premises; in other words, that a covenant of warranty entered into jointly by one assuming to be the owner of the fee, and a stranger to the title will not run with the land as against the stranger, and will not be available in favor of a subsequent grantee who holds no assignment of the cause of action arising from the breach.[5]

§ 162. **Assignee not affected by equities between covenantor and covenantee.** The assignee cannot, except in the case of a release by the covenantee, be affected by any agreement between the covenantor and the covenantee by which the liability of the former is lessened;[6] for example, an agreement at the time of the covenant that the covenantee should pay off an incumbrance on the premises, as part of the consideration;[7] or that the consideration to be paid, should be less than that expressed in the conveyance containing the covenant.[8] There seems to be no very clear reason why a release by the covenantee should be sustained as against an assignee without notice; such an act appears to be clearly within the spirit of the rule that the assignee cannot be affected by equities between the original parties of which he has notice,[9] and has been held to be within a statute providing that a deed concerning lands, tenements and hereditaments, must be recorded in order to bind a subsequent purchaser without notice.[10]

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[5] Mygatt v. Coe, 124 N. Y. 212; 26 N. E. Rep. 611, distinguishing Noke v. Awder, supra. In this case the defendant joined with his wife in a conveyance of land claimed to be hers, and warranted the title. The land passed through mesne conveyances to the plaintiff, who was evicted by one having title paramount to the defendant's wife, and who thereupon brought this action on the covenants in the original deed executed by defendant and wife. The court held that defendant (husband) being a stranger to the title, his covenant of warranty did not run with the land, and that consequently there could be no recovery against him. There was a learned dissenting opinion by BRADLEY, J., with whom concurred HAIGHT and BROWN, JJ. H. T. & C. Co. v. Whitehouse, 47 Utah 323, 154 Pac. 950, L. R. Ann. 1916 D. 611.

[6] Suydam v. Jones, 10 Wend. (N. Y.) 181; 25 Am. Dec. 552. Brown v. Staples, 28 Me. 497; 48 Am. Dec. 504. Eveleth v. Crouch, 15 Mass. 307. Snadon v. Salmon, 135 Ky. 47, 121 S. W. 970.

[7] Suydam v. Jones, supra.

[8] Greenvault v. Davis, 4 Hill (N. Y.), 643. Ill. Land Co. v. Bonner, 91 Ill. 114. Hunt v. Orwig, 17 B. Mon. (Ky.) 73; 66 Am. Dec. 144.

[9] Kellogg v. Wood, 4 Paige Ch. (N. Y.) 578.

§ 163. **Covenant extinguished by reconveyance to covenantor.** If the covenantee reconvey to the covenantor, or if by act of the law or otherwise the premises be again vested in the covenantor, the covenant of warranty is extinguished.[11] Thus, it has been held that if A. convey to B. with warranty, and B. then reconveys to A. with warranty, the last covenant can only protect A. against a title from or under B. subsequent to A.'s conveyance to him. If A. is evicted in consequence of a defect in the title prior to that time, he cannot recover against B. on the covenant contained in the last conveyance; his own covenant would be a complete bar to the suit.[12] But in order that the reconveyance shall extinguish the covenant, the parties must be the same. If two grant lands with warranty and the grantee reconveys to one of the grantors with warranty, the first warranty is not thereby extinguished.[13] Neither is there a release of the covenant where the reconveyance is made in a representative capacity only.[14] Nor does a reconveyance by the grantee, by way of mortgage, to the grantor, extinguish the warranty in the original deed; the benefit of such covenant passes to a purchaser at a sale under the mortgage.[15]

Pleading. An assignee in suing on a covenant of warranty, should set out the deed containing the covenant declared on, and then derive title to himself through the intermediate conveyances, naming them and giving their dates, but it is not necessary that the operative parts or the formalities of the execution of such conveyances should be set forth.[16]

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[10] Susquehanna Coal Co. v. Quick, 61 Pa. St. 339. See, also, Field v. Snell, 4 Cush. (Mass.) 50.

[11] Co. Litt. 490a; Bac. Abr. Warranty, O., p. 413. Goodel v. Bennett, 22 Wis. 565. Silverman v. Loomis, 104 Ill. 137. Carroll v. Carroll, 113 Iowa, 419; 85 N. W. Rep. 639; Green v. Edwards (Tex. Civ. App.), 39 S. W. Rep. 1005.

[12] Kellogg v. Wood, 4 Paige Ch. (N. Y.) 614.

[13] Bac. Abr. 451, n.; 1 Co. Inst. 393a; Prest. Touch. 201. Birney v. Hann, 3 A. K. Marsh. (Ky.) 322; 13 Am. Dec. 167.

[14] Curtis v. Hawley, 85 Ill. App. 429.

[15] Wiggins v. Pender, 132 N. C. 628; 44 N. E. Rep. 362; Wesco v. Kern (Oreg.), 59 Pac. Rep. 548.

[16] Williams v. Weatherbee, 1 Aik. (Vt.) 233.

The action by the remote covenantee is local — not transitory, and will lie only in the place where the land is.[17]

§ 164. **MEASURE OF DAMAGES. General rules.** The measure of damages in an action against the vendor for breach of a contract for the sale of personal property is the difference between the contract price and the market price.[18] A contrary rule with respect to personal property would seriously embarrass commercial transactions by holding out a strong temptation to the seller to violate his contract, pay the purchase price in damages to the buyer, and place in his own pockets the increase in value of the goods. Such also is the rule of damages for breach of an executory contract for the sale of lands where the vendor wilfully and wrongfully refuses to convey to the purchaser, or sells the estate knowing that by reason of a defective title he will not be able to perform his contract.[19] But a case in which the estate was sold and conveyed by the vendor in good faith believing his title to be good, is considered to stand upon different grounds; and if the estate be afterwards lost to the purchaser through a failure of the title, the vendor will only be liable to him in damages for the value of the land at the time the contract was made, to be measured by the purchase price, without regard to the increased value of the land at the time of the loss of the estate, whether caused by a general rise in the value of lands, or by improvements placed thereon by the purchaser. This is the rule in case of a breach of an executory contract for the sale of lands; of a breach of the covenant of seisin;[20] and of the covenants of warranty and for quiet enjoyment,[21] except that in certain of the New England States the covenantee is allowed the value of the estate at the time of eviction, in case of a breach of the covenant of warranty or for quiet enjoyment.[22] In those States, however, the rule of damages for a breach of the covenant of seisin is the same as that which prevails in the other States. At common law upon a loss of the estate by eviction under a paramount title, the remedy of the tenant upon the warranty of the lord of the fee was by writ

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[17] Keys &c. Realty Co. v. Trustees, 131 N. Y. Supp. 527, 146 App. Div. 796.

[18] Sedg. Dam. p. 365. Staed v. Rossier, 157 Mo. App. 300, 137 S. W. 901.

[19] Sedg. Dam., § 1010. Ante, § 97.

[20] As to executory contracts see ante, § 90, as to the covenant of seisin, ante, § 116, and the cases cited in the following note. Except in certain of the New England States the rule of damages for breach of the covenant of seisin where there has been an eviction and those of warranty and for quiet enjoyment is the same. 4 Kent Com. 462, 465. King v. Kerr, 5 Ohio, 160; 22 Am. Dec. 77. Brandt v. Foster, 5 Iowa, 297. Cox v. Strode, 2 Bibb (Ky.), 275; 5 Am. Dec. 603. It has been deemed better to separate the cases arising under the covenants of seisin and of warranty, and to treat the rule of damages with respect to each covenant separately, but the cases cited to the one may be considered with profit in the examination of the other.

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[21] Field Dam. § 461; Rawle Covt. § 164; 1 Sedgw. Dam. 238; 2 Sutherland Dam. 280; Waite's Act. & Def. 401. Cox v. Strode, 2 Bibb (Ky.), 275; 5 Am. Dec. 603; Booker v. Bell, 3 Bibb (Ky.), 176; 6 Am. Dec. 641; Cummings v. Kennedy, 3 Litt. (Ky.) 125; 14 Am. Dec. 45; Pence v. Duval, 9 B. Mon. (Ky.) 48; Hanson v. Buckner, 5 Dana (Ky.), 254; 29 Am. Dec. 401; Robertson v. Lemon, 2 Bush (Ky.), 301. Stout v. Jackson, 2 Rand. (Va.) 132, where the question was for the first time directly presented in Virginia. There was an able opinion by GREEN, J., announcing the rule stated in the text, and disapproving the *dicta* to the contrary in Mills v. Bell, 3 Call (Va.), 322, and other early cases. COALTER, J., dissented. The rule settled in this case remains unchanged in Virginia. Thompson v. Guthrie, 9 Leigh (Va.), 101; 33 Am. Dec. 225; Threlkeld v. Fitzhugh, 2 Leigh (Va.) 451; Jackson v. Turner, 5 Leigh (Va.), 126; Lowther v. Com., 1 Hen. & Munf. (Va.) 202; Click v. Green, 77 Va. 827. Moreland v. Metz, 24 W. Va. 137; 49 Am. Rep. 246; Butcher v. Peterson, 26 W. Va. 447; 53 Am. Rep. 89. Barnett v. Hughey (Ark.), 15 S. W. Rep. 464. Brown v. Dickerson, 12 Pa. St. 372; McClure v. Gamble, 27 Pa. St. 288; Cox v. Henry, 32 Pa. St. 18. Doyle v. Brundred, 189 Pa. St. 113; 14 Atl. Rep. 1107. Holmes v. Sinnickson, 3 Gr. (N. J. L.) 313; Hulse v. White, 1 Cox (N. J. L.), 173; Drake v. Baker, 34 N. J. L. 360. Willson v. Willson, 5 Fost. (N. H.) 229; 57 Am. Dec. 320; Drew v. Towle, 30 N. H. 531; 64 Am. Dec. 309; Nutting v. Herbert, 35 N. H. 120. Kinney v. Watts, 14 Wend. (N. Y.) 38; Peters v. McKeon, 4 Den. (N. Y.) 550; Hymes v. Van Cleef, 15 N. Y. Supp. 341; the head note to this case is misleading. May v. Wright, 1 Overt. (Tenn.) 385, *semble;* Elliott v. Thompson, 4 Humph. (Tenn.) 98; 40 Am. Dec. 630; McGuffey v. Humes, 85 Tenn. 26; 1 S. W. Rep. 506. Dickens v. Shepherd, 3 Murph. (N. C.) 326. Henning v. Withers, 3 Brev. (S. C.) 458; 6 Am. Dec. 589; Furman v. Elmore, 2 Nott & McC. (S. C.) 189; Lourance v. Robertson, 10 S. C. 12. Davis v. Smith, 5 Ga. 274; 47 Am. Rep. 279. A very exhaustive opinion was delivered in this case, reviewing the doctrines of the ancient common law applicable to the rule stated in the text. Simpson v. Balvin, 37 Tex. 685. Kempner v. Lumber Co., 20 Tex. Civ. App. 307; 49 S. W. Rep. 412. Roberts v. McFadden (Tex. Civ. App.), 74 S. W. Rep. 105. (Compare Davis v. Fair, 152 S. W. 218 and Adams v. Cox, 150 S. W. 1195, Texas cases.) Clark v. Parr, 14 Ohio, 118; 45 Am. Dec. 529; McAlpin v. Woodruff, 11 Ohio St. 120. Stebbins v. Wolf, 33 Kans. 765; 7 Pac. Rep. 542; Doom v. Curran, 52 Kans. 360; 34 Pac. Rep. 118. Dalton v. Bowker, 8 Nev. 190; Hoffman v. Bosch, 18 Nev. 360. Brandt v. Foster, 5 Iowa, 297; Swafford v. Whipple, 3 Gr. (Io.) 261; 54 Am. Dec. 498. Stark v. Olney, 3 Oreg. 88. Lloyd v. Sandusky, 203 Ill. 621; 68 N. E. Rep. 154. Sheets v. Andrews, 2 Bl. (Ind.) 274; Reese v. McQuilkin, 7 Ind. 450; Phillips v. Reichert, 17 Ind. 120; 79 Am. Dec. 463; Burton v. Reeds, 20 Ind. 87; Wood v. Bibbins, 58 Ind. 392; McClure v. McClure, 65 Ind. 487; Boatman v. Wood, 50 Ind. 403, right to interest on the purchase money. Donlon v. Evans, 40 Minn. 501; 42 N. W. Rep. 472, *semble.* Martin v. Long, 3 Mo. 391; Dunnica v. Sharp, 7 Mo. 71; Tong v. Matthews,

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23 Mo. 437; Lambert v. Estes, 99 Mo. 604; 13 S. W. Rep. 284. Blossom v. Knox, 3 Pinney (Wis.), 262 (3 Chand. 295); Conrad v. Trustees, 64 Wis. 258; 25 N. W. Rep. 24. Griffin v. Reynolds, 17 How. (U. S.) 609; Patrick v. Leach, 1 McCrary (U. S.), 250. Cheney v. Straube, 35 Nebr. 521; 53 N. W. Rep. 479. Holmes v. Sinnickson (Nebr.), 100 N. W. Rep. 417. West Coast Mfg. Co. v. West Coast Imp. Co., 31 Wash. 610; 72 Pac. Rep. 455. The following observations by CARR, J., in Threlkeld v. Fitzhugh, 2 Leigh (Va.), 461, are a forcible example of the arguments employed by those who maintain that the evicted purchaser is not entitled to damages for the increased value of the estate: "When land is sold the existing state of things, the present value and situation of the land, are the subjects in the minds of the parties; it *is this land as it now is* that is bought and sold and warranted. It is most natural then to suppose that the parties mean that the purchase money, the standard of value to which they have both agreed in the sale, shall be the measure of compensation if the land be lost. They seldom look into futurity to speculate upon the chances of a rise or fall in value. If they did the views of buyer and seller would probably be very different; and, whatever they might be, could form no part of the contract, nor enter into its construction. What is it that the seller warrants? *the land itself.* Does this warranty, either by force of its terms or by the intention of the parties, extend to any future value which the lands may reach when they have become the site of a populous city, are covered with expensive buildings, or mines of gold have been found in their bowels? Such a state of things was probably not dreamed of. And how can these subsequent accessions be the subject of a warranty made when they had no existence, nor were even in the contemplation of the parties." *Recent Cases:* Allinder v. Bessemer Co., 164 Ala. 275, 51 So. 234; McCormick v. Marcy, 165 Cal. 386, 132 Pac. 409; Taylor v. Allen, 131 Ga. 416, 62 S. E. 291; Mauzy v. Flint, 42 Ind. App. 386, 83 N. E. 757; Boice v. Coffeen, 158 Iowa 705, 138 N. W. 857; Sullivan v. Hill, 33 Ky. L. R. 962, 112 S. W. 564; Brooks v. Mohl, 104 Minn. 404, 116 N. W. 931, 124 Am. St. Rep. 629, 17 L. R. A. (N. S.) 1195; Allen v. Miller, 99 Miss. 75, 54 So. 731; Withers v. Bank, 104 Miss. 681, 61 So. 690; Coleman v. Lucksinger, 224 Mo. 1, 123 S. W. 441; 26 L. R. A. (N. S.) 934; Quick v. Walker, 125 Mo. App. 257, 102 S. W. 33; Merch. Nat. Bank v. Otero, 24 N. M. 598, 175 Pac. 781; Hunt v. Hay, 214 N. Y. 578, 108 N. E. 851; Campbell v. Bentley, 145 N. Y. Supp. 92, 159 App. Div. 522; Arnold v. Joines, 50 Okl. 4, 150 Pac. 130; Folk v. Graham, 82 S. C. 66, 62 S. E. 1106; Fid. Lumber Co. v. Ewing, (Tex. Civ. App.) 201 S. W. 1163; Wiggins v. Stephens, (Tex. Civ. App.) 191 S. W. 777; Irwin v. Maple, 252 Fed. 10, 164 C. C. A. 122.

[22] Post, § 165.

of *warrantia chartæ* in which he had restitution of other lands to the amount of those which he had lost. Damages were not recoverable, unless the warrantor were unable to make restitution in kind, and then the warrantee was allowed nothing for improvements or for the increased value of the land.[23] By the civil law the vendor, whether with or without fault, is bound to indemnify the purchaser to the full extent of his loss, which, of course, includes improvements and the increased value.[24] An apparent exception to the rule that the measure of damages for a breach of the covenant of warranty is the value of the land at the time of the conveyance exists where the covenant of warranty is contained in a mortgage or deed of trust to secure the payment of a debt. In such a case the value of the land at the time of the eviction is the measure of the covenantee's damages, provided that value do not exceed the amount of the debt secured.[25] It is obvious, however, that in such a case the debt secured is, for this purpose, treated as the equivalent of a price paid for the land. If the transaction between the grantor and the grantee consisted of an exchange of lands, the agreed value, or if none, the market value of the lands given in exchange, is the measure of damages on eviction from the lands received in exchange.[26]

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[23] Gore v. Brazier, 3 Mass. 523; 3 Am. Dec. 182.

[24] Hale v. New Orleans, 18 La. Ann. 321.

[25] Thus, in Haffey v. Birchetts, 11 Leigh (Va.), 89, a distinction was drawn between a breach of a covenant of warranty contained in a deed of bargain and sale and such a covenant in a deed of trust to secure a debt, the court holding that in the latter case the measure of damages was the value of the premises at the time of the eviction. "In case of a sale the measure is the value at the time of the sale, and the test of this value is the purchase money. But in the case of an incumbrance this principle can have no application, for price is not a subject of adjustment in the treaty for a security. Adequacy is alone inquired into. The true measure of damages, therefore, in case of eviction by superior title, is the value of the mortgaged or trust subject at the time of eviction, provided it do not exceed the amount of the debt secured, for it is obvious that the creditor can never be damaged to a greater amount than that." Thus, if the land at the time of the execution of the deed of trust was of the value of $1,000, the debt secured was $2,000, and the land had increased in value to $2,000 at the time of the eviction, the beneficiary would be entitled to the sum of $2,000 as damages. There is no injustice in this result, the covenantor being liable for the whole $2,000 at all events.

[26] Looney v. Reeves, 5 Kans. App. 279; 48 Pac. Rep. 606.

It is to be observed that the rule generally prevailing throughout the United States, denies to the covenantee upon a breach of any of the covenants for title, any recovery in damages for the increased value of the land, whether arising from extrinsic causes, or resulting from the labor and skill of the covenantee, and the improvements which he may have placed on the land. The rule is rested largely upon the presumed intention of the parties.[27] They contract with reference to the present value of the estate, and if the covenantee has any apprehensions as to the title and the safety of his bargain, he should require special covenants to protect himself from loss.[28] The apparent hardship of the rule is lessened by several considerations. Thus, if the covenantee knew the title was bad, he took the risk of losing his improvements,[29] and if he forebore an examination and remained ignorant of the state of the title, it was his own fault and calls for an application of the maxim that where one of two innocent parties must suffer a loss, he whose negligence made the loss possible must bear it. And again, in many if not all of the States, there are statutes that give to the evicted covenantee the right to an allowance for the value of his permanent improvements as against the successful claimant of the premises.[30]

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[27] Phillips v. Smith, Car. Law Rep. (N. C.) 475; 6 Am. Dec. 542, where it was said that nothing could be more unreasonable than to compute the damages in a manner not contemplated by the parties at the time of the contract, and which, if foreseen, would have broken off their negotiations. The covenantor is not compelled to pay a greater amount than the consideration paid to him, because he is held to have contracted with reference to that value, and the question is one of intention. Lourance v. Robertson, 10 S. C. 19; Ware v. Weatherell, 2 McC. (S. C.) 415.

[28] "If the vendee does not choose to rely on the common covenants, but to be secured also for the increase in value of the land and any improvements he may put on it, let him insist on particular covenants expressly guaranteeing to him such increase and improvements." CARR, J., in Threlkeld v. Fitzhugh, 3 Leigh (Va.), 462. BRONSON, J., in Kelly v. Dutch Church, 2 Hill (N. Y.), 116. In Nesbit v. Brown, 1 Dev. Eq. (N. C.) 30, it was held that a covenant to pay in case of eviction double the purchase money, and also all damages thence accruing, was a penalty and not stipulated damages, and that the purchase money and interest only could be recovered. There is nothing in the case, however, to show that the parties may not stipulate for actual damages sustained in excess of the purchase money and interest.

[29] Conrad v. Trustees, 64 Wis. 258; 25 N. W. Rep. 24.

[30] In Cox v. Strode, 2 Bibb (Ky.), 278; 5 Am. Dec. 603, it was said by the

If the covenantor was guilty of *fraud* in the procurement and execution of the contract of sale, and the fraud shall not have been waived by the acceptance of a conveyance and covenants for title with knowledge thereof, the covenantee may in a special action on the case for the deceit, recover damages to the full extent of any loss he may have sustained, including the value of his improvements and the increased value of the land.[31] In the action of covenant, which sounds altogether in contract, the plaintiff cannot introduce evidence of fraud on the part of the vendor for the purpose of aggravating the damages.[32]

The value or purchase price agreed upon by the parties is the measure of damages and not the value of the lands at the time of the conveyance. The execution of the conveyance may for many reasons be postponed or omitted until long after the contract has

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court on this point: "So far as the increase of value has been the effect of improvements made by the purchaser, he ought to be remunerated, but justice requires that this remuneration should be made by the successful claimant, for *nemo debet locupletari aliena jactura* is a maxim of universal justice adopted and enforced by our law. If the purchaser came within the statute concerning occupying claimants, the legislature has provided such a compensation to be made by the successful claimant as they deem just. * * * If he wilfully or supinely neglects to pursue the remedy which the law has given against the successful claimant he ought to abide the loss, and not be permitted to found upon his own negligence, a claim to an additional compensation against the seller."

[31] Bender v. Fromberger, 4 Dall. (Pa.) 444. The measure of damages, where the grantor pointed out incorrect boundaries, inclosing more land than he actually owned and conveyed, is the difference between the value of the land actually conveyed, and of that inclosed by the boundaries pointed out, without regard to the contract price. King v. Bressie (Tex. Civ. App.), 32 S. W. Rep. 729.

[32] 2 Bl. Com. 166; Rawle Covt. § 159. Carvill v. Jacks, 43 Ark. 439. But see May v. Wright, 1 Overt. (Tenn.) 390, an action on a covenant of warranty in which it was said that if the jury found that the covenantor when he sold knew that he had no title to the land, it was a fraud, and that the jury might give such damages as they thought would make the covenantee whole. See also, Eaton v. Hopkins, (Fla.) 71 So. 922. In Madden v. Land Co., 16 Idaho 59, 100 Pac. 358, 21 L. R. A. (N. S.) 332, it was held that the grantor was guilty of constructive fraud in executing a second conveyance of the land to an innocent purchaser, and that the first grantee was entitled to recover for the loss of his bargain, though he failed to protect himself by promptly putting his deed on record.

been completed by the purchaser, but the delay in that respect will not entitle him to a larger measure of damages.[33]

In an action on the warranty, plaintiff cannot be required to prove that the land was of the value that he paid for it.[34]

Nominal damages only for a breach of the covenant of warranty can be recovered against one who conveyed the land without consideration, as between the original parties.[35] Thus, one to whom the land had been conveyed by direction of the purchaser, to secure the grantee for money loaned to the purchaser with which to pay the purchase price, and who, after repayment of the loan, reconveyed to the purchaser with covenant of general warranty, was held liable for nominal damages only upon the eviction of the purchaser by an adverse claimant.[36] It has been held, however, in a case in which a money consideration was stated in the deed, the real consideration being love and affection, that the damages for a breach of the covenant of warranty must be measured by the consideration stated.[37] And where the consideration was paid in stock of a fictitious value, the actual value of the stock on the day of sale was held to be the measure of the covenantee's damages.[38] The grantor is not relieved from liability on his covenant of warranty by the fact that he received only a part of the consideration, and that the other part went to a third person, who acted as his agent for the sale of the premises.[39] If a valuable consideration be in fact paid, the grantor will be liable upon his warranty without regard to the parties receiving the consideration, or the manner of its appropriation.[40] And the fact that the grantor bought the premises and, for the same consideration that he paid, conveyed them to the grantee at the request of third persons, for a particular purpose, will not relieve him from liability on his covenant. If a third person chooses to execute a covenant of warranty under such circumstances, he must abide the consequences.[41]

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[33] But see Cummins v. Kennedy, 3 Litt. (Ky.) 125; 14 Am. Dec. 45, the court saying: "The general rule settled by a current of authorities is, that as the conveyance completes the sale, the value of the land conveyed, at the date of the conveyance, with interest and costs, forms the criterion of damages; and also that the price stipulated is the best evidence of that value. And where the parties have shown that price in the conveyance it would not perhaps be going too far to say that they ought to be concluded by it. Hence, if the consideration was paid long before the date of the deed, still if it is expressed, it would fix the criterion, though the land when conveyed had greatly risen in value."

[34] Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105; Coleman v. Luetcke (Tex. Civ. App.) 164 S. W. 1117.

[35] West v. West, 76 N. C. 45. One to whom a deed, absolute on its face, is executed as collateral security for a debt due to a third person, is put upon notice of the character of the transaction by the recital of the consideration, and cannot recover as a *bona fide* purchaser on a warranty contained in the deed. He is bound to know that he has received such consideration as is stated in the deed. Parke v. Chadwick, 8 W. & S. (Pa.) 96.

[36] West v. West, 76 N. C. 45.

[37] Hanson v. Buckner, 4 Dana (Ky.), 254; 29 Am. Dec. 401.

[38] McGuffey v. Humes, 85 Tenn. 26; 1 S. W. Rep. 506.

The fact that the land was bought for a particular purpose known to the vendor can make no difference in respect to the measure of damages for a breach of the covenant of warranty.[42] The covenantor may show in mitigation of damages that a tract of land to which he had no title was by mistake included in the conveyance by him.[43] Also, that the covenantee has received from the adverse claimant by way of refund, taxes, penalties, etc., charges upon the land paid by the covenantor, which he would have been entitled to recover from such claimant.[44] In some cases it has been held that damages for a breach of covenants for title must be assessed according to the law of the place where the granted premises lie;[45] in others, according to the rule in force in the State in which the action is brought;[46] and in others, according to the law of the place where the contract was made.[47] The last would seem to be the better rule, at least more just and equitable in its results, since it is a fair presumption that the parties contracted with reference to the law of the place where the contract was made.

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[39] Rash v. Jenne (Oreg.), 37 Pac. Rep. 538.

[40] Bloom v. Wolfe, 50 Iowa, 286.

[41] Whatley v. Patten (Tex. Civ. App.), 31 S. W. Rep. 60.

[42] Phillips v. Reichert, 17 Ind. 120; 79 Am. Dec. 463. Dimmick v. Lockwood, 10 Wend. (N. Y.) 142.

[43] Leland v. Stone, 10 Mass. 459.

[44] Danforth v. Smith, 41 Kans. 146; 21 Pac. Rep. 168; Stebbins v. Wolf, 33 Kans. 765; 7 Pac. Rep. 542.

[45] Tillotson v. Pritchard, 60 Vt. 94; 14 Atl. Rep. 302. Succession of Cassidy, 40 La. Ann. 827; 5 So. Rep. 292.

[46] Nichols v. Walter, 8 Mass. 243; Smith v. Strong, 14 Pick. (Mass.) 128.

[47] Aiken v. McDonald, (So. Car.) 20 S. E. Rep. 796. Looney v. Reeves, 5 Kans. App. 279; 48 Pac. Rep. 606.

In a case in which the grantor and a third person executed an instrument obliging themselves to satisfy any incumbrances upon the land, and the grantee was evicted under an incumbrance which they neglected to satisfy, it was held that his measure of damages was the value of the land at the time of the eviction. "This," said the court, "is not a covenant as to the state of the title, but an agreement to do certain acts for the plaintiff's benefit within a specified time. For the breach of such an executory contract, we know no reason why the plaintiff should not be allowed to recover such damages as are the necessary, natural and proximate result of the breach complained of."[48]

The failure of the grantee to take possession of the estate and perfect the title by adverse possession, will not relieve the grantor from liability upon his warranty.[49]

The grantee, of course, may show, in mitigation of damages, that before the trial he had acquired the outstanding title, and that the same, by virtue of his warranty, enured to the benefit of the grantee.[50]

In the case of an exchange of lands, the measure of damages for breach of the covenant of warranty is the value of the land conveyed in exchange by the covenantee.[51]

It will be seen in a subsequent chapter of this work that a grantee with warranty may, when sued for the purchase money, set up a breach of the warranty as a defense.[52] So, conversely, in an action by the grantee on the warranty the covenantor may set off the unpaid purchase money against the plaintiff's demand.[53]

The plaintiff cannot have substantial damages unless he proves the amount he paid for the land. But if he proves a breach of the warranty he is entitled, at least, to nominal damages.[54]

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[48] Manahan v. Smith, 19 Ohio St. 384.

[49] Graham v. Dyer (Ky.), 29 S. W. Rep. 346 (not officially reported).

[50] Looney v. Reeves, 5 Kan. App. 279; 48 Pac. Rep. 406.

[51] Wiggins v. Stephens, (Tex. Civ. App.) 191 S. W. 777. See ante, § 92, and post, § 167.

[52] Post, ch. 16.

[53] Beecher v. Baldwin, 55 Conn. 419; 12 Atl. Rep. 401. The court said that the grantee, in claiming substantial damages, proceeded upon the theory that she might require the vendor to make the title good, in which event she would be obligated to pay the purchase money.

§ 165. **Rule in New England States.** In the States of Massachusetts,[55] Maine,[56] Vermont,[57] Connecticut,[58] and Alabama,[59] the covenantee is permitted to measure his damages upon a breach of the covenant of warranty, by the value of the land at the time of his eviction. The distinction which they make between the covenant of warranty and the covenant of seisin is that the latter covenant is broken as soon as made if the covenantor have no title, while the covenant of warranty is not broken until eviction under title paramount; and that the parties intend that the damages shall be measured by the value of the land at the time when the covenant is broken.[60] If the eviction is constructive, as where the covenantee is unable to get possession of the land by ejectment brought for that purpose, the value of the land at the time the action of ejectment was decided against the plaintiff, is the measure of his damages.[61]

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[54] Croom v. Allen, 145 Ga. 347, 89 S. E. 199.

[55] Gore v. Brazier, 3 Mass. 543; 3 Am. Dec. 182. This is the leading case in Massachusetts. White v. Whitney, 3 Met. (Mass.) 89; Cecconi v. Rodden, 147 Mass. 164; 16 N. E. Rep. 749. In this case the covenantee was allowed for improvements made by him after the suit in which he was evicted had been begun, the improvements having been made in good faith.

[56] Swett v. Patrick, 12 Me. 1; Hardy v. Nelson, 27 Me. 525; Elder v. True, 32 Me. 104.

[57] Keeler v. Wood, 30 Vt. 242; Farwell v. Bean, 82 Vt. 172, 72 Atl. 731; Drury v. Shumway, 1 D. Chip. (Vt.) 110; 1 Am. Dec. 704. In this case it was also held that any amount the covenantee may have recovered from the successful claimant for improvements must be deducted from the damages. In Park v. Bates, 12 Vt. 387; 36 Am. Dec. 347, it was said by the court that none of the ruinous consequences attributed to the rule measuring the damages by the value of the land at the time of the eviction had been experienced in that State.

[58] Horsford v. Wright, Kirby (Conn.), 3; 1 Am. Dec. 8. This is one of the earliest cases upon the point. It merely announces the rule without discussing the reasons upon which it is founded. Mitchell v. Hazen, 4 Conn. 516; 10 Am. Dec. 169; Stirling v. Peet, 14 Conn. 245; Butler v. Barnes, 61 Conn. 399; 24 Atl. Rep. 328.

[59] Wilder v. Tatum (Ala.), 73 So. 833.

[60] The rule measuring the damages by the value of the land at the time of the eviction was recognized in Virginia at an early date, though not expressly adopted. Mills v. Bell, 3 Call (Va.), 320, *obiter*, a case of executory contract. TUCKER, J., in Nelson v. Matthews, 2 Hen. & Munf. (Va.) 164; 3 Am. Dec. 620. These *dicta* have all been disapproved in later cases. See ante, n. 21, p. 425. Damages for the value at the time of eviction were also allowed or the rule approved in Guerard v. Rivers, 1 Bay (S. C.), 263, and Liber v. Parsons, 1 Bay (S. C.), 19, but these cases were overruled by Furman v. Elmore, 2 Nott & McC. (S. C.) 189. The consideration money with interest has since

An exception to the New England rule giving damages for the value of the land at the time of eviction, is made in a case where the eviction results from the enforcement of a mortgage or other lien, and in which the covenantee has the privilege of redeeming the land by discharging the incumbrance and the costs of suit. In such a case the measure of his damages is the amount required to redeem the land.[62] Were this not so the covenantee might recover the full value of the estate as damages, and then repossess himself of the estate by redeeming it with a much smaller sum of money.

The New England rule as to the measure of damages has been pronounced unsound and has been vigorously assailed both by text writers and by the courts of other States.[63] The reasons which

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been made by statute the rule of damages. Acts 1824, p. 24; Earle v. Middleton, Cheves (S. C.), 127. In Clark v. Whitehead, 47 Ga. 516, it seems that under the statutory law of that State the grantee was held entitled to damages for the value of the land at the time of trial of the action for breach of covenant. In Jones v. Shay, 72 Iowa, 237; 33 N. W. Rep. 650, it was held error to award damages in excess of the purchase money, unless the plaintiff averred and proved an increase in the value of the premises.

[61] Park v. Bates, 12 Vt. 381; 36 Am. Dec. 347.

[62] Tuft v. Adams, 8 Pick. (Mass.) 549; White v. Whitney, 3 Met. (Mass.) 89; Thayer v. Clemence, 22 Pick. (Mass.) 490. Compare Lloyd v. Quimby, 5 Ohio St. 262.

[63] See the cases cited ante, note 21 p. 425. Rawle Covt. § 165. The learned writer says: "A vendor when making them (the covenants) never dreams of such an enlarged liability by reason of his purchaser's improvements; and on the other hand the latter takes the title for what it is worth at the time; he makes, by his contract, the purchase money the measure of the value of the title, and takes security by means of covenants in that amount and no more. * * * The practical application of the rule that the damages are measured by the value at the time of eviction may, moreover, work injustice in cases where the property may have depreciated in value, and in particular where that depreciation may have been owing to the neglect or other fault of the purchaser. In case he has received a covenant for seisin and a covenant for quiet enjoyment, he can of course sue upon either, or if he sue upon both he is allowed to have judgment entered upon either. If the property is less valuable than when he purchased it, he elects to enter judgment upon the covenant for seisin and receives the consideration money, which is far more

they urge against the rule seem conclusive. The decisions supporting that rule appear to have been founded more upon precedent and ancient usage, than upon any presumed intention of the parties, with respect to the measure of recovery upon the covenant.[64] It is not to be denied, however, that the rule limiting the damages to the consideration money will in some cases result in hardship and injustice. That rule has been adopted, not as a complete solvent of the rights of the parties in all cases, but as the best that could be devised having regard to the difficulties of the subject, and as the least calculated to produce inequitable results.[65]

§ 166. **Assignee's measure of damages.** If the action on the covenant of warranty be by an assignee of the covenantee, and the consideration paid for the land by the plaintiff was less than that paid to the covenantor; that is, the original purchase money, it has been held that the plaintiff can recover as damages only the purchase price which he paid.[66] There are cases, however, which

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than the property is then worth. If, however, it has increased in value, judgment is entered on the covenant for quiet enjoyment." In Ware v. Weatherall, 2 McC. (S. C.) 246, it was said by COLCOCK, J.: "It sounds well to say that if a man be deprived of a thousand dollars worth of improvements by a defect in his title, he who sold should be compelled to make it up. But I ask if it is not increasing the calamities of life to make men answerable for that which the most consummate wisdom and incorruptible integrity cannot guard against."

[64] See the remarks of PARSONS, C. J., in Gore v. Brazier, 3 Mass. 545, 546; 3 Am. Dec. 182.

[65] Staats v. Ten Eyck, 3 Caines (N. Y.), 111; 2 Am. Dec. 254, where it was said by KENT, C. J.: "To find a rule of damages in a case like this is a work of difficulty; none will be entirely free from objection or will not at times work injustice." McAlpin v. Woodruff, 11 Ohio St. 130.

[66] Mette v. Dow, 9 Lea (Tenn.), 99. In this case the court, by COOPER, J., lucidly observed: "The covenant (warranty) is a peculiar one, and not like an ordinary covenant for so much money. It is rather in the nature of a bond with a fixed sum as a penalty, the recovery on which will be satisfied by the payment of the actual damages. Each vendor subject to this rule may be treated as the principal obligor to his immediate vendee, and as the surety of any subsequent vendee to hold him harmless by reason of the failure of title; and the ultimate vendee when evicted is entitled to be subrogated to the rights of his immediate vendor against a remote vendor to the extent necessary to indemnify him. Such a vendee, to use the language of the Supreme Court of North Carolina, sues a remote vendor on the covenant to redress his, the plaintiff's own injuries, not the injuries of the immediate

adopt the contrary view, holding that the value of the premises is conclusively fixed by the price paid to the original covenantor, and that the remote grantee is entitled to recover that amount.[67] But if he paid more than the original purchase money, he cannot recover the excess on the original covenantor's warranty. The measure of damages for which the covenantor is liable cannot be increased by a transfer of the land.[68]

§ 167. **True consideration may be shown.** The consideration stated in the conveyance is *prima facie* evidence of the purchase price of the land. But parol evidence is admissible to show the true consideration, whether it be greater or less than that recited in the deed.[69] It has been said that the only operation of the con-

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vendee of such remote vendor. Accordingly, that court held, in a case like the one before us, that the measure of damages was the consideration paid by the plaintiff to his immediate vendor, with interest, and not the consideration paid by such vendor to the defendant. In other words, the damages recovered were limited to the actual injury sustained. Williams v. Beeman. 4 Dev. (N. C.) 483." Phillips v. Smith, 1 Car. Law Rep. 475. Whitzman v. Hirsh, 3 Pick. (Tenn.) 513; 11 S. W. Rep. 421. Moore v. Frankenfield, 25 Minn. 540. In Aiken v. McDonald, (So. Car.) 20 S. E. Rep. 796, the greater part of an estate in the premises for the life of another had been enjoyed by the original covenantor, but the value of the entire life estate was, nevertheless, deducted from the assignee's damages. In Solberg v. Robinson, 34 S. D. 55, 147 N. W. 87, it was held that a remote grantee was entitled to recover interest on his damages from the time his "constructive possession" was disturbed by notice of a superior title.

[67] Brooks v. Black, 68 Miss. 61; 9 So. Rep. 332. Lourence v. Robertson, 10 So. Car. 8. Mischke v. Baughn, 52 Iowa, 528; 3 N. W. Rep. 543; Dougherty v. Duval, 9 B. Mon. (Ky.) 57. Hollingsworth v. Mexia, 14 Tex. Civ. App. 363; 37 S. W. Rep. 455; Lewis v. Ross, 95 Tex. 358; 67 S. W. Rep. 405.

[68] Dickson v. Desire, 23 Mo. 166. Crisfield v. Storr, 36 Md. 150; 11 Am. Rep. 480. Rogers v. Golson, (Tex. Civ. App.) 31 S. W. Rep. 200. Taylor v. Wallace, (Colo.) 37 Pac. Rep. 962. Hunt v. Hay, 140 N. Y. Supp. 1070, 156 App. Div. 138. Where the purchaser resold the premises and directed the conveyance to be made to the sub-purchaser, which was done, and the sub-purchaser was evicted, it was held that the measure of his damages against the grantor was the price paid by him (plaintiff, sub-purchaser) to the original purchaser, and not that which the latter was to pay to the granter. Cook v. Curtis, 68 Mich. 611; 36 N. W. Rep. 692.

[69] Bingham v. Weiderwax, 1 Comst. (N. Y.) 509; McRea v. Purmont, 16 Wend. (N. Y.) 460; Shepherd v. Little, 14 Johns. (N. Y.) 210; Petrie v. Folz, 54 N. Y. Super. Ct. 223, 229. Morse v. Shattuck, 4 N. H. 229; 17 Am. Dec. 419; Nutting v. Herbert, 35 N. H. 127; Estabrook v. Smith, 6 Gray (Mass.) 572; 66 Am. Dec. 443. Moore v. McKie, 5 Sm. & M. (Miss.) 238.

sideration clause is to prevent a resulting trust in the grantor and to estop him to deny the deed for the uses therein mentioned.[70] Evidence of a secret understanding between the covenantor and the covenantee, by which the liability of the former upon the covenant is lessened, cannot, however, be received as against an assignee of the covenant, that is, a subsequent purchaser from the covenantee.[71] If no consideration be expressed in the deed, extrinsic evidence may, of course, be resorted to for the purpose of showing the purchase price.[72] If the consideration cannot be ascertained, the value of the land at the time of the conveyance, with interest, will be the measure of damages.[73] But parol evidence

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Swafford v. Whipple, 3 Gr. (Io.) 261; 54 Am. Dec. 498; Williamson v. Test, 24 Iowa, 138; Wachendorf v. Lancaster, 66 Iowa, 458; 23 N. W. Rep. 922. Barrett v. Hughey, (Ark.) 15 S. W. Rep. 464. Garrett v. Stuart, 1 McCord (S. C.), 514. Devine v. Lewis (Minn.), 35 N. W. Rep. 711. Guinotte v. Choteau, 34 Mo. 154; Henderson v. Henderson, 13 Mo. 151. Wilson v. Shelton, 9 Leigh (Va.), 342. Holmes v. Seaman (Neb.), 100 N. W. Rep. 417; Lloyd v. Sandusky, 95 Ill. App. 593. Bass v. Starnes, 108 Ark. 357, 158 S. W. 136; Hanlon v. Glue Co., 53 Ind. App. 504, 102 N. E. 48. Martin v. Gordon, 24 Ga. 533. In this case the real consideration was much less than that stated in the deed. In Stark v. Olney, 3 Oreg. 88, the consideration expressed in the deed was $2,000, but the plaintiff recovered only $507. In Staples v. Dean, 114 Mass. 125, it appeared that Sylvester, not being the owner of a lot, sold and agreed to convey it to Staples for about $950. Sylvester then purchased the lot from the real owner, Dean, for $450, and caused him to convey it to Staples with covenant of seisin, the deed expressing a consideration of $950. The title having failed, Staples brought an action on the covenant, and claimed that the consideration named in the deed was the measure of his damages. The defendant Dean was permitted to show the facts in the case, and the court held that the measure of damages was the value of the land at the time of the conveyance, or, at the plaintiff's election, the amount actually received by the defendant, $450. There are a few early cases holding generally that the consideration of a deed cannot be inquired into, but they are no longer regarded as authority. Among others may be named Steele v. Adams, 1 Gr. (Me.) 1; Clarke v. McAnulty, 3 S. & R. (Pa.) 367; Schermerhorn v. Vanderheyden, 1 Johns. (N. Y.) 139; 3 Am. Dec. 304. Of course, however, parol evidence cannot be received to show that a deed is void for want of a consideration. Parol evidence as to the consideration can only be received when it is offered for some purpose other than that of defeating the conveyance. Betts v. Union Bank, 1 Harr. & Gill (Md.), 175; 18 Am. Dec. 283. Wilt v. Franklin, 1 Binney (Pa.), 502; 2 Am. Dec. 474.

[70] Belden v. Seymour, 8 Conn. 304; 21 Am. Dec. 661.

[71] Greenvault v. Davis, 4 Hill (N. Y.), 647.

[72] Smith v. Strong, 14 Pick. (Mass.) 128.

[73] Smith v. Strong, 14 Pick. (Mass.) 128.

cannot be received to show that at the time of the conveyance the covenantee was aware of the objections to the title of his grantor, or of the existence of incumbrances upon the property, and had verbally agreed that in case of an eviction there should be no liability upon the covenantor.[74] It is competent, however, for the grantor to show by parol that a part of the land, to which there was no title, had been included in the deed by mistake, and that no consideration was paid for it. But such evidence is admissible only in mitigation of damages, and not for the purpose of negativing a breach of the covenant.[75]

If the consideration be paid in something other than money, the actual value of the consideration so received will be the measure of the covenantee's damages. Thus, where the consideration was paid in railroad bonds, worth less than par, the measure of damages was held to be the actual market value of the bonds at the time of the payment;[76] and when the consideration is an exchange of lands, the value of the land received by the covenantor is the measure of damages for the loss of that received by the covenantee.[77]

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[74] Estabrook v. Smith, 6 Gray (Mass.), 578; 46 Am. Dec. 443. Nutting v. Herbert, 35 N. H. 264. Suydam v. Jones, 10 Wend. (N. Y.) 184; 25 Am. Dec. 552. In Collingwood v. Irwin, 3 Watts (Pa.), 306, it was held that the defendant could not show by parol that at the time he executed the deed he assigned to the grantee a judgment against a third person, which the grantee accepted as sole security for the title and agreed never to hold the grantor liable on the covenant. And in Townsend v. Weld, 8 Mass. 146, it was held that parol evidence is inadmissible to show that the covenantee was aware of the defect of the covenantor's title and that he had agreed that the covenantor should not be charged in the event of an eviction.

[75] Rawle Covts. for Title (5th ed.), § 174; Lloyd v. Sandusky, 203 Ill. 621; 68 N. E. 154, a case in which the grantor was permitted to show that the grantee knew, at the time of the conveyance, that the coal and minerals under the surface had been previously conveyed away; that the value of such coal and minerals was excluded in fixing the purchase price, and that an exception of such coal and minerals had been omitted from the conveyance by mistake. See, also, Rook v. Rook, 111 Ill. App. 398.

[76] Montgomery v. Northern Pac. R. Co., 67 Fed. Rep. 445. Taylor v. Allen, 131 Ga. 416, 62 S. E. 291.

[77] Howard v. Hurst, 156 Mo. App. 205, 137 S. W. 1, where held, also, that the value of the lands as fixed by the parties at the time of the exchange governs in an action for breach of the warranty.

§ 168. **Measure of damages where the covenantee buys in the paramount title.** The law does not require the covenantee to submit to an actual eviction by legal process at the suit of the real owner, as a condition precedent to the recovery of damages for the loss of the estate. He is constructively evicted, and his right of action is complete if he yields up the possession upon the demand of the true owner.[78] Upon the same principle he is permitted to buy in the outstanding title and to recover as damages the amount necessarily and in good faith expended for that purpose.[79] "There seems to be no difference in principle between yielding up the possession to him who owns the paramount title, and fairly purchasing that title, so far as respects the right to recover damages on the warranty."[80] But he can in no case recover damages in excess of the amount paid by him to the adverse claimant,[81] or in excess of the purchase price of the land.[82] *Prima facie* the covenantee has a right to recover damages to the amount of the consideration expressed in the deed. It devolves upon the defendant to show that the covenantee got in the outstanding title at a price less than that sum.[83] The right of the covenantee to recover is not affected by the fact that he bought up the title after the commencement of his action upon the warranty.[84] And he is not only entitled to recover the sum paid to the holder of the better title, but he may have back other necessary expenses incurred in acquiring the right of the true owner.[85] But while the covenantee may buy in the paramount title he does so at his own risk, and the burden devolves upon him to show that the title so acquired is one to which he must have inevitably yielded,[86] and that he paid value therefor.[87] The rule in this respect is the same as that which applies in case of a voluntary surrender of the premises to the adverse claimant.

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[78] Ante, § 148.

[79] Mayne Dam. (Wood's ed.) 286; Field Dam. 378, *et seq.* Rawle Covt. § 192. Smith v. Compton, 3 B. & Ald. 407. Leffingwell v. Elliott, 10 Pick. (Mass.) 204. Loomis v. Bedell, 11 N. H. 74. Spring v. Chase, 22 Me. 505; 39 Am. Dec. 505. Turner v. Goodrich, 26 Vt. 709. Sanders v. Wagner, 32 N. J. Eq. 506. Dale v. Shively, 8 Kans. 190; McKee v. Bain, 11 Kans. 577. Lawton v. Howe, 14 Wis. 269. Baker v. Corbett, 28 Iowa, 318, *obiter*, case of executory contract. Weber v. Anderson, 73 Ill. 439. Beaseley v. Phillips, 20 Ind. App. 182; 50 N. E. Rep. 488. Leet v. Gratz, 92 Mo. App. 422; Withers v. Bank, 104 Miss. 681, 61 So. 690; Brooks v. Mohl, 104 Minn. 404, 116 N. W. 931, 124 Am. St. Rep. 629, 17 L. R. A. (N. S.) 1195. In Lawless v. Collier, 19 Mo. 480, it was held that if the grantee buys in the adverse title, the price paid is the measure of his damages for breach of the covenant of seisin, but if he assigned the covenants in his grantor's deed as part of the consideration for the adverse paramount title, the assignee will be entitled to the full amount of the purchase money. And in Nolan v. Feltman, 12 Bush (Ky.) 119, it was held that if through equities derived from the grantor, such as a claim against the true owner for improvements, the grantee subjects the premises to sale and buys them himself, he will be treated as purchasing for the grantor's benefit, and can only recover on the warranty what it cost him to perfect the title in this way.

[80] Donnell v. Thompson, 1 Fairf. (Me.) 176; 25 Am. Dec. 216.

[81] Farmers' Bank v. Glenn, 68 N. C. 39 and cases cited in note 79 above. Cox v. Henry, 32 Pa. St. 18. James v. Lamb (Tex.), 21 S. W. Rep. 172. Bush v. Adams, 22. Fla. 177; Herron v. Barbour, (Okl.) 182 Pac. 243; Brown v. Thompson, 81 S. C. 380, 62 S. E. 440; Waggener v. Howsley, 164 Ky. 113, 175 S. W. 4; Allen v. Miller, 99 Miss. 75, 54 So. 731. Where the outstanding title was gotten in by the husband of the covenantee, it was held that, by reason of his privity with her, she was estopped from claiming any greater

The right to buy in the paramount title is the privilege and not the duty of the covenantee. Therefore, his refusal to purchase the title when offered to him on moderate terms cannot be shown in defense of his action on the warranty.[88]

The rule that the covenantee can have credit only for the amount paid by him to get in the outstanding title, and that the title so acquired, except to this extent, enures to the benefit of the grantor, has been held not to apply where the subject of the contract was public land title to which had never been divested from the State. The reason for this doctrine is that the public

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amount of damages than what he paid to get in the title. Wade v. Barlow, 99 Miss. 33, 54 So. 662.

[82] Elliott v. Thompson, 4 Humph. (Tenn.) 98. McGary v. Hastings, 39 Cal. 360; 2 Am. Rep. 456. Richards v. Iowa Homestead Co., 44 Iowa, 304; 24 Am. Rep. 745. Clapp v. Herdman, 25 Ill. App. 509. Williams v. Thomas, 21 Ky. L. Rep. 1228; 54 S. W. Rep. 824.

[83] Hunt v. Orwig, 17 B. Mon. (Ky.) 73; 66 Am. Dec. 144.

[84] Leffingwell v. Elliott, 10 Pick. (Mass.) 204; 19 Am. Dec. 343.

[85] Dillahunty v. Little Rock, etc., R. Co., 59 Ark. 699; 27 S. W. Rep. 1002, and 28 S. W. Rep. 657. See, generally, the cases cited, ante, this section.

[86] Richards v. Iowa Homestead Co., 44 Iowa, 304; 24 Am. Rep. 745.

[87] Waggener v. Howsley, 164 Ky. 113; 175 S. W. 4.

[88] Norton v. Babcock, 2 Met. (Mass.) 510. Buck v. Clements, 16 Ind. 132. Lloyd v. Quimby, 5 Ohio, 265. Stewart v. Drake, 4 Halst. (N. J.) 143. Miller v. Halsey, 2 Gr. (N. J. L.) 48. Sanders v. Wagner, 32 N. J. Eq. 506.

lands are not a lawful subject of private contract, and an attempted conveyance thereof by one private person to another passes no interest whatever, and does not create the relation of vendor and vendee, and, therefore, cannot be held to furnish a consideration for the purchase price of the premises.[89] In such a case the rule that the purchaser cannot deny the vendor's title does not apply, even though the grantee knew that the title was in the government when the deed was made, and had himself at that time taken steps to acquire the lands as a homestead.[90] There is, however, a conflict of authority upon this point.[91] In a case in which the contract was executory, the supreme court of the United States held that the purchaser, who perfected the title by making entry of the land after he discovered the invalidity of a patent under which his vendors claimed, could recover only the amount paid by him in obtaining a patent. The court held, also, that having undertaken to defeat the title of his vendors by claiming the land as his own, he could not recover the costs of entering and surveying the land, as he might have done if he had brought an action affirming the contract, instead of attempting to rescind.[92] There would seem to be no reason why the principles of this decision should not apply equally to a case in which the contract had been executed by a conveyance, and the grantee seeks to recover on the covenants for title.

The covenantee cannot recover money which he paid out to extinguish the paramount title, unless the payment had that effect; so held in a case in which the outstanding interest was vested in minors, and the value of such interest was paid to their guardian under an order of court to convey the interest of his wards to the covenantee, the court having no power to enter such an order.[93]

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[89] Lamb v. James, 87 Tex. 485; 29 S. W. Rep. 647, citing Wheeler v. Styles, 28 Tex. 240; Rogers v. Daily, 46 Tex. 582; Palmer v. Chandler, 47 Tex. 333; Houston v. Dickinson, 16 Tex. 81. See, also, Kans. Pac. R. Co. v. Dunmeyer, 19 Kans. 543. Barr v. Greeley, 52 Fed. Rep. 926, *obiter;* Montgomery v. Northern Pac R. R. Co., 67 Fed. Rep. 445. Spier v. Lanman, 27 Tex. 205. (Compare, Ellis v. Crossley, 119 Fed. Rep. 779.)

[90] Dillahunty v. Little Rock, etc., R. Co. (Ark.), 27 S. W. Rep. 1002.

[91] Post, §§ 202, 220. Holloway v. Miller, 84 Miss. 776; 36 So. Rep. 531.

[92] Galloway v. Finlay, 12 Pet. (U. S.) 264. Thredgill v. Pintard, 12 How. (U. S.) 24.

§ 169. **Measure of damages for loss of term.** The rule that the covenantee upon eviction is not entitled to damages for the increased value of the land, has been held in New York and elsewhere not to apply in case of a breach of a covenant for quiet enjoyment contained in a lease, the lessee in case of eviction by title paramount being held entitled to damages for the value of his unexpired term over and above the rent reserved.[94] A similar rule has been applied in England[95] in such cases. A different rule formerly prevailed in New York; the earlier cases hold that the rent reserved for the residue of the unexpired term is the measure of the lessee's damages.[96] The late cases would seem to establish the better doctrine. They proceed upon the ground that the rule *caveat emptor* does not apply as between lessor and lessee. It is not customary for the lessee to examine the title, even if he were allowed to do so. It may be observed, too, that no very serious consequences can flow from a rule that gives the lessee the benefit of the actual value of the term, for it is but seldom that the annual

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[93] Leet v. Gratz, 92 Mo. App. 422.

[94] Clarkson v. Skidmore, 46 N. Y. 297. Clark v. Fisher, 54 Kans. 403; 38 Pac. Rep. 493. Fritz v. Pusey, 31 Minn. 368; 18 N. W. Rep. 94. Wetzel v. Richcreek (Ohio), 40 N. E. Rep. 1004. Sheets v. Joyner (Ind.), 38 N. E. Rep. 830. Damages for the value of the unexpired term over and above the rent reserved were allowed in Mack v. Patchin, 42 N. Y. 167; 1 Am. Rep. 506 (1870). The decision, however, seems to have been rested largely upon the want of good faith in the lessor and his connivance at the eviction of the lessee by foreclosure of a mortgage on the demised premises. (See the comments on this decision in Lannigan v. Kille, 97 Pa. St. 120; 39 Am. Rep. 979.) The case has been much cited, and justifies the following copious extract from the opinion of EARLE, C. J.: "Ordinarily in an action against the vendor of real estate for breach of the covenant of warranty the vendee can recover only the consideration paid and interest for not exceeding six years; and when the contract of sale is executory, no deed having been given, in cases where no part of the purchase money has been paid, the vendee can recover only nominal damages; and in cases where the purchase money has been paid, he can recover the purchase-money interest and nominal damages. In an action by the lessee against the lessor for breach of the covenant for quiet enjoyment, the lessor can ordinarily recover only such rent as he has advanced, and such mesne profits as he is liable to pay over; and in cases where the lessor is sued for a breach of a contract to give a lease or to give possession, ordinarily the lessee can recover only nominal damages and some incidental expenses, but nothing for the value of his lease. These rules, however much they may be criticised, must be regarded as settled in this State. But at an early day in England and in this country certain cases were declared to be exceptions to these rules, or, more properly speaking, not to be within them; as if the vendor is guilty of fraud, or can convey, but will not, either from perverseness or to secure a better bargain; or if he has covenanted to convey when he knew he had no authority to contract to convey; or where it is in his power to remedy a defect in the title and he refuses or neglects to do so; or when he refuses to incur expenses which would enable him to fulfill his contract. In all these cases the vendor or lessor is liable to the vendee or lessee for the loss of the bargain under rules analogous to those applied in the sale of personal property. * * * In this case the defendant resided in Buffalo, where the real estate was located,

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and he owned the real estate at the time he made the lease; and, in the absence of any proof to the contrary, he must be presumed to have known of the mortgages upon the real estate at the time he made the lease. He is, therefore, within the rule of law above alluded to, liable to the damages awarded against him, because he gave the lease knowing of the defect in his title * * * When he gave this lease, if he acted in *good faith,* he must have intended in some way to have taken care of these mortgages; and because he did not do so, having the ability, so far as appears, to do so, he should be held liable to the damages recovered. He not only failed to do his duty to the plaintiff in any of the respects here indicated, but went actively to work to remove him from the premises, and succeeded in doing so." In McAllister v. Landers, 70 Cal. 79; 11 Pac. Rep. 105, where a lessee was evicted under judgment in favor of one having older title, it was held that his damages for breach of the covenant for quiet enjoyment could not be less than the judgment for damages and costs against himself.

[95] Williams v. Burrell, 1 Com. B. 402; Lock v. Furze, 19 Com. B. (N. S.) 96; S. C. on appeal, L. R., 1 C. Pl. 441; Rolph v. Crouch, L. R. 3 Exch. 44.

[96] Kelly v. Dutch Church, 2 Hill (N. Y.), 105; Kinney v. Watts, 14 Wend. (N. Y.) 38. In Moak v. Johnson, 1 Hill (N. Y.), 99, the rule established by these cases seems to have been reluctantly admitted. The same rule has been announced in other States. Lanigan v. Kille, 79 Pa. St. 120; 39 Am. Rep. 797. McAlpine v. Woodruff, 11 Ohio St. 120. Lanigan v. Kille, supra, was a case of great hardship. A lessee had erected extensive and costly improvements for mining purposes on the demised premises under an agreement by which he had the right to remove the improvements at the end of the term. After some years' enjoyment of the estate the lessee was evicted by the true owner. After the eviction, in an action by the latter against the lessor for mesne profits, the defendant (lessor) was allowed the value of the improvements as a set-off against the plaintiff's demand. The lessee than brought an action on his implied covenant for quiet enjoyment, claiming damages for the increased value of the term by reason of the improvements. The court held that the consideration, that is, the rent reserved, was the measure of the lessee's damages, and that as the improvements were to be the property of the lessee at the end of the term they could not be treated as the consideration of the lease, and the only rent reserved being a royalty, the plaintiff was entitled to no more than nominal damages.

value of the premises is found to be in excess of the rent reserved; and leases are for the most part, of short duration in localities where the rental value of the property is likely to increase.

If the lessee is liable to the true owner for mesne profits, he may recover back the rent he has paid to the lessor, as damages for breach of the covenant for quiet enjoyment.[97] It seems that, if he has paid no rent, he can only recover nominal damages in case of eviction, with costs incurred in defending the title.[98]

A purchaser who pays an annual ground rent instead of a sum in gross will, if deprived of the premises by the eviction of the lessor, his heirs or assigns, be absolved from the payment of the rent *in toto*.[99] If he be deprived of a part of the premises, or pay off an incumbrance of less amount than the ground rent, he will be entitled to an abatement of the rent for such time as shall be sufficient for his indemnity.[1]

§ 170. **Measure of damages on eviction from part of the land.** If the covenantee be evicted from part only of the warranted premises, the measure of his damages will be, not the average price paid per acre for the whole tract, but such a proportion of the whole consideration paid as the value of the part to which the title fails bore at the time of the purchase to the whole purchase price.[2] The rule is the same whether the action be for breach of the covenant of seisin or the covenant of warranty. Of course, there is no room for the application of this rule where the estate lost consists of an undivided interest. One undivided moiety can

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[97] Kelly v. Dutch Church, 2 Hill (N. Y.), 105.

[98] Moak v. Johnson, 1 Hill (N. Y.), 99.

[99] Franciscus v. Reigart, 4 Watts (Pa.), 116.

[1] Garrison v. Moore, 1 Phila. (Pa), 282.

[2] Sedg. Dam. (8th ed.) 112; Rawle Covt. (5th ed.) § 187. Morris v. Phelps, 5 Johns. (N. Y.), 49 56; 4 Am. Dec. 323; Guthrie v. Pugsley, 12 Johns. (N. Y.), 126; Giles v. Dugro, 1 Duer (N. Y.), 331; Adams v. Conover, 22 Hun (N. Y.), 424; affd., 87 N. Y. 422; 41 Am. Rep. 381. Compare Mohr v. Parmelee, 43 N. Y. Super. Ct. 320, where it is said that "the damages are limited to a sum which bears to the whole consideration of the conveyance the same ratio which the size of the part of the premises as to which there is a failure of title bears to the size of the entire tract attempted to be conveyed." This seems to leave the relative value of the part lost out of consideration. Stahley v. Irvine, 8 Barr. (Pa.), 500. In Terry v. Drabenstadt, 68 Pa. St. 400, it was held that if the covenantee was evicted of one-third of the land by a widow claiming dower, the measure of his damages will be the value of the widow's life interest, taking the purchase money as the basis of the estimate. Weber v. Anderson, 73 Ill. 439; Wadhams v. Inness, 4 Ill. App. 646. Lloyd v. Sandusky, 203 Ill. 621; 68 N. E. Rep. 154. Hynes v. Packard, 92 Tex. 44; 45 S. W. Rep. 562. Hoffman v. Kirby, 136

Cal. 26; 68 Pac. Rep. 321. Messer v. Oestrich, 52 Wis. 694; 10 N. W. Rep. 6. If the part lost have valuable improvements on it, the value of that part including the improvements will be the measure of damages. Semple v. Wharton, 68 Wis. 626; 32 N. W. Rep. 690, correcting an inadvertent misstatement of the rule in Messer v. Oestrich, supra. Ela v. Card, 2 N. H. 175; 9 Am. Dec. 46; Partridge v. Hatch, 18 N. H. 494. The rule as stated in the head note to this case is misleading, and is not sustained by the opinion. Winnipiseogee Paper Co. v. Eaton, 65 N. H. 13; 18 Atl. Rep. 171. Wheeler v. Hatch, 12 Me. 389; Blanchard v. Blanchard, 48 Me. 174. Cornell v. Jackson, 3 Cush. (Mass.) 506; Lucas v. Wilcox, 135 Mass 77. Hubbard v. Norton, 10 Conn. 422. Humphreys v. McClenachan, 1 Munf. (Va.) 493; Crenshaw v. Smith, 5 Munf. (Va.) 415. Butcher v. Peterson, 26 W. Va. 447; 53 Am. Rep. 89. But, in Kelly v. Price, 22 W. Va. 247, it was said that the compensation should be allowed at the rate of the average price paid for the whole tract. Phillips v. Reichert, 17 Ind. 120; 79 Am. Dec. 463; Hoot v. Spade, 20 Ind. 326. Brandt v. Foster, 5 Iowa, 287. Wallace v. Talbot, 1 McCord (S. C.), 466. Dickens v. Shepherd, 3 Murph. (N. C.) 526. Grant v. Hill, (Tex. Civ. App.), 30 S. W. Rep. 952. Griffin v. Reynolds, 17 How. (U. S.) 609. Dubay v. Kelly, (Mich.) 100 N. W. Rep. 677; Loiseau v. Threlstad, 14 S. Dak. 257; 85 N. W. Rep. 189; West Coast Mfg. Co. v. West Coast Imp. Co., 31 Wash. 610, 72 Pac. Rep. 455; Southern Wood Mfg. Co. v. Davenport, 50 La 521; 23 So. Rep. 448. Morris v. Phelps, supra, is the leading case on this point. There it was held that where there was a want of title only as to part of the land conveyed, the damages ought to be apportioned to the measure of value between the land lost and the land preserved, and not according to the number of acres lost and the number preserved. "Suppose," said Chief Justice KENT, "a valuable stream of water with expensive improvements upon it, with ten acres of adjoining barren land, was sold for $10,000, and it should afterwards appear that the title to the stream with the improvements on it failed, but remained good as to the residue of the land, would it not be unjust that the grantee should be limited in damages under his covenants to an apportionment according to the number of acres lost, when the sole inducement was defeated, and the whole value of the purchase had failed? So, on the other hand, if only the title to the nine barren acres failed, the vendor would feel the weight of extreme injustice, if he was obliged to refund nine-tenths of the consideration." In Major v. Dunnavant, 25 Ill. 234, the consideration money embraced two tracts of land, one of two hundred and the other of eighty acres. The title to the eighty-acre tract failed. "Assuming," said the court, "that the proof shows that the two hundred acres were worth $5.000, and the 80 acres were worth $100, and the price paid for the whole was $6,000, then there was the sum of $900 paid for the whole purchase more than it was worth, and this loss must be apportioned to the two tracts according to their actual values respectively. Thus, dividing the $900 into be of no greater value than the other. In such a case, the damages will be in such proportion to the entire consideration as the undivided interest bears to the entire estate in the land.[3] It has been held, however, that the rule limiting damages to the actual value

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51 parts the tract worth $5,000 would bear 50 parts of it, and the tract worth $100 one part, and by this amount would the actual value of the 80-acre tract be increased for the purpose of ascertaining how much was paid in the purchase for this tract, and by adding to this sum the interest upon it the amount of the damages for the breach of the covenant would be ascertained." In Sears v. Stinson, 3 Wash. St. 615, the following rule was laid down: "The jury, assuming the value of the whole tract to be the contract price, must find how much less than the contract price the land was worth at the time of the sale by reason of the deficiency, and that will be the plaintiff's damages." In Wright v. Nipple, 92 Ind. 314, it was stated that the measure of damages for the loss of one-third of the land was one-third of the purchase money, but the part to which the title failed in that case was an undivided moiety, and the case, therefore, cannot be regarded as establishing in that State a rule different from that stated in the text. The same statement has been made elsewhere, but it did not appear that one part of the land was more valuable than the other, and the question of damages for the relative value was not before the court. King v. Kerr, 5 Ohio, 160; 22 Am. Dec. 777.

In Kentucky it is held that the measure of damages for the portion lost is the fair market value of that portion "considered with reference to the whole portion." Burkholder v. Farmers' Bank, 23 Ky. L. Rep. 2449; 67 S. W. Rep. 832. In Kempner v. Lumber Co., 20 Tex. Civ. App. 307, 49 S. W. Rep. 412, the part to which the title failed was much inferior in value to the rest of the land, and would not have been purchased but that the seller refused to sell a part only of the tract, and insisted upon the same price per acre for the whole tract. It was held that the measure of damages was the purchase price, without reference to the actual value of the part lost.

Recent Cases. Helton v. Asher, 135 Ky. 751; 123 S. W. 285. Sullivan v. Hill, 33 Ky. L. R. 962; 112 S. W. 564; Brawley v. Copelin, 106 Ark. 256; 153 S. W. 101; Lemly v. Ellis, 146 N. C. 221; 59 S. E. 683; Campbell v. Shaw, 170 N. C. 186; 86 S. E. 1035; Northcutt v. Hume, (Tex. Civ. App.) 174 S. W. 974; Fid. Lumber Co. v. Ewing, (Tex. Civ. App.) 201 S. W. 1163; Farmers' Etc. Bank v. Cole, (Tex. Civ. App.) 195 S. W. 949; Lumpkin v. Blewett, (Tex. Civ. App.) 111 S. W. 1072; Mayer v. Wooten, 46 Tex Civ. App. 327; 102 S. W. 423; Larkin v. Trammell, 47 Tex. Civ. App. 548; 105 S. W. 552; Smith v. Ward, 66 W. Va. 190; 66 S. E. 234; 33 L. R. A. (N. S.) 1030. Smith v. White, 71 W. Va. 639; 78 S. E. 378. The word "value" in the rule stated in the text means actual value, and not that fixed by the parties. Merch. Nat. Bank v. Otero, 24 N. M. 598; 175 Pac. 781. Where the grantee loses part of the lot conveyed, the measure of damages for breach of the warranty is the difference in the value of the lot after the loss. Withers v. Crenshaw, (Tex. Civ. App.) 155 S. W. 1189.

[3] Downer v. Smith, 38 Vt. 464; Scantlin v. Allison, 12 Kans. 92.

of the part lost does not apply where the original contract between the parties shows that the sale was by the acre and not in gross. In such case the contract is not merged in the subsequent deed, and the covenantor will not be permitted to show that the portion lost consisted of bluffs and gullies and was worthless.[4]

If, in addition to the general warranty, the deed shows that the sale was by the acre and that the grantor must account for any deficiency in the acreage, a suit to recover for such deficiency is not a suit upon the covenant of warranty, but is a suit upon the special covenant to refund.[5]

If there be no evidence of a difference in value between the part of the estate which has been lost and the part retained, the measure of damages will, of course, be such a proportion of the entire purchase as the part lost bears to the entire tract.[6]

It is to be observed also that if the grantor warrants the title to a certain number of acres only, and the grantee remains in peaceable possession of that number of acres, it is no breach of the warranty if he be evicted from a portion of the premises embraced in the deed.[7]

The words " more or less " in the deed ordinarily mean that the grantor does not warrant the precise number of acres named therein; and if there be no more than a reasonable deficiency in the acreage conveyed, there is no breach of the covenant of warranty in the deed.[8]

If the breach of the covenant is only as to one of several lots or parcels conveyed, the covenantee recovers the consideration paid for that particular lot or parcel.[9]

It will hereafter be seen that a purchaser may rescind or refuse to perform an executory contract for the sale of lands if the title to a portion of the estate prove defective, unless the portion affected or the charge upon the estate be trifling and inconsiderable.[10] He has no such option where the contract has been executed by a conveyance with full covenants for title. If he be evicted from part of the estate by paramount title, he cannot treat the contract as at an end and recover the entire purchase money as damages, even though the part to which the title failed had been the principal inducement to his purchase. If that part, however, be of greater value than the other, the part of the purchase money that he will be entitled to recover as damages, will, as we have just seen, be proportioned to the actual value of the portion of the premises lost. The same rule applies where it appears that the covenantor had not the quantity of estate or the interest that he undertook to convey.[11] Thus, in a case in Tennessee in which the grantor had only a life estate instead of a fee, it was held in an action for breach of the covenant of seisin that the plaintiff must keep the life estate, recovering as damages the difference between the value of the life estate and the fee.[12] Where a deed passes an estate of value, though not the precise estate covenanted, it is to be considered in measuring the damages for breach of the covenant.[13] If the covenantee and his grantees have enjoyed the benefit of a life estate in the premises, the value of such estate must be deducted from the damages, even though the plaintiff, who was an assignee of the covenant, enjoyed but a small portion of the life estate.[14] If the title be outstanding in tenants in common or joint tenants, and but one of these recovers an undivided half against the covenantee, the warranty is broken only as to one-half of the premises, and the covenantee can recover damages only on that basis. The recovery of an undivided half by a tenant in common with a third person, is not a constructive recovery of the whole estate in common.[15]

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[4] Conklin v. Hancock, 67 Ohio St. 455; 66 N. E. Rep. 518; Kempner v. Lumber Co., 20 Tex. Civ. App. 307; 49 S. W. Rep. 412.

[5] Holt v. Mynhier, 29 Ky. L. R. 819; 96 S. W. 477.

[6] Gass v. Sanger, (Tex. Civ. App.), 30 S. W. Rep. 502; Butte Cr. Etc. Dredging Co. v. Olney, 173 Cal. 697; 161 Pac. 260.

[7] Folk v. Graham, 82 S. C. 66; 62 S. E. 1106.

[8] Kitzman v. Carl, 133 Iowa, 340; 110 N. W. 587.

[9] Hanlon v. Glue Co., 53 Ind. App. 504; 102 N. E. 48.

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[10] Post, ch. 32. 1 Sugd. Vend. (8th ed.) 477 (315).

[11] Morris v. Phelps, 5 Johns. (N. Y.) 56; 4 Am. Dec. 323. See, also, cases cited ante p. 444, note 2. An agreement that if the title to part of the land fails, the grantee may have credit on his purchase-money notes on reconveying such part, does not oblige him to pursue that course. He may pay the notes and sue on the warranty. Wood v. Thornton, (Tex.) 19 S. W. Rep. 1034.

[12] Recohs v. Younglove, 8 Baxt. (Tenn.) 385. TURNEY, J., dissented, holding that the covenantee was entitled to damages to the extent of the entire purchase money. It was intimated by the court that a different conclusion might have been reached if the plaintiff had proceeded in equity for a rescission of the contract instead of seeking damages at law. It is doubtful, however, whether equity, in the absence of fraud or mistake, would have entertained the covenantee, the contract being fully executed, and his remedy at law being adequate and plain. Morris v. Phelps, supra. Upon the proposition stated in the text, see further Gray v. Brisco, Noy. 142, and cases cited ante, p. 444. Tanner v. Livingston, 12 Wend. (N. Y. 83.)

[13] Kimball v. Bryant, 25 Minn. 496; Ogden v. Ball, 38 Minn. 237; 36 N. W. Rep. 344; Huntsman v. Hendricks, 44 Minn. 432; 46 N. W. Rep. 910.

It has been held that the burden will be upon the plaintiff to show the relative value of the part to which the title failed, and that in the absence of any evidence on that point, it will not be presumed that all the parts were of the same value. The burden is on the plaintiff to establish all the facts showing that he is entitled to relief, and to what extent.[16] Evidence of the advantages or disadvantages of the part lost, is admissible on behalf of either party.[17]

Where the breach of the covenant of warranty or the covenant for quiet enjoyment, consists in the establishment of an easement in the granted premises, *e. g.*, the occupation of a part of the premises by a public highway, the measure of damages has been held to be the difference in value between the premises with and without the easement. In such a case the rule that the damages are to be measured by the consideration money, or a ratable part thereof, does not apply.[18] Where the breach consisted in the occupancy of a part of the premises by a tenant under a prior lease from the grantor, it was held that the measure of damages was the fair rental value of the part occupied,[19] and expenses of litigation with the tenant.[20]

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[14] Aiken v. McDonald (So. Car.), 20 S. E. Rep. 796.

[15] McGrew v. Harmon, (Pa. St.) 30 Atl. Rep. 265.

[16] Mischke v. Baughn, 52 Iowa, 528; 3 N. W. Rep. 543.

[17] Beaupland v. McKeen, 28 Pa. St. 124; 70 Am. Dec. 115.

[18] Hymes v. Esty, 133 N. Y. 342; 31 N. E. Rep. 105.

In a case in which the breach of warranty consisted in the condemnation of a part of the premises for street purposes, it was held that the measure of damages was not merely the value of the part taken, but that the grantee was entitled to recover also for the resulting injury to the balance of the property; and that in estimating the damages the peculiar value, for certain purposes, of the part taken, might be considered. James v. Warehouse Co., 23 Ky. L. Rep. 1216; 64 S. W. Rep. 966; 24 Ky. L. Rep. 1266; 70 S. W. Rep. 1046.

If, on failure of title to part of the premises, the suit be not for damages but for rescission and recovery of the purchase money paid, the rule that the damages cannot exceed the purchase money for that portion of the premises does not apply.[21]

§ 171. **Improvements.** The rule that the measure of damages upon a breach of the covenants of warranty and of seisin, is the consideration money and interest, precludes the purchaser from recovering the value of improvements placed by him on the premises.[22] When, however, these are of a permanent and substantial character, he is generally allowed their value in any proceeding against him by the holder of the paramount title to recover the premises and damages for their detention.[23] Especially will such an allowance be made when the grantee is evicted by the grantor himself, upon the ground that he was incompetent to execute the conveyance.[24]

§ 172. **Covenantee's right to interest as damages.** The rule generally prevailing throughout the United States is that the covenantee is entitled to recover interest on the consideration money awarded as damages for breach of the covenants for title in all cases in which he is liable to the real owner of the estate for mesne profits, and that he is not entitled to interest unless he is liable for the profits,[25] and this without regard to the proportion between the amount of the interest and the value of the mesne profits.[26] Thus, if the true owner's right to recovery of the profits is limited by statute to a certain number of years next preceding his action to recover the premises, the evicted covenantee will not be entitled to interest beyond that period.[27] So, if he takes a life estate instead of a fee under the conveyance, he is not entitled to interest on the damages, because he has a right to the profits as against the remainderman.[28] The same rule applies where the eviction results from the enforcement of a mortgage or other incumbrance on the land, the covenantee not being liable to the incumbrancer for rents and profits.[29] In some cases, however, it has been

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[19] Bass v. Stearns, 108 Ark. 357; 158 S. W. 136.

[20] Browning v. Stillwell, 86 N. Y. Supp. 707; 42 Misc. 346.

[21] Fordtran v. Cunningham, (Tex. Civ. App.) 177 S. W. 212.

[22] Bender v. Fromberger, 4 Dall. (U. S.) 442, leading case. Coffman v. Huck, 19 Md. 435. But see Morton v. Ridgway, 3 J. J. Marsh. (Ky.) 254. Lejeune v. Barrow, 11 La. Ann. 501.

[23] 1 Story C. C. (U. S.) 478. Thompson v. Morrow, 5 Serg. & R. (Pa.) 289. The right of the defendant in ejectment to an allowance for improvements made by him upon the estate, is affirmed by statute in many of the States. Where the grantee is, by statute, entitled to the value of his improvements as against the owner of the paramount title, he cannot recover the value of such improvements from the covenantor. Webb v. Wheeler, 80 Neb. 438; 114 N. W. 636; 17 L. R. A. (N. S.) 1178.

[24] Hawkins v. Brown, 80 Ky. 186.

[25] 4 Kent. Com. 475. The learned author says: "The interest is to countervail the claim for mesne profits to which the grantee is liable, and is and ought to be commensurate in point of time with the legal claim to mesne profits." 2 Sutherland Dam. 300. Staats v. Ten Eyck, 3 Caines (N. Y.), 111; 2 Am. Dec. 251; Pitcher v. Livingston, 4 Johns. (N. Y.) 1; 4 Am. Dec.

229; Caulkins v. Harris, 9 Johns. (N. Y.) 324; Bennet v. Jenkins, 13 Johns. (N. Y.) 50. Collier v. Cowger, 52 Ark. 322; 12 S. W. Rep. 702. Cox v. Henry, 32 Pa. St. 18. Sumner v. Williams, 8 Mass. 222; 5 Am. Dec. 83. Willson v. Willson, 25 N. H. 229; 57 Am. Dec. 320; Groesbeck v. Harris, 82 Tex. 411; 19 S. W. Rep. 850; Brown v. Hearon, 66 Tex. 63; 17 S. W. Rep. 395. Bennett v. Latham, 18 Tex. Civ. App. 403; Huff v. Riley (Tex. Civ. App.) 64 S. W. Rep. 387. Mather v. Stokely, 218 Fed. 764; 134 C. C. A. 442; Withers v. Bank, 104 Miss. 681; 61 So. 690; Davis v. Lee, 52 Wash. 330; 100 Pac. 752; 132 Am. St. Rep. 973. Thompson v. Guthrie, 9 Leigh (Va.) 101; 33 Am. Dec. 225. In the earlier cases of Threlkeld v. Fitzhugh, 3 Leigh (Va.), 451 and Jackson v. Turner, 5 Leigh (Va.), 119, it seems to have been held that the covenantee was entitled to interest only from the date of his eviction. So, also, in Moreland v. Metz, 24 W. Va. 138; 49 Am. Rep. 246. Frazer v. Supervisors, 74 Ill. 282. McNear v. McComber, 18 Iowa, 12. Stebbins v. Wolf, 33 Kans. 771; 7 Pac. Rep. 542. Rich v. Johnson, 1 Chand. (Wis.) 20; S. C., 2 Pinney (Wis.), 88; Messer v. Oestrich, 52 Wis. 694; 10 N. W. Rep. 6. King v. Kerr, 5 Ohio, 160; 22 Am. Dec. 777. McGuffey v. Humes, 9 Lea (Tenn.), 93. Flint v. Steadman, 36 Vt. 210. A covenantee counterclaiming for damages arising from a judgment of eviction in ejectment cannot have interest on the damages for the time he remained in possession after judgment. Wacker v. Straub, 88 Pa. St. 32. The removal of timber from the premises by a vendee of the covenant cannot be set off against the covenantee's right to interest, he not having received any of the proceeds of the timber. Graham v. Dyer, (Ky.), 29 S. W. Rep. 346.

[26] British & Am. Mtge. Co. v. Todd, 84 Miss. 522; 36 So. 1040.

[27] Harding v. Larkin, 41 Ill. 413. Morris v. Rowan, 17 N. J. L. 304. De Long v. Spring Lake Co., 65 N. J. L. 1; 47 Atl. 491. Hutchins v. Rountree, 77 Mo. 500; Lawless v. Collier, 19 Mo. 486. Kyle v. Fauntleroy, 9 B. Mon. (Ky.) 620. Caulkins v. Harris, 9 Johns. (N. Y.) 324. Cox v. Henry, 32 Pa. St. 19. Mette v. Dow, 9 Lea (Tenn.) 96; Crittenden v. Posey, 1 Head (Tenn.), 312. Staed v. Rossier, 157 Mo. App. 300; 137 S. W. 901.

[28] Guthrey v. Pugsley, 12 Johns. (N. Y.) 126.

[29] Patterson v. Stewart, 6 Watts & S. (Pa.) 527; 40 Am. Dec. 586; Williams v. Beeman, 2 Dev. (N. C.) 486.

held that the covenantee will not be allowed interest on the damages unless he shows that he has accounted to the real owner for the rents and profits.[30] In other cases his right to interest has been declared complete without regard to the question of mesne profits, on the ground that the covenantor has no interest in the profits, and cannot recoup them from the purchase money and interest, nor compel the covenantee to account for them.[31] If the covenantee, being liable for the mesne profits, buy in the paramount title and recover as damages the amount expended for that purpose, he will be allowed interest on the recovery, it being presumed that the mesne profits entered into the consideration paid for the paramount title.[32] It has also been held that he will be entitled to interest on the amount paid to get in the outstanding title, whether he has or has not been in the pernancy of the rents and profits, and whether the latter are more or less than the interest on the purchase price of the land.[33] But where the covenantee was kept out of possession for a time and afterwards acquired possession, it was held that he could not recover the rental value of the premises for the time he was kept out of possession, since he might have acquired possession to be delivered before accepting the conveyance.[34] The rule that the covenantee is not entitled to interest unless he is liable for the rents and profits, of necessity applies only to cases in which he was in possession of the estate. If he was never able to get possession, he will, of course, be entitled to interest from the time the purchase money was paid. Interest runs from the time of purchase, and not merely from the date of eviction.[35]

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[30] Field Dam. § 466; 1 Sedg. Dam. (7th ed.) 338, n. Wacker v. Straub, 88 Pa. St. 32. Burton v. Reeds, 20 Ind. 91. This rule has been established by statute in Missouri. Hutchins v. Rountree, 77 Mo. 500. Pence v. Gabbert, 70 Mo. App. 201. But see Foster v. Thompson, 41 N. H. 73, where it was held to be immaterial to the allowance of interest whether the covenantee had or had not accounted to the adverse claimant for rents and profits, it being presumed that mesne profits will be recovered by the real owner. In Whiting v. Dewey, 15 Pick. (Mass.) 428, it was intimated that if from lapse of time the covenantee became no longer liable for the mesne profits they should be deducted from the purchase money and interest.

[31] Wilson v. Peelle, 78 Ind. 384; Wright v. Nipple, 92 id. 314; Rhea v. Swain, 122 Ind. 272; 23 N. E. Rep. 776, where held, also, that failure of the true owner to get judgment for the rents and profits gave the covenantor no claim to them. But see Burton v. Reeds, 20 Ind. 87. In Mitchell v. Hazen, 4 Conn. 435; 10 Am. Dec. 169, it was said that the grantee was entitled to the consideration with interest, whether he had been in possession or not, for the reason that the money due to the owner for rents and profits constituted a distinct and separate claim. And in Hulse v. White, 1 Cox (N. J. L.), 173, the court said: "The defendant cannot avail himself of the use made by the plaintiffs of the property of another, in order to lessen the damages. We must suppose that the real owner will have satisfaction for the profits received from the land." In Earle v. Middleton, Cheves (S. C.), 129, it was held that the fact that the covenantee had been in receipt of the profits did not affect his right to interest on the consideration money. Interest in such a case is allowed as an indemnity against any demand for mesne profits that may be made upon the covenantee in the future. The covenantor cannot demand to have the profits set off against interest because he is not concerned with them. In this connection O'NEALE, J., said: "There is no case of eviction, actual or constructive, by *paramount title*, where the party's right to interest would be defeated by the reception of the rents and profits. The defect reaches back to the beginning of his title, and the rents and profits which he has received are not those of his vendor, but those of a third person having the paramount title. The damages recovered in a case of actual eviction, or which may be recovered by an existing paramount title outstanding, are in the place of rents and profits, and represent them in legal contemplation."

§ 173. **Costs as elements of damages.** In England and in most of the American States, in which the question has been considered, the covenantee is permitted to include in his recovery for a breach of the covenant of warranty or of seisin, the taxed costs incurred by him in defending the title when attacked by the adverse claimant, although he may not have notified the covenantor to appear and defend the suit.[36] The purpose of such a notice is not to make the covenantor liable for costs but to make the judgment in the adverse claimant's suit conclusive upon him when sued by the covenantee for the breach of his covenant.[37] There has been much conflict of opinion, however, upon the question of the liability of the covenantor for costs incurred by the covenantee in defending the title, as affected by the refusal of the former to appear and defend. There are cases which hold that if the covenantor refuse to defend when notified, he thereby confers upon the covenantee the right to proceed with the defense and to incur all legal costs necessary for that purpose.[38] On the other

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[32] Harding v. Larkin, 41 Ill. 413.

[33] Spring v. Chase, 22 Me. 505; 39 Am. Dec. 505.

[34] Andrus v. St. Louis Smelting Co., 130 U. S. 643. No authorities cited.

[35] Simpson v. Belvin, 37 Tex. 675. Bellows v. Litchfield, 83 Iowa, 36; 48 N. W. Rep. 1062. N. Pac. R. Co. v. Montgomery, 86 Fed. 251. But if he is not liable for mesne profits he can recover interest only from the date of eviction. McGuffy v. Hawes, 85 Tenn. 26; 1 S. W. Rep. 506; Mette v. Dow, 9 Lea (Tenn.) 93.

[36] The cases cited below include, also, those in which the covenantee was allowed the costs of defending the title, but in which no objection was made to the allowance, on the ground that the covenantor had not been notified to defend. Williams v. Burrill; 1 Com. B. 402; Smith v. Compton, 3 B. & Adolph, 407; Pomeroy v. Partington, 3 Term Rep. 678, note. Bennet v. Jenkins, 13 Johns. (N. Y.) 50; Waldo v. Long, 7 Johns. (N. Y.) 173. Keeler v. Wood, 30 Vt. 242. Kyle v. Fauntleroy, 9 B. Mon. (Ky.) 622; Robertson v. Lemon, 2 Bush (Ky.), 302. Jeter v. Glenn, 9 Rich. L. (S. C.) 374. Crisfield v. Storr, 36 Md. 151; 11 Am. Rep. 480. Harding v. Larkin, 41 Ill. 421.

McKee v. Bain, 11 Kans. 578. Sumner v. Williams, 8 Mass. 162, 222. Brooks v. Black, (Miss.) 8 So. Rep. 332. Matheny v. Stewart, (Mo.) 17 S. W. Rep. 1014. Hazlett v. Woodruff, 150 Mo. 534; 51 S. W. Rep. 1048; Long v. Wheeler, 84 Mo. App. 101. Estep v. Bailey, (Oreg.) 185 Pac. 227; Rennie v. Gibson, (Okl.) 183 Pac. 483; Anderson v. Merrill Co., 77 N. H. 275; 90 Atl. 789; Scott v. Scott, 183 Ky. 604; 210 S. W. 175. The costs which the covenantee is entitled to recover do not include those of an action between himself and one to whom he had sold the property, in which action it was determined that the title was unmarketable. Hilliker v. Rueger, 228 N. Y. 11; 126 N. E. 266. Costs and counsel fees incurred by the grantee in defending the title to a piece of land, which, by mistake, was not included in his deed, cannot be recovered against the grantor, though the deed was, after judgment against the grantee, reformed so as to embrace the lot in question, with covenant of warranty. Butler v. Barnes, 61 Conn. 399; 24 Atl. Rep. 328. The taxable costs paid by the plaintiff may be included in the damages though the costs were not in fact taxed. Webb v. Holt, 113 Mich. 338; 71 N. W. Rep. 637.

[37] Morris v. Rowan, 17 N. J. L. 309 (1839), FORD, J., saying: "The defendant's counsel supposes the costs on eviction are allowed because it was the warrantor's duty to defend the suit upon receiving notice of the action, and he objects to them in this case because no notice was given to the warrantor or his representatives of the pendency of the action. But all the cases agree in allowing the costs of eviction, and it is immaterial whether he had notice or not. His covenant to warrant and defend is not a conditional one, if he has notice, otherwise want of notice might bar the warranty itself. He covenants to defend as absolutely as he does to warrant. The intent of notice is not to make him liable for costs; it is to make the record of eviction conclude him in respect to the title." HORNBLOWER, C. J., stated that he had examined a number of cases bearing on the point in dispute, and that in none of them did it appear that the right to costs depended on notice to the covenantor to defend." See, also, Duffield v. Scott, 3 Term Rep. 374.

[38] Swett v. Patrick, 12 Me. 1; Williamson v. Williamson, 71 Me. 442. Dubay v. Kelly (Mich.), 100 N. W. Rep. 677. Mercantile Trust Co. v. So. Park Residence Co., 94 Ky. 271; 22 S. W. Rep. 314. Winnepiseogee Paper Co. v. Eaton, 65 N. H. 13; 18 Atl. Rep. 171. Walsh v. Dunn, 34 Ill. App.

hand there are cases which decide that if the covenantor deems the title indefensible and chooses to abandon it to the adverse claimant, the covenantee has no right to saddle him with the costs of an unprofitable litigation by defending the suit,[39] especially where it was clear that defense would be useless, and the covenantor notified the covenantee not to defend.[40] It may be doubtful whether the want of notice to defend, or the refusal of the covenantor to defend when notified, is proper to be considered in determining the right of the covenantee to costs. There would seem to be no obligation upon the covenantee to relinquish the estate to the adverse claimant and lose the benefit of his improvements and the increase in value of the premises, merely because the covenantor is unwilling or unable to litigate the title. And it would seem that the right of the covenantee to protect his bargain, should be deemed to have been fully within the contemplation of the parties at the time the covenant was made, and the costs thence accruing to have been within the intent and purposes of the covenant. For these reasons, in addition to those first stated, it is believed that the covenantee is entitled to recover the taxed costs incurred by him in defending the title, whether the covenantor was or was not notified to defend, and whether he neglected or complied with the notice.[41]

The grantee will not be entitled to costs of defending the title if the grantor instead of conveying with warranty, merely covenants to return the purchase money, if the grantee is evicted.[42] Neither can he recover such costs unless they were incurred in an action to which he was a party of record and in which his title

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146. Teague v. Whaley, 20 Ind. App. 26; 50 N. E. 41; Jeffords v. Dreisbach, 168 Mo. App. 577; 153 S. W. 274; Helton v. Asher, 135 Ky. 751; 123 S. W. 285. Whether the notice be to prosecute or defend. Potwin v. Blasher, 9 Wash. 460; 37 Pac. Rep. 710.

[39] Terry v. Drabenstadt, 68 Pa. St. 403; Fulweiler v. Baugher, 15 Serg. & R. (Pa.) 55. But see Hood's Appeal, (Pa. St.) 7 Atl. Rep. 137.

[40] Matheny v. Stewart, (Mo.) 17 S. W. Rep. 1014. The suit here was against a remote grantor, and the request not to defend was by the immediate grantor.

[41] Mr. Rawle inclines to this view. Covts. for Title (5th ed.), § 199, and note 2.

[42] Barnett v. Montgomery, 6 T. B. Mon. (Ky.) 332.

was passed upon.[43] Nor can he recover costs incurred in a suit against a mere trespasser or in a suit against himself by an adverse claimant in which he is successful, for the covenant of warranty is not broken by a tortious disturbance, nor by the assertion of adverse claims.[44] If the covenantor was not seized, and the covenantee nevertheless enter on the land, and the real owner recover against him in trespass, the covenantee cannot recover the costs and damages so incurred in an action on the covenant of seisin.[45] Nor will the covenantee be allowed the costs of a suit against himself by one to whom he had conveyed the land, and who was evicted.[46] Where the warrantor expressly agreed to pay any costs that might be incurred in defending the title, he was held liable for such costs, though not made a party to the adverse claimant's suit.[47] The right of the grantee to recover costs expended in defending the title is not affected by the fact that he did not take the initiative and proceed against the adverse claimant. He is not bound to follow the advice or request of the grantor to sue one who sets up an adverse claim to the premises. He may subject himself to suit by resisting or interfering with such claimant, without losing his right to recover the costs of such suit from the grantor.[48] The covenantee, it seems, is as much entitled to recover as damages, costs incurred in a suit by him to recover possession from an adverse claimant, as those incurred in defending a suit by the latter,[49] provided the suit was brought against the adverse claimant with the concurrence of the covenantor.[50]

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[43] Harding v. Larkin, 41 Ill. 413.

[44] Christy v. Ogle, 33 Ill. 295. Smith v. Parsons, 33 W. Va. 644; 11 S. E. Rep. 68. Kane v. Fisher, 2 Watts (Pa.) 246. Hoffman v. Dickson, 65 Wash. 556; 118 Pac. 737; Ann. Cas. 1913 B, 869.

[45] Cushman v. Blanchard, 2 Gr. (Me.) 266; 11 Am. Dec. 76.

[46] Stark v. Olney, 3 Oreg. 88.

[47] Hedrick v. Smith, (Tex.) 14 S. W. Rep. 197. The case does not show whether the promise was made before or after the warranty.

[48] Smith v. Sprague, 40 Vt. 43.

[49] Sutherland Dam. 303. Lasswell L. & L. Co. v. Langdon, (Mo. App.) 204 S. W. 812; Burchfield v. Brinkman, 92 Kan. 377; 140 Pac. 894.

[50] Kyle v. Fauntleroy, 9 B. Mon. (Ky.) 620. See, also, Dale v. Shively, 8 Kans. 276. Kingsbury v. Smith, 13 N. H. 125. There the court said: "The principle deducible from the cases cited would seem to be that the grantee in an action upon a covenant of warranty, express as in a deed, or implied

As the covenant does not extend to baseless claims, it has been held that the covenantee is not entitled to recover, on the warranty, costs and expenses incurred by him in prosecuting a suit to quiet his title against the heirs of a widow of a former owner, who had forfeited her dower right to the granted premises by electing to take the homestead right in other lands of her husband, instead of dower.[51]

It seems that special agreements to indemnify the vendee for all costs and damages of any kind which he may sustain in case of eviction, are not merged in a subsequent conveyance to him with covenants for title;[52] and if the covenantee be evicted, he may recover all costs and expenses incurred in defending the title, without regard to the question of notice to the covenantor to defend.[53]

In order to recover costs and expenses of defending the title as a part of his damages, the covenantee is not required to show that an account of the same was presented to the defendant and payment thereof demanded before suit on the covenant was begun.[54]

Nor is it necessary that the covenantee shall show that he has actually paid the costs and expenses of defending the title; he is

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as upon the sale of personal property, is entitled to recover, as part of his damages sustained by reason of the failure of the title conveyed, the reasonable and necessary expenses incurred in a proper course of legal proceedings for the ascertainment and protection of his rights under the purchase, as well as a reasonable compensation for his trouble, and expenses to which he may have been put in extinguishing a paramount title. And it seems to us that there can be no sound distinction between the case in which the expenses are incurred in the necessary and proper prosecution of a suit for such ascertainment and protection of the purchaser's rights, and the case of a defense made for the same purpose. In Yokum v. Thomas, 15 Iowa, 67, it was held that the covenantee could not recover costs incurred in a suit to vacate an invalid patent issued to an adverse claimant of the land. And in Gragg v. Richardson, 25 Ga. 566; 71 Am. Dec. 190, the covenantee was denied attorney's fees paid by him in a suit to recover the land. In Saccoccio v. Sprague, (R. I.) 71 Atl. 1057, the covenantee was allowed the costs and expenses of suits by him to determine the nature and extent of an incumbrance on the property, the covenantor having refused to take any steps in that direction.

[51] Thorne v. Clark, (Iowa) 84 N. W. Rep. 701. Compare Smith v. Keeley, 146 Iowa 660; 125 Mo. 669.

[52] Colvin v. Schell, 1 Grant (Pa.), 226.

[53] Cox v. Henry, 32 Pa. St. 21; Anderson v. Washerbaugh, 43 Pa. St. 115.

[54] Tarbell v. Tarbell, 60 Vt. 486; 15 Atl. Rep. 104.

entitled to recover costs incurred though not paid. But he cannot recover interest on unpaid costs.[55]

§ 174. **Counsel fees and expenses.** Counsel fees and reasonable expenses incurred in asserting or defending the title, have not been as freely allowed the covenantee as the taxed costs of suit in such cases. There would seem, however, to be no difference in the principles upon which the covenantee's claim is rested in either case. He is as much obliged to avail himself of the services of counsel, as of those of other officers of the court, in the defense or prosecution of his suit.[56] There is much conflict of authority upon the point. In some cases the covenantee has been permitted to recover the reasonable fees paid by him to his counsel, though no notice of the adverse claimant's suit was given the covenantor and no opportunity given him to assume the defense.[57] In other cases such fees have been denied the covenantee unless notice was given the covenantor to defend, and was neglected by him.[58] And in still other cases these fees have been refused the covenantee regardless of the question of notice to the covenantor.[59] The fees paid must have been reasonable; it is error to include them in the damages without reference to their reasonableness.[60] Reasonable personal expenses, and compensation for trouble incurred in defending the title have been allowed the covenantee though the covenantor was vouched in to defend the adverse claimant's suit.[61] Counsel fees for advice and assistance in buying the outstanding title have in some cases been allowed,[62] and in others refused[63] the plaintiff. If the covenantor assume the defense when requested, it has been held that the plaintiff cannot recover attorney's fees;[64] if, however, the covenantor refuse or neglect to defend when notified the right of the plaintiff to recover those items has been asserted in some cases,[65] and denied in others.[66] It has been held that the covenantee will not be entitled to recover attorney's fees and other expenses incurred by him in getting in an outstanding title to the land.[67]

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[55] Walton v. Campbell, 51 Neb. 788; 71 N. W. Rep. 737.

[56] 2 Suth. Dam. 308. Taylor v. Holter, 1 Mont. 688. Swett v. Patrick, 12 Me. 9.

[57] Ryerson v. Chapman, 66 Me. 562. This case holds also that the burden is on the plaintiff to show that the fees were reasonable. Harding v. Larkin, 41 Ill. 422. Haynes v. Stevens, 11 N. H. 28. Pitken v. Leavitt, 13 Vt. 379; Turner v. Goodrich, 26 Vt. 709. Dale v. Shivley, 8 Kans. 276; McKee v. Bain, 11 Kans. 578. (Compare Jewett v. Fisher, [Kan. App.] 58 Pac. 1023.) McAlphine v. Woodruff, 11 Ohio St. 120; Brooks v. Mohl, 104 Minn. 404; 116 N. W. 931; 124 Am. St. Rep. 629, 17 L. R. A. (N. S.) 1195; Solberg v. Robinson, 34 S. D. 55, 147 N. W. 87. Among the foregoing cases are included some in which it appears that the covenantee was not vouched in to defend the adverse claimant's suit, but in which the want of notice to defend was not urged as an objection to the allowance of fees. In Robertson v. Lemon, 2 Bush (Ky.), 301, the vendor had specially covenanted to indemnify the vendee "against all loss, cost and damages growing out of or on account of any defect in the title." Under this agreement $300 counsel fees paid by the covenantee were allowed him. In Swartz v. Ballou, 47 Iowa, 188, it was held that the plaintiff was entitled to "reasonable attorney's fees," but that "reasonable fees" meant such as had been actually incurred, and that he must show that he had paid, or obligated himself to pay, the fees claimed. Johnson v. Crowley, (Mo. App.) 207 S. W. 235. But in Rickert v. Snyder, 9 Wend. (N. Y.) 419, 423, it was held that the covenantee was entitled to reasonable attorney's fees, though the amount actually paid was neither alleged in the declaration, nor proved at the trial. If the covenantor himself disturb the covenantee in the possession, the latter will, in an action for breach of the covenant for quiet enjoyment, be entitled to counsel fees paid in resisting the covenantor. Levitzky v. Canning, 33 Cal. 308.

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[58] Crisfield v. Storr, 36 Md. 150; 11 Am. Rep. 480. As an illustration of the widely diverging opinions of judges upon the question of the covenantor's liability for counsel fees as affected by the fact, or the absence of, notice to defend, it may be noted that the very ground upon which they were allowed in this case, namely, the refusal of the covenantor to defend, is that which is assigned in other cases for refusing the allowance; the argument being that the covenantor should not be subjected to expense and trouble if he deems the title incapable of defense. Terry v. Drabenstadt, infra. Barlow v. Delaney, 40 Fed. Rep. 97. Mercantile Trust Co. v. So. Park Residence Co., (Ky.) 22 S. W. Rep. 314. Meservy v. Snell, (Io.) 62 N. W. Rep. 767. Alexander v. Staley, 110 Io. 607; 81 N. W. Rep. 803; Wiggins v. Pender, 132 N. C. 628; 44 N. E. Rep. 362. Pineland Mtge. Co. v. Trust Co., 139 Mo. App. 209; 122 S. W. 1133; Jeffords v. Dreisbach, 168 Mo. App. 577; 153 S. W. 274.

[59] Williams v. Burg, 9 Lea (Tenn.), 455. Morris v. Rowan, 2 Harr. (N. J. L.) 309; Holmes v. Sinnickson, 3 Gr. (N. J. L.) 313. Jeter v. Glenn, 9 Rich. L. (S. C.) 374; Ex parte Lynch, 25 So. Car. 193. Brooks v. Black, 68 Miss. 161; 8 So. Rep. 332; Matheny v. Stewart, 108 Mo. 73; 17 S. W. Rep. 1014. Coleman v. Clark, 80 Mo. App. 339. In Turner v. Miller, 42 Tex. 421, it was held that counsel fees should never be allowed the covenantee, unless stipulated for; distinguishing Rowe v. Heath, 23 Tex. 620, where the covenantor had specially promised to bear the expense of litigation. Cates v. Field, (Tex. Civ. App.) 85 S. W. Rep. 52. Adams v. Cox, (Tex. Civ. App.) 150 S. W. 1195; Morgan v. Haley, 107 Va. 331, 58 S E. 564, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846; Gremillion v. Roy, 125 La. 524, 51 So. 576; Brawley v. Copelin, 106 Ark. 256, 153 S. W. 101; Beach v. Nordman, 90 Ark. 63, 117 S. W. 787.

[60] Jones v. Balsley, 154 N. C. 61, 69 S. E. 827.

[61] Leffingwell v. Elliott, 19 Pick. (Mass.) 204; 19 Am. Dec. 343. Among the items allowed in this case were charges for the plaintiff's time, board, livery expenses, expenses of preparation for trial, attendance at court, etc., in the adverse claimant's suit. Merrit v. Morse, 108 Mass. 270; Taylor v. Allen, 131 Ga. 416, 62 S. E. 291. Where one tract of land was by mistake conveyed for another, the purchaser was not allowed as part of his damages railroad fares and hotel bills incurred while attempting to make a settlement with the vendor. Doom v. Curran, 52 Kans. 360; 34 Pac. Rep. 1118. The covenantee has been held entitled to his personal expenses, even though

§ 175. **NOTICE TO DEFEND OR PROSECUTE EJECTMENT.** If a grantee who has received a covenant of general warranty be evicted in pursuance of the judgment of a court in favor of one setting up an adverse claim to the land, he must show, in an action for breach of the covenant, that the title so established was superior to that derived by himself from the defendant, the covenantor. It would

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incurred after the covenantor had, upon notice, assumed the defense. Kennison v. Taylor, 18 N. H. 220, citing Loomis v. Bedel, 11 N. H. 74; Moody v. Leavitt, 2 N. H. 174.

[62] McKee v. Bain, 11 Kans. 569. Lane v. Fury, 31 Ohio St. 574.

[63] Leffingwell v. Elliott, 10 Pick. (Mass.) 204; 8 Pick. (Mass.) 457; 19 Am. Dec. 343. In these cases, however, the covenantor was allowed for costs and expenses, other than counsel fees. Long v. Wheeler, 84 Mo. App. 101.

[64] Wimberly v. Collier, 32 Ga. 13. Kennison v. Taylor, 18 N. H. 220.

[65] Crisfield v. Storr, 36 Md. 150; 11 Am. Rep. 480; Stark v. Olney, 3 Oreg. 88; Lane v. Fury, 31 Ohio St. 574; Keeler v. Wood, 30 Vt. 242; Swett v. Patrick, 12 Me. 1; Beach v. Nordman, 90 Ark. 59, 117 S. W. 785; Ellis v. Abbott, 69 Oreg. 234, 138 Pac. 488; Rennie v. Gibson, (Okl.) 183 Pac. 483; Jones v. Balsley, 154 N. C. 61, 69 S. E. 827; Culver v. Jennings, 157 N. C. 565, 72 S. E. 1005; Helton v. Asher, 135 Ky. 751, 123 S. W. 285. See Ryerson v. Chapman, 66 Me. 562, where it was said that Swett v. Patrick, supra, does not decide that costs and attorneys' fees are not recoverable when notice to defend is not given, but merely gives the fact of notice as an additional or conclusive reason why they should be included in the damages.

[66] Terry v. Drabenstadt, 68 Pa. St. 400, SHARSWOOD, J., saying: "Without undertaking to lay down any general rule, it would seem to be most reasonable to hold that where a covenantor has been notified to appear and defend, and declines or fails to do so, and the covenantee chooses to proceed and incur costs and expenses in what it may be presumed that the covenantor considered an unnecessary and hopeless contest, he does so certainly upon his own responsibility." See, also, Fulweiler v. Baugher, 15 S. & R. (Pa.) 55.

[67] Mercantile Trust Co. v. S. Park Residence Co., 94 Ky. 271; 22 S. W. Rep. 314.

be obviously unjust that the covenantor should be exposed to the danger of collusion between the grantee and the adverse claimant resulting in a judgment of eviction, or that he should be bound by the proceedings in a suit to which he had no opportunity to become a party. It has been held, however, almost universally in America, that if the covenantee, when sued in ejectment by an adverse claimant, notifies the covenantor of the pendency of the suit and requests him to appear and defend it, the latter thereby becomes substantially a party to the suit and bound by the judgment therein rendered, so that the covenantee will, in an action for breach of the covenant, be relieved from the burden of proving that the title established by such judgment was in fact paramount to that of the covenantor, and that in default of such notice the burden devolves upon the covenantee to show that he was evicted by one having a better title.[68] These decisions would seem necessarily to assume that in the States in which they were rendered some provision of law or some practice existed by which the covenantor when notified to appear could procure himself to be admitted as a party defendant to the suit, though it is not necessary that he should be a party to the suit to be bound by the notice.[69] In North Carolina it has been held that judgment of eviction rendered after notice and request to the covenantor to appear and defend was in no way conclusive upon him, inasmuch as there was no law or rule, or practice by which he might be made a party to the suit.[70] The better opinion, however, seems

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[68] Abbott's Trial Ev. 519; Rawle Covts. for Title (5th ed.), § 117. Salle v. Light, 4 Ala. 700; 39 Am. Dec. 317, case of personal property. Hinds v. Allen, 34 Conn. 185, 195. Gragg v. Richardson, 25 Ga. 566; 71 Am. Dec. 190; Clements v. Collins, 59 Ga. 124; Haines v. Fort, 93 Ga. 24; 18 S. E. Rep. 994; Phillips v. Cooper, 93 Ga. 639; 20 S. E. Rep. 78; Claycomb v. Munger, 51 Ill. 373; Morgan v. Muldoon, 82 Ind. 347; Bever v. North, 107 Ind. 545; Jones v. Waggoner, 7 J. J. Marsh. (Ky.) 144; Graham v. Dyer, (Ky.) 29 S. W. Rep. 346; Elliott v. Sanfly, 89 Ky. 57; 11 S. W. Rep. 200; Jones v. Jones, (Ky.) 7 S. W. Rep. 886; Chenault v. Thomas, 26 Ky. L. Rep. 1029; 83 S. W. Rep. 109; Jackson v. Marsh, 5 Wend. (N. Y.) 44, a case in which the covenantee confessed judgment in favor of the adverse claimant. Davis v. Wilbourne, 1 Hill L. (S. C.) 28, case of personal property. In Buckels v. Mouzon, 1 Strobh. L. (S. C.) 448, it was held that a judgment by default against the covenantee would not bind the covenantor, though notified to defend. And in Middleton v. Thompson, 1 Spear L. (S. C.) 67, it was held that it must appear that the title was put in issue. Greenlaw v. Williams, 2 Lea (Tenn.), 533; Bank of Winchester v. White, 114 Tenn. 62; 84 S. W. Rep. 697; Groesbeck v. Harris, 82 Tex. 411; 19 S. W. Rep. 850; Somers v. Schmidt, 24 Wis. 419; 1 Am. Rep. 191; Wallace v. Pereles, 109 Wis. 316; 85 N. W. Rep. 371; Long v. Howard, (Minn.) 53 N. W. Rep. 1014; Fitzpatrick v. Hoffman, (Mich.) 62 N. W. Rep. 349. It is immaterial upon what title the covenantee was evicted if the covenantor was notified to defend. Wendell v. North, 24 Wis. 223. Notice to defend a suit for dower binds the covenantor. Terry v. Drabenstadt, 68 Pa. St. 400. If the covenantee neither notifies his covenantor, nor avails himself of a valid defense which the covenantor might have made, the latter may avail himself of such defense in an action on the covenant. Walton v. Cox, 67 Ind. 164. A decision of arbitrators adverse to the covenantor's title, rendered without notice of

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the arbitration to the covenantor, is not binding upon him. Prewitt v. Kenton, 3 Bibb (Ky.), 282. In Texas the covenantee, when sued by an adverse claimant, is not only allowed to implead the covenantor and bind him by the result, but he may have judgment over against the covenantor for breach of warranty in case the adverse claimant establishes his title and obtains judgment; and this to prevent multiplicity of actions. Kirby v. Estell, 75 Tex. 485; 12 S. W. Rep. 807; Johns v. Hardin, (Tex) 16 S. W. Rep. 623. Such a practice is, of course, inadmissible under common-law systems of procedure. In a case in Texas in which, after the warrantor had been vouched in to defend, his co-defendant, the warrantee, amended his answer so as to claim judgment over against the warrantor in case of an eviction, it was held that the latter, having received no notice of the amendment, was not bound by a judgment for breach of warranty rendered against him in pursuance of such amendment. The only effect of the pleadings, as they stood, was to make the judgment against the warrantee conclusive of the question of paramount title in the *evictor*. Mann v. Matthews, 82 Tex. 98; 17 S. W. Rep. 395.

Recent Cases. Carpenter v. Carpenter, 88 Ark. 169, 113 S. W. 1032; Cox v. Bradford, 101 Ark. 302, 142 S. W. 170; McCormick v. Marcy, 165 Cal. 386, 132 Pac. 449; White v. Stewart & Co., 131 Ga. 460, 62 S. E. 590; Taylor v. Allen, 131 Ga. 416, 62 S. E. 291; Brooks v. Winkles, 139 Ga. 732, 78 S. E. 129; Ashburn v. Watson, 8 Ga. App. 566, 70 S. E. 19; McDonnell v. Downs, 48 Ill. 271; Harding v. Sucher, 261 Ill. 284, 103 N. E. 1019; Sarlls v. Beckman, 55 Ind. App. 638, 104 N. E. 598; Bollenbacher v. Lee (Ind. App.) 121 N. E. 663; Richstein v. Welch, 197 Mass. 224, 83 N. E. 417; Talbert v. Grist, 198 Mo. App. 492, 201 S. W. 906; Fassler v. Streit, 100 Neb. 722, 161 N. W. 172; Estep v. Bailey, (Oreg.) 185 Pac. 227; Brader v. Zbranek, (Tex. Civ. App.) 213 S. W. 331; Farwell v. Bean, 82 Vt. 172, 72 Atl. 731; Norfolk & W. R. Co. v. Mundy, 110 Va. 422, 66 S. E. 61; Kapiolani Est. v. Atcherly, 238 U. S. 119, 31 S. C. 832, 59 L. ed. 1229, Ann. Cas. 1916 E. 142.

[69] Wolfe v. Land Co., 255 Fed. 503.

[70] Williams v. Shaw, N. C. Term. Rep. 197; 7 Am. Dec. 706; Shober v. Robinson, 2 Murph. (N. C.) 33; Wilder v. Ireland, 8 Jones L. (N. C.) 88; Saunders v. Hamilton, 2 Hayw. (N. C.) 282; Martin v. Cowes, 2 Dev. & Bat.

to be that it is the duty of the covenantor to appear upon notice and request and furnish all the aid and information in his power for the successful maintenance of the suit, and that having done so, he may avail himself of the judgment therein rendered, though not actually a party to the suit.[71] Judgment against the covenantee in trespass, as well as in ejectment, binds the covenantor if he has been notified of the suit and requested to defend.[72] So, also, in trespass to try title, [73] and in foreclosure proceedings.[74]

The covenantee, by giving the proper notice and request to defend, is not only relieved from the burden of showing that the judgment under which he was evicted was founded upon a paramount title, but the covenantor will not, in the absence of fraud or collusion, be permitted, when sued for a breach of his covenant, to dispute the title of the ejectment plaintiff, or show a better

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L. (N. Car.) 101, the court saying: "In our opinion the record of the judgment is not only not conclusive evidence, but it is not any evidence of title against the vendor. It would be repugnant to principle to bind any one by a judgment in a suit where, if an opposite judgment had been rendered, he could derive no benefit from it, to which suit he was not a party, and where he could not challenge the request nor examine witnesses, nor exercise any of the means provided by law for ascertaining the truth and asserting his right. In real actions a warrantor might be made a party by voucher; in ejectment a landlord may come in to defend the possession of his tenant, but there is no provision of law by which a vendor can be brought in to vindicate the possession of his vendee. To a judgment against the vendee, the vendor is a stranger, and, therefore, that judgment is against him evidence only of the fact of the judgment and of the damages and costs recovered."

[71] Chamberlain v. Preble, 11 Mass. 375, where it is said: "If he does not assume the defense, it is at least his duty to communicate all information in his power as to the validity of the plaintiff's title. If he fails to do so, if he stands by and permits a recovery for want of evidence of which he has knowledge, he cannot be permitted to show that the result would have been otherwise if the evidence had been produced, and so avoid the effect of a recovery in a suit against him. If he pays no attention to the notice, and turns his back upon the suit, he cannot, when called upon to respond, be permitted to prove that the defendant in the original suit would have prevailed if the defense had been conducted with a fuller knowledge of material facts." Under a statute permitting the landlord to be made defendant when the tenant is sued in ejectment, a vendor who warranted the title cannot insist on being substituted as defendant. Linderman v. Berg, 12 Pa. St. 301.

[72] Merritt v. Morse, 108 Mass. 270.

[73] Johns v. Hardin, (Tex.) 16 S. W. Rep. 623.

[74] Collier v. Cowger, 52 Ark. 322; 12 S. W. Rep. 702.

title in himself.[75] The notice and request make him a privy to the action, and he is bound whether he does or does not appear and defend.[76] In a case in which he did not appear after notice and request, he was concluded, though the suit in which the adverse title was established was decided upon an agreed state of facts which was erroneous, and which, if it had been correctly stated, would have defeated the adverse title, the agreed statement of facts having been made in good faith and without collusion.[77]

Notice to the covenantor to appear and defend the suit by the adverse claimant is not necessary where he is made a party defendant to the suit, and served with a copy of the summons.[78]

Notice should be given to the covenantor himself. Notice to his agent, appointed to collect the purchase money, is insufficient.[79] Notice to the personal representative of the covenantor need not be given if the covenantor was properly notified during his lifetime.[80] If the covenantee be evicted under a title derived from himself, the covenantor will not, of course, be estopped from showing that fact though he may have disregarded a notice to appear and defend the suit.[81] The notice to appear and defend relieves the covenantee and the adverse claimant of any imputation of collusion.[82] But if there be actual collusion, or judgment be rendered against the covenantee through his negligence, the covenantor will not be bound, notwithstanding the notice.[83] If the covenantor appears and defends the suit in pursuance of the notice and request, *a fortiori* will he be bound by the judgment, being actually and not merely constructively a party to the suit and will not be permitted afterwards to show that his title was good.[84] In Wisconsin it has been held that the covenantor, though notified to defend the action, and failing so to do, will not be bound by a judgment against his grantee if not allowed to pay the costs and take a new trial.[85]

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[75] Merritt v. Morse, 108 Mass. 270, citing Shears v. Dusenbury, 13 Gray (Mass.) 292; Chamberlain v. Preble, 11 Allen (Mass.), 370, and Haven v. Grand Junc. R. Co., 12 Allen (Mass.), 337. Cooper v. Watson, 10 Wend. (N. Y.) 205; Morris v. Rowan, 17 N. J. L. 307, *obiter;* Ives v. Niles, 5 Watts (Pa.) 323; Middleton v. Thompson, 1 Spear L. (S. C.) 67; Wilson v. McElwee, 1 Strobh. L. (S. C.) 65; Williams v. Burg, 9 Lea (Tenn.), 455; Williams v. Weatherbee, 2 Aik. (Vt.) 357; Wendel v. North, 24 Wis. 223. The foregoing decisions are rested upon the familiar principle enunciated by BULLER, J., in the leading case of Duffield v. Scott, 3 Term Rep. 374, namely: "If a demand is made which the person indemnifying is bound to pay, and notice is given to him, and he refuses to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment and estops the other party from saying that the defendant in the first action was not bound to pay the money."

[76] Rawle Covts. (5th ed.) § 117; Wimberly v. Collier, 32 Ga. 13; McConnell v. Downs, 48 Ill. 271; Woodward v. Allen, 3 Dana (Ky.), 164.

[77] Chamberlain v. Preble, 11 Allen (Mass.), 370. The warrantor, if made a party, is bound by judgment in a suit by an adverse claimant, though rendered upon a stipulation between the plaintiff and the co-defendant, to which he was not a party. Brown v. Hearon, 66 Tex. 63; 17 S. W. Rep. 395; Mann v. Matthews, 82 Tex. 98; 17 S. W. Rep. 927.

[78] Rennie v. Gibson, (Okl.) 183 Pac. 483; Seyfried v. Knoblauch, 44 Colo. 86, 96 Pac. 993; Rice v. Cook, (Mo. App.) 120 S. W. 1191.

[79] Graham v. Tankersley, 15 Ala. 634. But in a case in which an agent, upon being notified, appeared and practically took charge of the suit, the principal was held bound by the result. Bellows v. Litchfield, 83 Iowa, 36; 48 N. W. Rep. 1062.

The notice must be unequivocal, certain and explicit. Mere notice to attend the trial will not suffice unless attended with an express request to defend the title.[86] Knowledge of the adverse suit, incidentally acquired through third parties, will not conclude him.[87]

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[80] Brown v. Taylor, 13 Vt. 631; 37 Am. Dec. 18. This decision was criticised in Somers v. Schmidt, 24 Wis. 420; 1 Am. Dec. 191. See, also, Rawle Covts. (5th ed.) § 119.

[81] Rawle Covts. (5 the ed.) § 117, note.

[82] Swenk v. Stout, 2 Yeates (Pa.), 470, 472.

[83] Sisk v. Woodruff, 15 Ill. 15, *obiter;* Davis v. Smith, 5 Ga. 274.

[84] Brown v. McMullen, 1 Hill L. (S. C.) 29. Collis v. Cogbill, 9 Lea (Tenn.), 137.

[85] Eaton v. Lyman, 26 Wis. 62. It seems that in this State the covenantor, though not a party to the suit, is by statute entitled to a new trial as a matter of right.

[86] Paul v. Witman, 3 Watts & S. (Pa.) 409; Collins v. Baker, 6 Mo. App. 588; Dalton v. Bowker, 8 Nev. 190; Greenlaw v. Williams, 2 Lea (Tenn.), 533; Sheets v. Joyner, (Ind.) 38 N. E. Rep. 830; Teague v. Whaley, 20 Ind. App. 31, 50 N. E. 41; Pence v. Rhonemus, 58 Ind. App. 268, 108 N. E. 129; Morgan v. Haley, 107 Va. 331, 58 S. E. 564, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846. The rule stated in the text, drawn from the cases cited, has not been applied in all cases in which it has been sought to bind one person by the result of a suit against another. Thus, in Chicago City v. Rollins, 2 Bl. (U. S.) 418, it was held that an individual would be concluded by a judgment recovered against a corporation for his act or negligence if he knew that the suit was pending and could have defended it. An express notice to such individual is not necessary to create a liability on his part. Where

The better opinion seems to be that the covenantor is as much bound by notice to appear and *prosecute* a suit against an adverse claimant of the estate begun by the covenantee as he is to defend one instituted against him.[88] This, however, has been denied upon the ground that there is no principle upon which the covenantor can be substituted as plaintiff in the action.[89] The covenantee, after beginning a suit against the adverse claimant and notifying the covenantor to appear and prosecute, may dismiss the suit without affecting his right to recover on the warranty.[90]

No particular form of notice is necessary; it will be sufficient if it explicitly notifies the covenantor of the suit and requests him to defend it.[91]

It has been held that the notice must be in writing,[92] but the weight of authority establishes the sufficiency of a verbal notice.[93]

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the covenantor, pending an action of ejectment against the covenantee, wrote to him as follows: "I must defend the action. I have consulted a lawyer here, and have given him a fee. He recommends removing it to the Supreme Court. The costs I expect to pay. You did right to employ a lawyer. If another is wanted you must employ one. I cannot attend myself," it was held that the covenantor was bound by a judgment against the defendant. Leather v. Poultney, 4 Binn. (Pa.) 356, per TILGHMAN, J.

[87] Somers v. Schmidt, 24 Wis. 419; 1 Am. Rep. 191; Fernbach v. Stein, 146 N. Y. Supp. 1078.

[88] Park v. Bates, 12 Vt. 381; 36 Am. Dec. 347; Pitkin v. Leavitt, 13 Vt. 379; Brown v. Taylor, 13 Vt. 637; 37 Am. Dec. 618; Gragg v. Richardson, 25 Ga. 570; 71 Am. Dec. 190; Walsh v. Dunn, 34 Ill. App. 146. In DeJarnette v. Dreyfus, 166 Ala. 138, 51 So. 932, it was held that the covenantee could not recover the expenses of a suit by him to restrain the enforcement of an alleged incumbrance on the land, in the absence of notice to the covenantor of the intention to bring such suit.

[89] Ferrell v. Alder, 8 Humph. (Tenn.) 43. And in North Carolina it has been held that if the covenantee sues an intruder, the fact that the covenantor will not produce his title deeds in aid of the prosecution gives the plaintiff no rights against him. Wilder v. Ireland, 8 Jones L. (N. C.) 88.

[90] White v. Williams, 13 Tex. 258.

[91] Williams v. Burg, 9 Lea (Tenn.), 455; Richstein v. Welch, 197 Mass. 224, 83 N. E. 417.

[92] Mason v. Kellogg, 38 Mich. 132. BRONSON, J., in Miner v. Clark, 15 Wend. (N. Y.) 425. Verbal notice of an application for the appointment of commissioners to assign dower is not conclusive upon those interested. In re Cooper, 15 Johns. (N. Y.) 533. In Mason v. Kellogg, supra, the court said:

A judgment of eviction rendered against the covenantee without notice to the covenantor, has, in some instances, been held *prima facie* evidence of paramount title in the evictor on behalf of the covenantee when suing for a breach of the covenant of warranty.[94] But the better opinion appears to be that in such a case the judgment is evidence tending to show an eviction only, the burden still being upon the covenantee to show that the eviction was under a paramount title.[95] If he neglects to give the notice, he

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"Upon full consideration we think the dictates of policy, the force of analogy, and weight of reason require the notice to be in writing. Our policy has always favored written memorials of title to real estate, and in view of the effect which the law attributes to this proceeding, it is sufficiently near being a fact of title to be within the policy. It bears a striking analogy to the ancient process of voucher and summons and similar proceedings in some of our States, and of course such proceedings could not be verbal. It contemplates the introduction of the covenantor and the entire prosecution of the defense in complete accordance with his views and under his direction. It is essentially a legal proceeding, and it is a well-recognized general rule that every notice of that character must be in writing."

[93] Miner v. Clark, 15 Wend. (N. Y.) 425, BRONSON, J., dissenting. Somers v. Schmidt, 24 Wis. 419; 1 Am. Rep. 191. The sufficiency of a verbal notice seems to have been assumed in Collingwood v. Irwin, 3 Watts (Pa.), 306, and in Greenlaw v. Williams, 2 Lea (Tenn.), 533; Sarlls v. Beekman, 55 Ind. App. 638, 104 N. E. 598; Morrette v. Bostwick, 111 N. Y. Supp. 1021, 127 App. Div. 701. In Cummings v. Harrison, 57 Miss. 275 (1879), it was said: "In order to bind the warrantor by the result of an action of ejectment against the party holding under him, and to conclude him from showing title when he is sued on his warranty, it is not necessary for the notice to him by the defendant in the action of ejectment to be in writing or in any particular form, or that a demand should be made of him to defend the action. If the warrantor has reasonable notice of the action against his warrantee, and an opportunity to defend it, he will be bound by the result, and when sued on his warranty, cannot be heard to show that the action of ejectment might have been successfully defended. He should have interposed such defense then, or ever afterwards be silent."

[94] Leathers v. Poultney, 4 Binn. (Pa.) 352; Paul v. Witman, 3 Watts & S. (Pa.) 407; Collingwood v. Irwin, 3 Watts (Pa.), 306, 310. Pitkin v. Leavitt, 13 Vt. 385; King v. Kerr, 5 Hamm. (Ohio) 154; 22 Am. Dec. 777; Simpson v. Belvin, 37 Tex. 675. In Somerville v. Hamilton, 4 Wheat. (U. S.) 230, the court was divided upon this point. Where the covenantee was evicted in consequence of the vacation of a sheriff's deed under execution sale in a suit to which the covenantor was a party, notice to the covenantor and request to defend were unnecessary. Arnold v. Joines, 50 Okl. 4, 150 Pac. 130.

[95] Graham v. Tankersley, 15 Ala. 634; Hinds v. Allen, 34 Conn. 195; Rhode v. Green, 26 Ind. 83; Walton v. Cox, 67 Ind. 164; Patton v. Kennedy, 1 A. K.

must come prepared to prove that the evictor had the better title. This, as has been well said, imposes no hardship upon him, and subjects him to but little inconvenience. It by no means follows that a judgment in ejectment against a grantee is founded upon the invalidity of the grantor's title. The judgment may be obtained by collusion; by a failure of the defendant to make proof of the title under which he entered; or under a conveyance from the covenantee himself; or under a tax title originating in his own default.[96]

The notice must be given in reasonable time.[97] It will suffice if time enough is allowed to prepare the case for trial. If ejectment has been actually begun against the covenantee, it is immaterial that his notice to defend was given before the complaint or declaration in ejectment was filed.[98] Whether notice has or has not been given to the covenantor to appear and assist in the defense of a suit attacking the title conveyed by him is a question for the jury.[99] The sufficiency of the notice, when given, is to be determined by the court.[1] Notice to the covenantor to appear and defend a suit by the adverse claimant is not indispensable, nor a condition precedent, to the right of the covenantee to recover on the warranty if the suit result in an eviction. It is prudent, however, to give the notice in order to dispense with proof that the eviction was under a paramount title.[2] But in Louisiana it has been held that if the

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Marsh. (Ky.) 288; 10 Am. Dec. 744; Devour v. Johnson, 3 Bibb (Ky.), 410; Booker v. Bell, 3 Bibb (Ky.), 175; 6 Am. Dec. 641; Booker v. Meriweather, 4 Litt. (Ky.) 212; Cox v. Strode, 4 Bibb (Ky.), 4; 5 Am. Dec. 603; Ryerson v. Chapman, 66 Me. 557; Hardy v. Nelson, 27 Me. 525; Hines v. Jenkins, 64 Mich. 469; 31 N. W. Rep. 432; Fields v. Hunter, 8 Mo. 128; Holladay v. Menifee, 30 Mo. App. 207; Dalton v. Bowker, 8 Nev. 190; Middleton v. Thompson, 1 Spear L. (S. C.) 67; Stevens v. Jack, 3 Yerg. (Tenn.), 403, case of personal property; Clark v. Munford, 62 Tex. 531; Cates v. Field (Tex. Civ. App.) 85 S. W. Rep. 52.

[96] Sisk v. Woodruff, 15 Ill. 15; Brady v. Spurck, 27 Ill. 479.

[97] Middleton v. Thompson, 1 Spear L. (S. C.) 67; Davis v. Wilbourne, 1 Hill L. (S. C.) 28; 26 Am. Dec. 154. The notice must have been given in time to allow the covenantor reasonable opportunity to prepare his defense, otherwise the judgment will not be conclusive upon him. Morrette v. Bostwick, 111 N. Y. Supp. 1021, 127 App. Div. 701.

[98] Cook v. Curtis, 68 Mich. 611; 36 N. W. Rep. 692.

[99] Collingwood v. Irwin, 3 Watts (Pa.), 310.

[1] Rawle Covts. (5th ed.) § 120.

[2] Chapman v. Holmes, 5 Halst. (10 N. J. L.) 24; King v. Kerr, 5 Ohio.

covenantor loses a good defense that he might have made if he had been seasonably called upon to defend the title, the covenantee cannot recover on the warranty.[3] A record of a judgment of eviction which appears to be a complete transcript will be received in evidence in an action for breach of warranty, though not certified to be full and complete.[4] It has been held that if judgment in ejectment be recovered against the covenantee, not on the ground that the plaintiff's title was superior to that of the covenantor, but on the ground that the defendant in ejectment was precluded by the acts and declarations of his immediate grantor from taking refuge under the good title, the latter will not be bound by the judgment, though he was notified to appear and defend the suit.[5]

Whether notice was or was not given the covenantor to appear and defend, is a question of fact for the jury.[6]

Notwithstanding notice to the covenantor to appear and defend a suit attacking the title, the covenantee must, if evicted, show, in an action for breach of the covenant, that the eviction took place under a title older than his own; that is, a title not derived from himself, unless the record of the suit in which he was evicted shows that fact.[7] Therefore, where the breach of warranty complained

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158; 22 Am. Dec. 777; Pitkin v. Leavitt, 13 Vt. 379; Ryerson v. Chapman, 66 Me. 557; Talbot v. Bedford, Cooke (Tenn.), 447; Boyle v. Edwards, 114 Mass. 373; Wheelock v. Overshiner, (Mo.) 19 S. W. Rep. 640. The foregoing cases are largely founded on Smith v. Compton, 3 Barn. & Ad. 407, a case in which the covenantor compromised a suit against himself by the adverse claimant at £500, and was afterwards permitted to recover the amount so paid from the covenantor, though the latter was not notified of the adverse claimant's suit. TENTERDEN, C. J., said: "The only effect of want of notice in a case such as this is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss."

[3] Kelly v. Wiseman, 14 La. Ann. 661.

[4] Radcliff v. Ship, Hard. (Ky.) 299.

[5] Kelly v. Dutch Church, 2 Hill (N. Y.), 105.

[6] Cox v. Bradford, 101 Ark. 302, 142 S. W. 170; Morgan v. Muldoon, 82 Ind. 347; Pence v. Rhonemus, 58 Ind. App. 268, 108 N. E. 129.

[7] Folliard v. Wallace, 2 Johns. (N. Y.) 395; Williams v. Wetherbee, 2 Aik. (Vt.) 337; Knapp v. Marlboro, 34 Vt. 235; Pitkin v. Leavitt, 13 Vt. 379, 384; Swazey v. Brooks, 34 Vt. 451. See cases cited, post, § 176. Parol evidence of testimony given on the trial of ejectment against the covenantee is admissible to show that recovery was under a title derived from the covenantor. Leather v. Poultney, 4 Binn. (Pa.) 356.

of was that an adverse decree had been rendered against the covenantee in a suit against him to quiet title, and that possession had been taken by the adverse claimant under that decree, but it did not appear that the title on which such decree was based was older than or prior to that under which the covenantor conveyed, it was held that the plaintiff, the covenantee, was not entitled to recover, since there was nothing to show that the title under which he was evicted was derived from himself.[8]

If the grantee is evicted by one who claims under a prior deed from the grantor such eviction is a breach of a covenant against the acts of the grantor himself. The covenant of special warranty embraces past as well as future acts of the grantor.[9] An eviction by one holding under a prior appointment by the grantor is equivalent to an eviction by the grantor himself.[10] It has been held that if the grantor conveys a clear title with general warranty, and the grantee fails to record his deed in due time, by reason of which he loses the estate to a subsequent grantee of the covenantor who first records his deed, there is no breach of the covenant of warranty, and that the remedy of the covenantee, if any, is by action on the case for the damages actually sustained, or for money received to his use by the covenantor.[11] Other cases, however, hold, and apparently with greater reason, that the grantor cannot claim that the grantee should have recorded his deed in order to guard against a subsequent wrongful transfer of the same title to another by the grantor himself. The covenant of warranty includes a covenant against all persons claiming by, through, or under the grantor, and the case mentioned comes literally within these terms. The doctrine of estoppel applies.[12]

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[8] Peck v. Houghtaling, 38 Mich. 127. Clements v. Collins, 59 Ga. 124, the court saying: "The great and insurmountable defect in the evidence, however, is that it fails to show that the recovery in ejectment was had upon title outstanding at the date of the warranty. Nothing appears which is the least inconsistent with the covenant. Ten years had elapsed when ejectment suit was brought, and no date in the pleadings or the evidence has any relation whatever to so remote a period in the past. What the judgment in ejectment adjudicates is that the plaintiff (in the ejectment) had title at the commencement of that action, in 1869. But that fact is perfectly consistent with title in the warrantor in 1859. There is nothing to show that the very deed containing the warranty now sued on was not a part of the chain of title upon which the premises were recovered in the action of ejectment."

[9] Faries v. Smith, 11 Rich. L. (S. C.) 82.

[10] Calvert v. Sebright, 15 Beav. 156.

[11] Wade v. Comstock, 11 Ohio St. 71, upon the ground that the covenant of warranty relates solely to the title as it was at the time the conveyance was made, and merely binds the covenantor to protect the grantee and his assigns against a lawful and better title existing before or at the time of the grant. Mr. Rawle seems to approve this rule, at least in cases in which an interest remains in the grantor, *e. g.*, an equity of redemption, the conveyance containing the covenant having been a mortgage. Covenants for Title (5th ed.), § 128, n. 5. See, also, Scott v. Scott, 70 Pa. St. 244.

§ 176. **PLEADING AND BURDEN OF PROOF.** In an action on a covenant of warranty the plaintiff must set out the covenant or its substance in his declaration or complaint and then aver an eviction by one having lawful right.[13] It is not sufficient merely to negative the words of the covenant; the eviction must be alleged.[14] But it is not necessary that the facts constituting the eviction[15] nor the nature of the eviction, that is, whether actual or constructive, be alleged;[16] nor is it necessary that the paramount title under which the eviction transpired nor the nature thereof be set forth particularly.[17] Nor need the plaintiff allege that he relied on the defendant's warranty, for that were to allege what the law presumes.[18] But he must aver that he was evicted by one having a lawful title[19] and that such title was older and better than that protected by the covenant, otherwise it would not appear but that the plaintiff was evicted under a title derived from himself.[20] Of course, however, if the warranty was against the claims of a particular person, it would be sufficient to allege that the plaintiff was evicted by that person without averring that his title was older or better than that of the defendant or that it existed at the time of the covenant.[21] It

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[12] Curtis v. Deering, 12 Me. 499; Williamson v. Williamson, 71 Me. 442; Lukens v. Nicolson, 4 Phila. R. 22. See, also, Maeder v. Carondelet, 26 Mo. 114. Staples v. Flint, 28 Vt. 794, *semble.*

[13] See form, 2 Chit. Pl. 546. Brady v. Peck, 99 Ky. 42; 34 S. W. Rep. 206; Gano v. Green, 116 Ga. 22, 42 S. E. Rep. 371; Hampton v. Webster, 56 Neb. 628, 77 N. W. Rep. 50; Merrill v. Suing, 66 Neb. 404, 92 N. W. Rep. 618; Sears v. Broady, 66 Neb. 207, 92 N. W. Rep. 214; Dexter v. Manly, 4 Cush. (Mass.) 14; Wilson v. Vreeland, 176 N. C. 504, 97 S. E. 427; Joyner v. Smith, 132 Ga. 779, 65 S. E. 68. A covenant of warranty should not be pleaded as a covenant for quiet enjoyment. It should be pleaded according to its form, leaving the effect to be determined in the action. Peck v. Houghtaling, 38 Mich. 127.

[14] Blanchard v. Hoxie, 34 Me. 378; Wills v. Primm, 21 Tex. 380; Raines v. Callaway, 27 Tex. 678; Thompson v. Brazile, 65 Ark. 495; 47 S. W. Rep. 299. A pleading by the covenantee, alleging inability to get possession of the premises because held by a third person, claiming under a superior title, is fatally bad, unless it alleges that the premises were so held at the time of the warranty, or that the person in possession had been adjudged to have the paramount title. Jett v. Farmers' Bank, 25 Ky. L. Rep. 817; 76 S. W. Rep. 385.

[15] Rickert v. Snyder, 9 Wend. (N. Y.) 420; Townsend v. Morris, 6 Cow. (N. Y.) 123; Cheney v. Straube, 35 Neb. 521; 53 N. W. Rep. 479. Compare Kleinberg v. Kinealy, (Mo. App.) 207 S. W. 237, where held that an allegation that defendant "breached the said warranty" is a mere conclusion of law and insufficient, and that the facts showing the breach should have been alleged. A declaration in covenant on a general warranty of lands, which states that the defendant had no title at the time of the sale, that ejectment had been brought against the plaintiff by a stranger, of which he gave the defendant notice, and that plaintiff had afterwards been evicted in due course of law is sufficient. Swenk v. Stout, 2 Yeates (Pa.), 470. An averment that

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the covenantor had not a good and sufficient title to the land, and that by reason thereof the plaintiff was ousted and dispossessed of the premises by due course of law is sufficient as an averment of an eviction by title paramount. Banks v. Whitehead, 7 Ala. 83; Reese v. McQuillikin, 7 Ind. 451; Mills v. Rice, 3 Neb. 76. In Day v. Chism, 10 Wh. (U. S.) 449, the following language in the declaration "that the said O. had not a good and sufficient title to the said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law," was held sufficient as a substantial averment of an eviction by title paramount.

[16] Reese v. McQuilliken, 7 Ind. 451; Sheffey v. Gardner, 79 Va. 313.

[17] Talbot v. Bedford, Cooke (Tenn.), 447. But see Prestwood v. McGowan, 128 Ala. 267; 29 So. Rep. 386, where it was held that the paramount title must be substantially set forth.

[18] Norris v. Kipp, 74 Iowa, 444; 38 N. W. Rep. 152.

[19] Greenby v. Wilcox, 2 Johns. (N. Y.) 1; Webb v. Alexander, 7 Wend. (N. Y.) 286.

[20] Wotton v. Hele, 2 Saund. 177 and n. 10; Hayes v. Bickerstaff, Vaugh. 118; Folliard, v. Wallace, 2 Johns. (N. Y.) 395; Greenby v. Wilcox, 2 Johns. (N. Y.) 1; Grannis v. Clark, 8 Cow. (N. Y.) 36; Crisfield v. Storr, 36 Md. 148; 11 Am. Rep. 480, and analogous cases there cited. Pitkin v. Leavitt, 13 Vt. 384; Giddings v. Canfield, 4 Conn. 482; Jones v. Jones, 87 Ky. 82, 7 S. W. Rep. 886; Chenault v. Thomas, 26 Ky. L. Rep. 1029; 83 S. W. Rep. 109. So, also, in an action for rent a plea of eviction by title paramount must aver that such title existed before the demise. Naglee v. Ingersoll, 7 Pa. St. 185, 205. An averment that the plaintiff was evicted by the holder of "a superior and better title than the one sold by the defendant," is sufficient as an averment that the plaintiff was not evicted under a title derived from himself. Woodward v. Allen, 3 Dana (Ky.), 164.

[21] Patton v. Kennedy, 1 A. K. Marsh. (Ky.) 389; 10 Am. Dec. 744; Pence v. Duval, 9 B. Mon. (Ky.) 49. The necessity for such an averment is even greater where there have been several intermediate conveyances, as in the

is not necessary to aver that the title to the land has been tried; it is sufficient to aver an eviction by paramount title, and the superiority of that title will be determined at the trial;[22] nor is it necessary, where the plaintiff was evicted by judgment and process in a possessory action, to aver that the defendant had notice of the action and was requested to defend it.[23] Nor is it necessary to allege that the grantor did not, after executing the covenant, acquire a title which would enure to the benefit of the grantee by estoppel;[24] nor that the covenantee relied on the warranty, since that is a presumption of law.[25] The covenant must, of course, be truly described, and the breach averred not to be within any of the restrictions, limitations or qualifications of the covenant, if any, contained in the deed. Thus, where the declaration set forth a conveyance and warranty of the entire estate in fee, and a conveyance with warranty, subject to a mortgage, appeared in evidence, the variance was held fatal.[26] The plaintiff must also allege that the title or claim under which he was evicted, came within the defendant's covenants.[27] It will be sufficient, however, if the covenant be stated according to its legal effect and not in the precise language of the deed.[28]

Burden of proof. The plaintiff in an action for breach of the covenant of warranty alleging an eviction, as he must, has the

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latter case it would be intended, if the declaration did not aver that the title of the party evicting was older and better and existing at the date of the covenant, that he had derived it from one of the intermediate grantees. In such a case the title of the party evicting might well be older and better than that of the defendant in the ejectment, and yet not older and better than that of the covenantor, and if it was not older and better than the latter there would be no breach of the covenant. Language of GRASON, J., in Crisfield v. Storr, 36 Md. 148; 11 Am. Rep. 480. An averment that a stranger had brought suit and recovered the land, without alleging against whom he recovered, or that the plaintiff's (grantee's) title had been called in question, or that the title of such claimant was superior to that of the plaintiff, does not sufficiently allege a breach of the covenant of warranty. Wills v. Primm, 21 Tex. 380.

[22] Patton v. Kennedy, 1 A. K. Marsh. (Ky.) 288; 10 Am. Dec. 744.

[23] Rhode v. Green, 26 Ind. 83.

[24] Mason v. Cooksey, 51 Ind. 519.

[25] Norris v. Kipp, 74 Iowa, 444; 38 N. W. Rep. 152.

[26] Shafer v. Wiseman, 47 Mich. 63; 10 N. W. Rep. 104.

[27] Dexter v. Manly, 4 Cush. (Mass.) 14.

[28] Bland v. Thomas, (Ky.), 3 S. W. Rep. 595.

affirmative of the issue, and the burden of proof lies on him to show the eviction under a lawful title older than that under which he held.[29] But the burden shifts if the defendant so pleads as to have the affirmative himself. Thus, where the breach alleged was that the title was outstanding in another by reason of which the plaintiff could not get possession, and the defendant pleaded that the better title was not so outstanding but had been by himself conveyed to the plaintiff, it was held that the burden was upon him to show that the title so conveyed was paramount.[30] And if the covenantee shows that he has been evicted or kept out of possession by one claiming title the burden lies upon the covenantor to show that his title was paramount to that of the evictor. The reason for this rule is that a party in possession of lands is always presumed to have a valid title.[31]

The deed containing the covenant if properly executed and recorded, will be received in evidence to show the warranty, without proof of its execution.[32]

§ 177. **COVENANT FOR QUIET ENJOYMENT.** The covenant for quiet enjoyment and the covenant for warranty are in effect the same,[33] the only difference being, it seems, that the former is broken by an actual disturbance of the possession of the covenantee by one having a superior right, while the latter is not broken until the disturbance has culminated in an eviction.[34] Thus, ejectment brought by the true owner against the covenantee is a breach of the covenant for quiet enjoyment, while there is no breach of the covenant of warranty until the action has resulted in an eviction.[35] A suit in equity in which it is sought to deprive the covenantee of his estate is as much a breach of the covenant for quiet enjoyment as an action of ejectment, or other possessory proceeding.[36] So, also, a suit in which a stranger is adjudged to be a tenant in common with the covenantee.[37] The principal use and employment of this covenant, therefore, is in the creation and conveyance of estates for years. It is broken only by an actual disturbance of the possession by one having a better right,[38] unless the disturbance was by the lessor himself or his agents. In the latter event the covenant is broken without regard to the question of paramount title.[39] With respect to the acts of the lessor, it is immaterial that the lease does not contain an express covenant for quiet enjoyment. Such a covenant will always be implied from the lease itself in case of a tortious disturbance by the lessor.[40]

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[29] Peck v. Houghtaling, 88 Mich. 127. Holladay v. Menifee, 30 Mo. App. 215.

[30] Owen v. Thomas, 33 Ill. 320. In Georgia it has been held that if the covenantee shows that since his purchase the land has been sold under execution against a *stranger*, and that he surrendered the possession of such purchase (the defendant in the execution having had possession after judgment entered against him), the burden will be cast on the covenantor to show that the person to whom the surrender was made did not have the better title. Taylor v. Stewart, 54 Ga. 81.

[31] Heyn v. Ohman, (Neb.) 60 N. W. Rep. 952, citing Ward v. McIntosh, 12 Ohio St. 231. Jones v. Bland, 112 Pa. St. 176; 2 Atl. Rep. 541. Brown v. Feagin, 37 Neb. 256; 55 N. W. Rep. 1048.

[32] Williams v. Weatherbee, 2 Aik. (Vt.) 337.

[33] 3 Washb. Real Prop. 467 (660); Rawle Covts. for Title (5th ed.), § 96. Fowler v. Poling, 2 Barb. (N. Y.) 300; Rea v. Minkler, 5 Lans. (N. Y.) 196.

[34] See 2 Sugd. Vend. 273 (601) and Rawle Covts. for Title (5th ed.), § 130, where it is said that a suit in equity against the purchaser threatening the title is a breach of the covenant for quiet enjoyment. A lessee claiming that he has been evicted from a ground rent, must show that his tenancy has been

The covenant for quiet enjoyment like the covenant of warranty, is not a covenant that the grantor is seised of an idefeasible estate. Therefore, it is not broken where the grantor, purporting to convey a fee, had only a life estate, so long as the grantee remains in the undisturbed possession of the life estate.[41]

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successfully interfered with. A mere suit to prevent him from using the premises for particular purposes will not amount to a breach of the covenant. Jarden v. Lafferty, (Pa. St.) 7 Atl. Rep. 743. The covenant is not broken by a proceeding which interferes only with a particular mode of enjoyment of the premises. Rawle Covts. (5th ed.), § 130. Possession by a tenant under an unexpired lease operates a breach of this covenant. Morris v. Hesse, (Tex. Civ. App.) 210 S. W. 710. In Simonds v. Diamond Match Co., 159 Mich. 241; 123 N. W. 1132, it was held that such possession was a breach of the covenant for quiet enjoyment, but not a breach of the covenant of warranty.

[35] Stewart v. West, 14 Pa. St. 336. N. Y. Etc. Coal Co. v. Graham, 226 Pa. 348; 75 Atl. 657.

[36] Sugd. Vend. (14th ed.) 601; Rawle Covts. (5th ed.), § 130.

[37] Black v. Barto, 65 Wash. 502; 118 Pac. 623; Ann. Cas. 1913 B, 846.

[38] Ante, § 142.

[39] Moore v. Weber, 71 Pa. St. 429; 10 Am. Rep. 708.

[40] Dexter v. Manly, 4 Cush. (Mass.) 14.

[41] Wilder v. Ireland, 8 Jones L. (N. C.) 88. Of course, if the life estate has fallen in and the reversioner has entered, the covenant is broken. Parker v. Richardson, 8 Jones L. (N. C.) 452.

CHAPTER XV.

COVENANT FOR FURTHER ASSURANCE.

IN GENERAL. § 178.
BREACH. ESTOPPEL. ASSIGNABILITY. DAMAGES. § 179.

§ 178. **IN GENERAL.** This covenant is usually expressed in the following words: "And that he, the said (grantor), shall at all times hereafter, at the request and expense of the said (grantee), his heirs and assigns, make and execute such other assurances for the more effectual conveyance of the said premises as shall be by him reasonably required."[1] It is one of the six covenants inserted in conveyances in those States or localities in which it is customary to employ all of the "full" or "usual" covenants for title. Actions at law for breach of the covenant for further assurance are of infrequent occurrence, and few cases of that kind are to be met with on this side of the Atlantic. The remedy upon the covenant is usually sought in equity;[2] that is, to compel the vendor to execute the further assurance, or, it seems, to remove an incumbrance from the premises.[3] The execution of the further assurance will, of course, operate to pass any estate which the vendor may have acquired after the execution of the original conveyance. It is to be observed, however, that the terms "general" or "special" as descriptive of the other covenants for title is not applicable to the covenant for further assurance as it is usually written. In this respect, it is dependent upon the other covenants for title, so that if those covenants are of a kind that will not entitle the purchaser to a conveyance of the after-acquired estate, or to have an incumbrance removed by the vendor, he cannot call for such relief in equity merely because his deed contains a covenant for further assurance. In other words, such a covenant in a mere quit claim or release would not entitle the purchaser to require the conveyance of any estate which the grantor may thereafter have acquired.[4] Nor can the purchaser demand, under the covenant for further assurance, the conveyance of a greater estate or interest than that to which he is entitled under the original conveyance.[5] But an express covenant in a quit-claim deed to convey the after-acquired estate will, of course, entitle the grantee to such a conveyance.[6]

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[1] Rawle Covts. (5th ed.) p. 29. This language does not in terms require the vendor to remove an incumbrance from the premises. It seems, however, that the agreement "to make and execute such other assurances" is construed to have that effect. 2 Sugd. Vend. 294 (613); Platt Covts. 344. King v. Jones, 5 Taunt. 427.

[2] Post, § 207. 2 Sugd. Vend. 294 (613); Rawle Covts. (5th ed.), § 98. Cochran v. Pascault, 54 Md. 16.

[3] 2 Sugd. Vend. (14th Eng. ed.) 613. King v Jones, 5 Taunt. 427. This covenant will be found of great practical importance where the purchaser desires to compel the grantor to remove an incumbrance from the estate which exceeds the purchase price of the premises. This cannot be done under a covenant of warranty. East Tenn. Nat. Bank v. First Nat. Bank, 7 Lea (Tenn.), 420, and it may be doubtful whether it can be done under a covenant against incumbrances under the rule which limits the liability of the covenantor to the consideration money and interest. Ante, § 131.

A covenant for further assurance operates in one respect as well for the protection of the grantor as for the benefit of the grantee. Thus, it has been held that the grantor has a right to acquire an outstanding paramount title to the estate by reason of this covenant, and to tender the title so acquired in satisfaction of a breach of the other covenants for title.[7]

§ 179. **WHAT CONSTITUTES BREACH. ESTOPPEL. ASSIGNABILITY. DAMAGES.** The covenant for further assurance is not broken until the grantor refuses to execute such further conveyance, devised and tendered by the purchaser, as he may reasonably require, or to do some act or thing necessary to perfect the title, such as may be reasonably insisted upon by the purchaser.[8] The vendor cannot be required to execute useless and unnecessary conveyances,[9] nor to do acts in themselves impracticable;[10] such as to procure a conveyance from a person *non compos mentis,*[11] or to procure a certain thing to be done by one physically incapable of performance.[12] The thing to be done must also be lawful,[13] and the request therefor must be made within a reasonable time.[14]

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[4] This is Mr. Rawle's opinion (Covts. for Title [5th ed.], § 105), citing Davis v. Tollemache, 2 Jur. (N. S.), 1181, and it seems clearly sustainable, both upon reason and authority. But a contrary view seems to have been taken in the case of Bennett v. Waller, 23 Ill. 106, where it was said that under a covenant for further assurance contained in a quit-claim deed "a subsequent title enures as well as under a covenant of warranty." This case can probably be explained upon the ground that the quit claim under consideration was not a mere release of all the grantor's right or interest, but a conveyance of an estate of a particular description, which operates to estop the grantor as well as a conveyance with general warranty. Van Rensselaer v. Kearney, 11 How. (U. S.) 297. In Armstrong v. Darby, 26 Mo. 517, it was held that a covenant for further assurance in a conveyance with covenant against incumbrances created by the grantor only, did not oblige the grantor to remove an incumbrance not created by himself.

[5] Taylor v. Dabar, 1 Ch. Cas. 274. Uhl v. Ohio River R. Co., 51 W. Va. 106; 41 S. E. Rep. 340.

[6] Lamb v. Burbank, 1 Sawy. (C. C.) 227.

[7] Cochran v. Pascault, 54 Md. 1. Building Co. v. Fray, 96 Va. 559; 32 S. E. Rep. 58.

The covenant for further assurance will estop the grantor from setting up an after-acquired title to the estate.[15] The better opinion seems to be that this covenant operates an actual transfer of the after-acquired estate;[16] it has been held, however, that the covenant for further assurance gives the grantee merely a right to call for a conveyance of the after-acquired estate, and to compel a specific performance of the covenant in equity.[17]

The covenant for further assurance is necessarily prospective in its operation, and passes with the land to subsequent grantees.[18]

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[8] Rawle Covts. (5th ed.), § 99. Bennet's Case, Cro. Eliz. 9. Miller v. Parsons, 9 Johns. (N. Y.) 336. Fields v. Squires, Deady (U. S.), 388. The covenant for further assurance is broken if the grantor refuses to procure a release of an incumbrance upon the premises which he is bound to discharge. Colby v. Osgood, 29 Barb. (N. Y.) 349.

[9] Gwynn v. Thomas, 2 G. & J. (Md.) 420.

[10] 2 Sugd. Vend. 295 (613). In Armstrong v. Darby, 26 Md. 517, it was held that the statutory covenant for further assurance implied in the words "grant, bargain and sell" embraces only such incumbrances as the vendor has control of; and that if a defect cannot be supplied by the grantor, as where there is an outstanding mortgage created by a prior grantor, the vendor cannot be made liable on his covenant for further assurance.

[11] Anon., Moore, 124.

[12] Anon., Moore, 124, a case in which it was sought to compel a woman in travail to execute the assurance.

[13] Heath v. Crealock, L. R., 10 Ch. App. 31.

[14] Nash v. Ashton, T. Jones, 195.

[15] Pierce v. Milwaukee R. Co., 24 Wis. 553. Bennett v. Waller, 23 Ill. 183.

[16] Bennett v. Waller, 23 Ill. 183.

[17] Chauvin v. Wagner, 18 Mo. 531.

[18] Bennett v. Waller, 23 Ill. 97. Colby v. Osgood, 29 Barb. (N. Y.) 339. Clarke v. Priest, 47 N. Y. Supp. 489; 21 App. Div. 174.

The breach, when it occurs, is a continuing one, and may be availed of by him who suffers the ultimate damage, though he be not the one who made the demand for further assurance.[19]

The plaintiff can recover nominal damages only for a breach of the covenant for further assurance, unless he can show that he has sustained actual damages. The mere refusal of the vendor to execute the further assurance would not entitle the grantee to actual damages unless he could show that he had sustained the ultimate damage that would result from the refusal.[20] If the grantor should refuse to satisfy an incumbrance on the premises, and the grantee should be compelled to discharge it to protect his title, he would doubtless be permitted to recover as damages the amount so paid by him, provided, it is apprehended, such amount do not exceed the consideration money and interest.[21]

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[19] Rawle Covts. (5th ed.), § 230.

[20] Rawle Covts. for Title (5th ed.), § 195. Burr v. Todd, 41 Pa. St. 213, *obiter*. Questions as to the measure of damages for a breach of the covenant for further assurance are not likely to arise. First, because the remedy upon this covenant is usually sought in equity; and, secondly, because such facts as would entitle the purchaser to substantial damages for a breach of this covenant would nearly, if not always, amount to a breach of the covenant against incumbrances or that of warranty, and the purchaser in most cases contents himself with an action on those covenants.

[21] This in analogy to the rule that the damages for a breach of the covenant of warranty, seisin or against incumbrances, is to be measured by the consideration money. No reason why he should be allowed a greater measure of damages for the breach of the one covenant than for the breach of the other can be perceived.

CHAPTER XVI.

DETENTION OF THE PURCHASE MONEY WHEN THERE HAS BEEN A BREACH OF THE COVENANTS FOR TITLE.

GENERAL RULE. § 180.
MERGER OF PRIOR AGREEMENTS. § 181.
PURCHASE WITH KNOWLEDGE OF DEFECT. § 182.
RECOUPMENT. § 183.
RECOUPMENT IN FORECLOSURE OF PURCHASE-MONEY MORTGAGE. § 184.
PARTIAL FAILURE OF CONSIDERATION. § 185.
ASSUMPSIT TO TRY TITLE. § 186.
WHAT CONSTITUTES EVICTION. § 187.
DISCHARGE OF INCUMBRANCES. § 188.
RULE IN TEXAS. § 189.
RULE IN SOUTH CAROLINA. § 190.
PLEADINGS. § 191.
RESUME. § 192.

§ 180. **GENERAL RULE.** In most cases the detention of the purchase money by the purchaser of lands on failure of the title, amounts to an election on his part to rescind the contract. In a subsequent portion of this work[1] under the head of "Remedies in Disaffirmance or Rescission of the Contract of Sale," the several rules which determine the rights of the purchaser in this respect, will be found stated at large, except the rules which apply where the contract has been executed by a conveyance with certain covenants for title, and the purchaser, when sued for the purchase money, sets up as a defense, by way of counterclaim or recoupment, his eviction from the premises by one holding under a prior incumbrance or a better title. This is equivalent to an independent action by the purchaser to recover for a breach of the covenants for title, and is, therefore, an affirmance of the contract on his part. Hence, it has been deemed proper to separate this branch of the law of detention of the purchase money from the general treatment of that subject, and to discuss the same in this place as one of the remedies of the purchaser in affirmance of the contract after the acceptance of a conveyance with covenants for title. We, therefore, proceed to lay down the following rule, which should be read as one of the series of propositions of law governing the right of the purchaser to recover back or to detain the purchase money, as set forth in another part of this work.[2]

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[1] Post, ch. 24, *et seq.*

If the contract has been executed by the delivery and acceptance of a conveyance containing a covenant of warranty, or for quiet enjoyment, or against incumbrances, and there has been such a breach of those covenants as would give the grantee a present right to recover substantial damages against the grantor, the former will, in an action against him for the purchase money, be allowed to set up such breach as a defense by way of recoupment of the plaintiff's demand. If there has been no such breach the grantee cannot detain or recover back the purchase money.[3]

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[2] These propositions are to be found, post, § 237.

[3] Rawle Covt. (5th ed.) § 326; 2 Warvelle Vend. 919; 2 Sugd. Vend. (8th Am. ed.) 193 (549) note g. (As to what consitutes a breach of the several covenants for title, see ante, the chapters treating of them respectively.) Greenleaf v. Queen, 1 Pet. (U. S.) 138; Noonan v. Lee, 2 Bl. (U. S.) 499; Kimball v. West, 15 Wall. (U. S.) 377. Prevost v. Gratz, 3 Wash. (C. C.) 439. Brisco v. Mining Co., 82 Fed. 952. In the case of Patton v. Taylor, 7 How. (U. S.) 132, it was held that the covenantee could not detain the purchase money, in the absence of a breach of the covenant of warranty, though the covenantor was insolvent. To the text; Peden v. Moore, 1 Stew. & P. (Ala.) 81; 21 Am. Dec. 649, *ob. dict.;* Wilson v. Jordan, 3 Stew. & P. (Ala.) 92; Dunn v. White, 1 Ala. 645; Cullum v. Bank, 4 Ala. 21; 37 Am. Dec. 725; Cole v. Justice, 8 Ala. 793; Tankersly v. Graham, 8 Ala. 247; Knight v. Turner, 11 Ala. 639; McLemore v. Mabson, 20 Ala. 139; Thompson v. Christian, 28 Ala. 399; Helvenstein v. Higgason, 35 Ala. 262; Garner v. Leaverett, 32 Ala. 410; Thompson v. Sheppard, 85 Ala. 611; 5 So. Rep. 334; Frank v. Riggs, 93 Ala. 252; 9 So. Rep. 359; Heflin v. Phillip, (Ala.) 11 So. Rep. 729. Wheat v. Dotson, 12 Ark. 699; McDaniel v. Grace, 15 Ark. 135; Robards v. Cooper, 16 Ark. 288; Key v. Henson, 17 Ark. 254; Hoppes v. Cheek, 21 Ark. 585; Lewis v. Davis, 21 Ark. 239; Busby v. Treadwell, 24 Ark. 457; Sorrells v. McHenry, 38 Ark. 127. But in a suit to forclose a vendor's lien the covenantee may have credit for all sums necessarily paid by him to protect the title. Morris v. Ham, 47 Ark. 293. Possession of a part of the premises by a mere intruder without color of title, through a mistake as to boundaries, is not such a breach of the covenant for quiet enjoyment as will entitle the purchaser to detain the purchase money. Hoppes v. Cheek, 21 Ark. 585. Where the vendor agreed to convey the property before payment of the purchase money, and the purchaser accepted a deed which conveyed none of the property purchased, and afterwards discovered the error, it was held that he might refuse to pay the purchase money until the vendor should execute a

proper conveyance of the premises. McConnell v. Little, 51 Ark. 333; 11 S. W. Rep. 371. To the text: Salmon v. Hoffman, 2 Cal. 138; 56 Am. Dec. 322; Fowler v. Smith, 2 Cal. 39. In Norton v. Jackson, 5 Cal. 262, it was held that eviction by process of law was necessary to enable the covenantee to set up breach of warranty as a defense in an action for the purchase money. To the text: Hurd v. Smith, 5 Colo. 233. (But see McCutchen v. Klaes, 143 Pac. 143; 26 Colo. App. 374, where held that the contract remains executory, notwithstanding the execution and delivery of a warranty deed by the vendor, and that upon a clear failure of the title the grantee is entitled to rescind and recover the purchase money paid.) Smoot v. Coffin, 4 Mackey (D. C.), 407; Bletz v. Willis, 19 D. C. 449. McGhee v. Jones, 10 Ga. 135; Roberts v. Woolbright, 1 Ga. Dec. 98. Brantley Co. v. Johnson, 102 Ga. 850; 29 S. E. Rep. 486. But in Smith v. Hudson, 45 Ga. 208, it was held that the purchaser might detain the purchase money if he could show that his remedy upon the warranty would not protect him. It would seem, also, that he might detain the purchase money in that State if there had been a judgment against him in ejectment, though there had been no actual eviction, since such a judgment, without eviction, amounts to a breach of warranty in Georgia. Clark v. Whitehead, 47 Ga. 516, overruling Leary v. Durham, 4 Ga. 593. Where a purchaser caused the conveyance with warranty to be made to a sub-purchaser, himself remaining liable for the purchase money, it was held that he could not, in an action against him for the purchase money, avail himself of the breach of warranty in the conveyance to the sub-purchaser, even though he held the sub-purchaser's notes as collateral. Gordon v. Phillips, 54 Ga. 240. To the text: Deal v. Dodge, 26 Ill. 458; Vining v. Leeman, 45 Ill. 246; Whitlock v. Denlinger, 59 Ill. 96; Lafarge v. Matthews, 68 Ill. 328; People v. Sisson, 98 Ill. 335. The same rule applies in case of the eviction of a lessee by paramount title. Pepper v. Rowley, 73 Ill. 262. In Buckles v. Northern Bank of Ky., 63 Ill. 268, 271, the rule is qualified by the statement that such a defense cannot be made so long as the possession of the vendee remains undisturbed and the paramount title unasserted. The qualification is obscure, in that it does not appear what is meant by the assertion of the paramount title, whether a suit prosecuted or threatened, or a suit which has resulted in a judgment of eviction. The rule that failure of title cannot be set up as a defense where there has been no breach of the vendor's covenants does not apply where the purchase-money notes and mortgage expressly provide that they shall not be paid until the title has been perfected. Smith v. Newton, 38 Ill. 230; Weaver v. Wilson, 48 Ill. 128. Whisler v. Hicks, 5 Bl. (Ind.) 100; 33 Am. Dec. 454; Smith v. Ackerman, Id. 541. In both of these cases the objection made to the payment of the purchase money was an outstanding contingent right of dower in the wife of the vendor. To the text: Buell v. Tate, 7 Bl. (Ind.) 55; Pomeroy v. Burnett, 8 Bl. (Ind.) 142; Oldfield v. Stevenson, 1 Ind. 153; Streeter v. Henly, 1 Ind. 401; Clark v. Snelling, 1 Ind. 382; Hooker v. Folson, 4 Ind. 90; Wilkerson v. Chadd, 14 Ind. 448; Laughery v. McLean, 14 Ind. 106; Estep v. Estep, 23 Ind. 114; Starkey v. Neese, 30 Ind. 222; Stephens v. Evans, 30 Ind. 39; Hanna v. Shields, 34 Ind. 84; James v. Hayes, 34 Ind. 272, distinguishing Murphy v. Jones, 7 Ind. 529; Brewer v. Parker, 34 Ind. 172; Cartwright

v. Briggs, 41 Ind. 184; Strain v. Huff, 45 Ind. 222; Cornwell v. Clifford, 45 Ind. 392; Mahoney v. Robbins, 49 Ind. 146; Jones v. Noe, 74 Int. 368; Gibson v. Richart, 83 Ind. 313; Bethell v. Bethell, 92 Ind. 318; Marsh v. Thompson, 102 Ind. 272; 1 N. E. Rep. 630; Parker v. Culbertson, (Ind.) 27 N. E. Rep. 619. Grubbs v. Barber, 102 Ind. 131; 1 N. E. Rep. 636; Pearson v. Wood, 27 Ind. App. 419; 61 N. E. Rep. 593. Mauzy v. Flint, 42 Ind. App. 386; 83 N. E. 757; Rook v. Wright, 186 Ind. 654; 117 N. E. 864. In Small v. Reeves, 14 Ind. 163, a leading case in that State, the rule was thus stated: "Where a deed (with covenants) is made and accepted and possession taken under it, want of title will not enable the purchaser to resist the payment of the purchase money or recover more than nominal damages on his covenants while he retains the deed and possession, and has been subjected to no inconvenience or expense on account of the defect of title." In Fehrle v. Turner, 77 Ind. 530, a purchaser was permitted to show that a suit to recover part of the land was being prosecuted against him, and to enjoin proceedings to collect the purchase money, until the adverse claimant's suit should be determined. Overruling Strong v. Downing, 34 Ind. 300. In Peterson v. McCullough, 50 Ind. 35, the purchaser claimed an abatement of the purchase money by reason of an incumbrance resulting from the right of a canal company to overflow part of the land. Relief was denied on the ground that the evidence did not show an easement in the company by prescription. To the text: Allen v. Pegram, 16 Iowa, 163; Nosler v. Hunt, 18 Iowa, 212; Gifford v. Ferguson, 47 Iowa, 451; Burrows v. Stryker, 47 Iowa, 477. Of course, it is no defense to an action for the purchase money that incumbrances on the land were not removed by the grantor, until a few days before the commencement of such suit. Winch v. Bolton, (Iowa) 63 N. W. Rep. 330. In Blasser v. Moats, (Iowa) 46 N. W. Rep. 1076, a purchaser who had taken a conveyance with general warranty and a verbal agreement that the vendor would procure his wife to sign the deed, was permitted to resist the payment of the purchase money on the ground that the wife had not signed the deed. To the text: Scantlin v. Anderson, 12 Kans. 85; Chambers v. Cox, 23 Kans. 393; Sunderland v. Bell, 39 Kans. 21, 663. Ingraham v. Ward, 56 Kans. 550; 44 Pac. Rep. 14. Lewis v. Norton, 5 T. B. Mon. (Ky.) 1; Rawlins v. Timberlake, 6 T. B. Mon. (Ky.) 225; Miller v. Long, 2 A. K. Marsh. (Ky.) 334; Gale v. Conn., 3 J. J. Marsh. (Ky.) 538; Simpson v. Hawkins, 1 Dana (Ky.), 303; Taylor v. Lyon, 2 Dana (Ky.), 276; Casey v. Lucas, 2 Bush (Ky.), 55; Trumbo v. Lockridge, 4 Bush (Ky.), 416; Butte v. Riffe, 78 Ky. 353; Bellfont Iron Wks. v. McGuire, (Ky.) 11 S. W. Rep. 203. Com. School Dist. v. Conrad, 19 Ky. Law R. 199; 39 S. W. Rep. 497; Vivian v. Stevens, (Ky.) 56 S. W. Rep. 520; Atkinson v. Hager, (Ky.) 121 S. W. 955. In Pryse v. McGuire, 81 Ky. 608, it was held that if the purchaser had never been put in possession, he might defend an action for the purchase money on the ground of failure of the title, though there had been no eviction. It will be remembered, however, that inability of the grantee to get possession is a constructive eviction from the premises. Ante, § 146. If the purchaser take a deed with general warranty from the husband, he will be deemed to have relied on the warranty, and cannot enjoin the collection of the purchase money unless he be evicted by the doweress.

Booker v. Meriweather, 4 Litt. (Ky.) 212. A restriction in a prior deed by which a subsequent grantee is preventable from selling liquor on the premises, will not entitle such grantee to detain the purchase money, the covenantor being alive and solvent. Smith v. Jones, (Ky.) 31 S. W. Rep. 475. In Louisiana, owing to the prevalence of the civil law, which disregards the rule *caveat emptor*, the distinction between executed and executory contracts with respect to the detention of the purchase money on failure of the title, is not observed. A perfect outstanding title in a stranger is held equivalent to eviction in that State, and entitles the grantee to rescind the contract. McDonald v. Vaughan, 14 La. Ann. 716. One who buys land at a sale under execution against himself, and sells the land again, cannot refuse to pay the original price on the ground that the property is incumbered — no claim on that account having been made against him. Oakey v. Drummond, 7 La. Ann. 205. To the text: Wentworth v. Goodwin, 21 Me. 150, *semble;* Jenness v. Parker, 24 Me. 289, *semble.* Timms v. Shannon, 19 Md. 296, 316; 81 Am. Dec. 632. In Middlekauff v. Barrick, 4 Gill (Md.), 290, it was broadly stated that if there was no fraud the purchaser had no remedy except upon his covenants, although he had been evicted by an adverse claimant. It does not appear, however, that this language was intended to restrict the covenantee's right to avail himself of a breach of covenant by way of recoupment. To the text: Lothrop v. Snell, 11 Cush. (Mass.) 453; Bartlett v. Tarbell, 12 Allen (Mass.), 125; Knapp v. Lee, 3 Pick. (Mass.) 459; Rice v. Goddard, 14 Pick. (Mass.) 293. Haldane v. Sweet, 55 Mich. 196; 20 N. W. Rep. 902; Pfirrman v. Wattles, (Mich.) 49 N. W. Rep. 40; Leal v. Terbush, 52 Mich. 100; 17 N. W. Rep. 713, *semble.* This was an action to recover back purchase money paid by a covenantee. The court does not advert to the rule remitting the purchaser to his action on the covenants, but rests its decision refusing the purchaser relief, on the ground that the entire consideration had not failed. To the text: Anderson v. Lincoln, 5 How. (Miss.) 279; Coleman v. Rowe, 5 How. (Miss.) 460; 37 Am. Dec. 164. The contract was executory in this case, but the vendor had executed a bond to make title. Vick v. Percy, 7 Sm. & M. (Miss.) 256; 45 Am. Dec. 303; Walker v. Gilbert, 7 Sm. & M. (Miss.) 456; Hoy v. Taliaferro, 8 Sm. & M. (Miss.) 727; McDonald v. Green, 9 Sm. & M. (Miss.) 138, *semble;* Duncan v. Lane, 8 Sm. & M. (Miss.) 744; Gilpin v. Smith, 11 Sm. & M. (Miss.) 129; Heath v. Newman, 11 Sm. & M. (Miss.) 201; Dennis v. Heath, 11 Sm. & M. (Miss.) 206; 49 Am. Dec. 51; Johnson v. Jones, 13 Sm. & M. (Miss.) 580; Wailes v. Cooper, 24 Miss. 232; Harris v. Rowan, 24 Miss. 504; Winstead v. Davis, 40 Miss. 785; Ware v. Houghton, 41 Miss. 382; 93 Am. Dec. 258, where, however, the warranty was of title to a slave; Guice v. Sellers, 43 Miss. 52; 5 Am. Rep. 476; Miller v. Lamar, 43 Miss. 382. Cooley v. Rankin, 11 Mo. 647; Connor v. Eddy, 25 Mo. 75; Wellman v. Dismukes, 42 Mo. 101; Eddington v. Nix, 49 Mo. 134; Wheeler v. Standley, 40 Mo. 509; Mitchell v. McMullen, 59 Mo. 252; Hart v. Railroad Co., 65 Mo. 509; Key v. Jennings, 66 Mo. 356; Hunt v. Marsh, 80 Mo. 398; Dudley v. Waldrop, (Mo. App.) 183 S. W. 1095. A purchaser who accepts a conveyance from a stranger thereby waives his right to recover from the vendor money paid in removing incumbrances from the land. Herryford v. Turner, 67 Mo. 296. To the text: Mills v. Saunders, 4 Neb. 190. Perkins v. Bamford, 3 N. H. 522; Getchell v. Chase, 37 N. H. 106; Drew v. Towle, 7 Fost. (N. H.) 412; 54 Am. Dec. 309, where the rule stated in the text was held to apply only where there has been a total failure of the consideration. To the text: Beach v. Waddell, 4 Halst. Ch. (N. J.) 299. Kuhnen v. Parker, 56 N. J. Eq. 286; 38 Atl. Rep. 641; Gihon v. Morris, 90 N. J. Eq. 230; 106 A. 807. In Cooper v. Bloodgood, 32 N. J. Eq. 209, it was held that the necessity of obtaining a lease of riparian rights from the State could not be held an eviction entitling the covenantee to detain the purchase money where he might have obtained the land itself by appropriation. To the text: Bumpuss v. Platner, 1 Johns. Ch. (N. Y.) 213; Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519; 7 Am. Dec. 554; Woodruff v. Bunce, 9 Paige Ch. (N. Y.) 443; 38 Am. Dec. 559; Miller v. Avery, 2 Barb. Ch. (N. Y.) 594; Woodworth v. Jones, 2 Johns. Cas. (N. Y.) 417; Lattin v. Vail, 17 Wend. (N. Y.) 188; Whitney v. Lewis, 21 Wend. (N. Y.) 131; Tallmadge v. Wallis, 25 Wend. (N. Y.) 118; Edwards v. Bodine, 26 Wend. (N. Y.) 109; Batterman v. Pierce, 3 Hill (N. Y.), 171; Lamerson v. Marvin, 8 Barb. (N. Y.) 14; Farnham v. Hotchkiss, 2 Keyes (N. Y.), 9; Ryerson v. Willis, 81 N. Y. 277; Gifford v. Society, 104 N. Y. 139; 10 N. E. Rep. 39: Dunning v. Leavitt, 85 N. Y. 30; 39 Am. Rep. 617; Clanton v. Burges, 2 Dev. Eq. (N. C.) 13; Wilkins v. Hogue, 2 Jones Eq. (N. C.) 479; Crowell v. Jones, 167 N. C. 386; 83 S. E. 551. In Mills v. Abraham, 6 Ired. (N. C.) 456, it was held that a purchaser with full knowledge of the defective title, and taking covenants for his protection, could not resist the payment of the purchase money if the covenants were broken. In Ohio the purchaser is by statute permitted to retain the possession and defend a suit for the purchase money by bringing in the person claiming an adverse estate or interest, so that the rights of all parties may be adjusted in the same action. Rev. Stat. Ohio, 1884, § 5780. Before the enactment of that statute the rule was as stated in the text. Stone v. Buckner, 12 Ohio, 73; Edwards v. Norris, 1 Ohio, 524; Hill v. Butler, 6 Ohio 216. Under the same statute the purchaser might have deducted from the purchase money by way of counterclaim the amount of an incumbrance on the premises discharged by him. Craig v. Heis, 30 Ohio St. 550. For the construction of this statute see Templeton v. Kramer, 24 Ohio St. 554. In Purcell v. Heerny, 28 Ohio St. 39, it was held that, independent of such statutory provision, the purchaser must show an eviction before he can claim relief against payment of the purchase money. To the text: Fellows v. Evans, 33 Oreg. 30; 53 Pac. Rep. 491; Failing v. Osborne, 3 Oreg. 498. In this case a stipulation of the vendors that "if it should be adjudged that they had no legal right to sell, and if the purchaser by reason thereof be legally compelled to give up the premises," they should refund the purchase money, was given the effect of a covenant of warranty, and the purchaser held not entitled to detain the purchase money unless there had been an actual or constructive ouster. The Pennsylvania decisions on the point stated in the text will be found post, § 271. In an action on a purchase-money mortgage the defendant may set off damages arising from a breach of warranty of the title, but he will not be entitled to interest on such damages if he remain in possession, even though a judgment in ejectment had been recovered against him. Wacker v. Straub,

"Generally speaking," says Sugden, "a purchaser, after a conveyance, has no remedy except upon the covenants he has obtained, although evicted for want of title; and however fatal the defect of title may be, if there is no fraudulent concealment on the part of the seller, the purchaser's only remedy is under the covenants."[4] Practically the same rule exists in many of the American States, with this qualification, that in any case in which there has been a breach of the covenants which the purchaser has received, for which he would be entitled to recover substantial damages, he may in an action against him for the purchase money recoup the amount

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88 Pa. St. 32. Price v. Hubbard, 8 S. Dak. 92; 65 N. W. Rep. 436. To the text: Elliott v. Thompson, 4 Humph. (Tenn.) 99; 40 Am. Dec. 630; White v. Ewing, 69 Fed. 451; Young v. Butler, 1 Head (Tenn.), 640, the court saying: "From the facts in this record we have no doubt that it was the purpose of the purchaser from the beginning to obtain the deed and the possession of the property without paying for it until such time as it suited his convenience to do so," a remark applicable to a large percentage of injunctions against the collection of the purchase money. The fact that the vendor's title is merely equitable will not entitle the purchaser to detain the purchase money. The subsequently acquired legal title will enure to the benefit of the purchaser under the vendor's covenant of warranty. McWhirter v. Swaffer, 6 Baxt. (Tenn.) 342. In McNew v. Walker, 3 Humph. (Tenn.) 186, the vendor having only a life estate in the premises conveyed the same in fee with general warranty. The court refused to enjoin the collection of the purchase money, there being no fraud and no eviction alleged. Westervelt v. Menly, (Tex. Civ. App.) 216 S. W. 680. In Texas Ry. Co. v. Gentry, 69 Tex. 625; 8 S. W. Rep. 98, it was held that a purchaser of a railroad property with warranty could not resist the payment of the purchase money on the ground that certain rights of way enjoyed by the company had not been acquired, if proceedings for compensation by the true owner were barred by the Statute of Limitations. For the Texas doctrine relating to detention of the purchase money, see post, § 189. To the text: Dix v. School Dist., 22 Vt. 309, *semble.* As to the rule governing the right of the purchaser to detain the purchase money, as enforced in Virginia, where the title is found to be bad, after the acceptance of a conveyance, see post, § 337. To the text: Hoyt v. Rothe, 95 Wash. 369; 163 Pac. 925; Digman v. West, 71 W. Va. 296; 76 S. E. 561; Horton v. Arnold, 18 Wis 212; Eaton v. Tallmadge, 22 Wis. 526; Smith v. Hughes, 50 Wis. 620; 7 N. W. Rep. 653; Bardeen v. Markstrum, 64 Wis. 613; 25 N. W. Rep. 565. Campbell v. Medbury, 5 Biss. (C. C.) 33. In Hall v. Gale, 14 Wis. 54, and Walker v. Wilson, 13 Wis. 522, the non-existence of a right to raise the water in a mill dam to a specified height, the purchaser having been enjoined by the adjacent proprietors, was held a breach of the covenant of warranty entitling him to detain the purchase money.

[4] Sugd. Vend. (8th Am. ed.) 383 (251); 2 id. 193 (549).

of those damages from the plaintiff's demand.[5] But so long as there has been no such breach of the covenant of warranty, or for quiet enjoyment, or against incumbrances, as would entitle the covenantee to recover substantial damages against the covenantor, the former cannot, either at law or in equity, resist the payment of the purchase money. In some of the States, however, as will hereafter be seen, the rigor of this rule is relaxed where suit is threatened or prosecuted by the adverse claimant, or where from non-residence or insolvency of the covenantor, judgment against him for breach of his covenant either cannot be obtained, or, if obtained, will prove an unavailing remedy.[6]

An illustration of the rule stated in the foregoing proposition is afforded by the early and leading case of Abbott v. Allen.[7] There the purchaser entered under a conveyance with covenants of seisin and general warranty, and executed a mortgage to secure the deferred payments of the purchase money. When the mortgage was about to be enforced, the purchaser prayed an injunction against the sale of the premises, but set out in his bill of facts which went no farther than to show that his title was doubtful or unmarketable. The injunction was dissolved by Chancellor JAMES KENT, who said that "it would lead to the greatest inconvenience and perhaps abuse, if a purchaser in the actual enjoyment of land, when no person asserts or takes any measures to assert a hostile claim, can be permitted on suggestion of a defect or failure of title, and on the principle of *quia timet,* to stop the payment of the purchase money, and of all proceedings at law to recover it."

Of course if the deed contain an express provision that the purchase money may be detained or abated if adverse claims or incumbrances should be asserted against the property, the rule restricting the purchaser to his covenants in case the title fails does not apply. The purchaser is at liberty to protect himself by special covenants or agreements;[8] and these it is apprehended will prevail over the usual and formal covenants for title contained in the deed, if inconsistent with them.

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[5] Ante, cases cited n. 3, p. 481.

[6] Post, chs. 26 and 34. In White v. Ewing, 69 Fed. Rep. 451, it was held that the insolvency of the grantor could not be availed of as a defence to an action for the purchase-money, if the grantor's grantor, who had conveyed with general warranty, was solvent.

[7] 2 Johns. Ch. (N. Y.) 519; 7 Am. Dec. 554.

An important exception to the general rule that a purchaser who has received a deed with covenants of general warranty cannot detain the purchase money unless he has been evicted, exists where the deed conveys an unknown, uncertain and undetermined interest in the land, and the grantee has never been let into possession. Thus where the grantor conveyed all of his "right, title and interest in and to a certain undivided tract of land," with general warranty, and it appeared that he had no interest whatever in the land conveyed, that fact was held a complete defense to an action for the purchase money.[9] It has been held that the right to set up a breach of warranty as a defense to an action for the purchase money is not affected by the fact that the land was conveyed by the defendant's direction to a third party, and the warranty made to him.[10] If the purchaser agrees to take his title from a third person who has nothing to do with the bargain, and accepts from that person a conveyance with covenants for title, he must look to those covenants for redress if the title fails, and cannot on that ground defend an action by the vendor to recover the purchase money.[11] Whatever judgment is rendered on the defendant's plea setting up a breach of covenant in an action against him for the purchase money, whether against him or in his favor, will be *res adjudicata* of his rights with respect to the alleged breach, and will estop him from afterwards maintaining an action on the covenant to recover damages for the breach.[12]

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[8] Platt v. Gilchrist, 3 Sandf. (N. Y.) 118, where the court said: "The possibility that the title might fail and the purchaser be evicted, was in the minds of the parties. They might also have provided that in case of a claim being made by title paramount before actual payment of the consideration money, the right of the vendor to call for its payment should be suspended. But this they have not thought proper to do, and this court can with no more propriety add such a clause to the contract and suspend the collection of the purchase money, than it can suspend the collection of rent expressly covenanted to be paid, upon the destruction of the buildings, where the parties have not themselves provided against it." In Walter v. Johnson, 2 Nev. 354, the deed contained a provision that the purchase money should be abated if the grantee had to pay for the release of any adverse claim against the property. The court held that the words "adverse claim" meant a valid and paramount title, and that the grantee was not entitled to credit for a sum paid to a claimant without color of title. In Chaplin v. Briscoe, 11 Sm. & M. (Miss.) 372, where the deed contained a similar stipulation, it was held that the covenantee might avail himself of the defense of failure of the title, though he had conveyed away his interest in the premises to a stranger.

[9] Lewis v. West, 23 Mo. App. 495, the court saying that "to such a case would seem to apply the principle on which is based the rule that the covenants of seisin (warranty also) are broken as soon as made when the land conveyed is in the possession of a stranger at the date of the deed under a paramount title, and substantial damages are recoverable by the grantee."

[10] Bottorf v. Smith, 7 Ind. 673.

The purchase money cannot be detained in a case in which the covenantee has executed a release of warranty to his grantor.[13]

The rule that a grantee with covenants of warranty cannot resist the payment of the purchase money until actual or threatened eviction, does not apply where the grantor pointed out, at the time of the sale, incorrect boundaries, enclosing more land than was actually conveyed.[14]

The answer of the grantee setting up a breach of the grantor's covenants for title in an action to recover the purchase money, must contain an offer to reconvey the premises to the grantor.[15]

§ 181. **MERGER OF PRIOR AGREEMENTS.** The principle upon which these decisions largely rest is that the purchaser by demanding covenants for title and receiving them has provided his remedy in case the title fails, and that in those covenants are merged all prior agreements of the parties respecting the title, whether oral or written, that are inconsistent with them.[16] There are exceptions to this doctrine of merger, however; namely, that promises made by a vendor, after the execution of a conveyance but before it has been delivered and accepted, that he will discharge incumbrances on the premises are not merged in the conveyance afterwards accepted. Nor are such promises within the Statute of Frauds or obnoxious to the rule that evidence of a contemporaneous verbal agreement will not be received to alter the terms of a written contract.[17] Collateral stipulations of which the conveyance is not necessarily a performance, are not conclusively presumed to have been merged in the conveyance. Thus, an agreement by the *purchaser* to pay off an existing mortgage on the

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[11] Leonard v. Austin, 2 How. L. (Miss.) 888.

[12] Tallmadge v. Wallis, 25 Wend. (N. Y.) 116. Tillotson v. Grapes, 4 N. H. 444, 449.

[13] White v. Furtzwangler, 81 Ga. 66; 6 S. E. Rep. 692.

[14] King v. Bressie (Tex. Civ. App.), 32 S. W. Rep. 729. This decision might well be rested upon the ground of fraud or mistake of the grantor.

[15] Herron v. Harbour, 57 Okl. 71; 155 Pac. 506.

[16] Rawle Covts. (5th ed.) § 320. Miller v. Avery, 2 Barb. Ch. (N. Y.) 582, where it was said that the doctrine of merger applied as well in equity as at law. Hunt v. Amidon, 4 Hill (N. Y.), 345; 40 Am. Dec. 283. Bryan v. Swain, 56 Cal. 616. Little v. Thropp, 245 Pa. 539; 91 Atl. 924. A verbal agreement between the parties at the time of the execution of a deed with warranty and a purchase-money note and mortgage payable in ninety days, that if within the ninety days the title be found bad it may be rejected, has

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been held to be merged in the deed and not available as a defense to the foreclosure of the mortgage if the title be found bad. Jewell v. Bannon, 12 Pa. Co. Ct. Rep. 399. In Beard v. Dalaney, 35 Iowa, 16, the vendor conveyed the premises with general warranty, and also executed a title bond conditioned to perfect the title within a reasonable time. This was not done and a judgment was recovered on the bond. The point that the title bond was merged in the conveyance was not raised. The court held that the purchaser could not recover on the warranty without showing an eviction, but that the same rule did not apply in the action on the title bond. A bond for title is merged in a conveyance subsequently given. Shontz v. Brown, 27 Pa. St. 123. A special covenant in a title bond to indemnify the vendee against all costs, charges and damages, if the land recovered from him under a paramount title, is not merged in a subsequent conveyance of the land with warranty. Cox v. Henry, 32 Pa. St. 18.

[17] In Remington v. Palmer, 62 N. Y. 31, after the execution of the deed, but before it was delivered, a question arose as to which of the parties should pay an assessment on the premises. The vendor having agreed to pay it, the purchaser accepted a conveyance. Afterwards, in an action by the purchaser to recover the amount of the assessment from the vendor, the latter set up the defense that his agreement to pay the assessment was merged in the conveyance and that plaintiff could not recover. The defense was adjudged insufficient, the court saying: "It is said that all agreements preceding the delivery of the deed were merged in the same. This position is not a sound one, for while all prior agreements may be merged in the deed when executed it by no means follows, that, before the contract is fulfilled by a delivery and acceptance of the deed, that conditions may not be made which are obligatory upon the parties. The deed being ready for delivery, and the plaintiff ready to pay the money, they had a perfect right to exact, as a condition of fulfilling the contract, that the defendant should pay the assessment when it became due. This is not contradicting a written agreement by parol, but evidence of the terms upon which the money was paid and the conveyance delivered. As the agreement was made after the deed was executed and before delivery there could be no merger of this agreement in the deed." Citing Murdock v. Gilchrist, 52 N. Y. 242.

premises has been held not to have been merged in a subsequent conveyance of the premises with covenants of warranty.[18] Also, that the original provisions of the contract respecting the title, are not merged in the conveyance, unless the same be accepted in complete execution of the agreement.[19] A covenant to put the vendee in possession is not merged in a subsequent conveyance with warranty.[20] And a contract which expressly provides that its restrictions and stipulations shall be complied with and carried out as if embodied in the deed, will not be held to have been merged therein.[21]

It has been held that an executory contract for the *exchange* of lands is not merged in the deeds of conveyance executed in pursuance thereof, and that if one of the parties thereto agreed to remove an incumbrance from the land to be conveyed by him, such promise would not be merged in the conveyance when executed.[22] And the better opinion is that fraud on the part of the vendor with respect to the title, is not merged in a subsequent conveyance of the premises with warranty, the grantee accepting the conveyance in ignorance of the fraud.[23]

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[18] Reed v. Sycks, 27 Ohio St. 285. Disbrow v. Harris, 122 N. Y. 365; 25 N. E. 356. Here the stipulation was that a small portion of the purchase money should be kept back until certain repairs to the premises were made by the grantor. Citing Morris v. Whitcher, 20 N. Y. 41; Whitbeck v. Waine, 16 N. Y. 532; Bennett v. Abrams, 41 Barb. (N. Y.) 619; Murdock v. Gilchrist, 52 N. Y. 242. Dillingham v. Estill, 3 Dana (Ky.), 21.

[19] Cavanaugh v. Casselman, 88 Cal. 543; 26 Pac. Rep. 515, where the conveyance embraced only a part of the purchased premises. Read v. Loftus. 82 Kan. 485; 108 Pac. 850; Davis v. Lee, 52 Wash. 330; 100 Pac. 752; 132 Am. St. Rep. 973. The burden is on the covenantor to show that a particular incumbrance was excepted from the operation of the covenant. N. Y. etc. Coal Co. v. Graham, 226 Pa. 348; 75 Atl. 657. In Sessa v. Arthur, 183 Mass. 230; 66 N. E. Rep. 804, it was held that the purchaser did not waive an express provision in the contract of sale that he was to have a warranty deed free from incumbrances, by accepting a deed declaring the premises to be subject to the incumbrance of a certain passage way between the premises and an adjoining house, and retaining the deed two months without objection to the title.

[20] German Am. Real Est. Co. v. Starke, 84 Hun (N. Y.), 430; 32 N. Y. Supp. 403. Williams v. Frybarger, 9 Ind. App. 558.

[21] Newbold v. Peabody Heights Co., 70 Md. 499; 17 Atl. Rep. 372.

[22] Bennett v. Abrams, 41 Barb. (N. Y.) 619, 625.

[23] Post, §§ 270, 276.

§ 182. **EFFECT OF PURCHASE WITH KNOWLEDGE OF DEFECT OR INCUMBRANCE.** If a man purchase land knowing that the title is bad or the land is incumbered, that fact, as has been seen, does not affect his right to recover on the covenants for title in his deeds, for it may be that he was induced to purchase because of the security and indemnity from loss afforded by his vendor's covenants.[24] But whether in such a case upon a breach of those covenants he will be suffered to detain the purchase money is a question upon which there has been a conflict of decision. The weight of authority and the better opinion seems to be that he must pay the purchase money and look to his covenants for relief,[25] except in those cases in which the vendor, *after* the deed had been executed, but before it had been delivered and accepted expressly agreed to remove the incumbrances. Such a promise, it will be remembered, has been held not to be merged in the subsequent conveyance.[26] There are cases which affirm the right of the purchaser to detain the purchase money, notwithstanding his acceptance of a conveyance with notice of the incumbrance,[27] and it cannot be denied that there would be much hardship in denying him that right where the vendor had in the first instance agreed to extinguish the incumbrance, but had neglected or refused to do it.[28]

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[24] Ante, § 124. Wadhams v. Swan, 109 Ill. 46.

[25] Wailes v. Cooper, 24 Miss. 208; Gartman v. Jones, 24 Miss. 234; Stone v. Buckner, 12 Sm. & M. (Miss.) 73, *obiter.* Cummins v. Boyle, 1 J. J. Marsh. (Ky.) 480. Stansbury v. Taggart, 3 McLean (U. S.), 457. In Perkins v. Williams, 5 Coldw. (Tenn.) 512, it was held that the rule stated in the text would apply even though the vendor was insolvent. In Greenleaf v. Cook, 2 Wh. (U. S.) 17, the court said: "'Acquainted with the extent of the incumbrance and its probable consequences, the defendant consents to receive the title which the plaintiff was able to make, and in receiving it executes his note for the purchase money. To the payment of a note given under such circumstances the existence of the incumbrance can certainly furnish no legal objection." *Per* MARSHALL, Ch. J. In Ryerson v. Willis, 8 Daly (N. Y.) 462, a grantee with warranty gave a mortgage on the premises for a balance of the purchase money, under an agreement that it should not be collected until the grantor should procure and deliver to him a quit claim of a certain interest in the premises. The quit claim not having been delivered the grantee brought a suit to cancel the mortgage, but the court held that he was not entitled to that relief, and that his remedy was upon the covenants in the deed. This decision was rested largely upon the ground that the grantee had purchased with notice of the defective title.

[26] Ante, § 181. Remington v. Palmer, 62 N. Y. 31.

[27] Jaques v. Esler, 4 N. J. Eq. 461, citing Tourville v. Nash, 3 P. Wms. 306. Johnson v. Gere, 2 Johns. Ch. (N. Y.) 546. Shannon v. Marselis, Saxt. (N. J.) 425; Van Waggoner v. McEwen, 1 Gr. (2 N. J. Eq.) 412. These authori-

There is a conflict of decision upon the question whether, as between vendor and purchaser, the latter will be deemed to have notice of defects and incumbrances which appear from the public records. The weight of authority and the better opinion seems to be that the law of notice from the public registers has no application as between vendor and purchaser.[29]

§ 183. **RECOUPMENT.** At common law, a total failure of consideration could always be pleaded in bar to an action on a contract, but if the failure of the consideration was only partial, the defendant was, as a general rule, driven to his cross-action against the plaintiff. A total failure of the consideration occurred wherever the defendant received absolutely no benefit under the contract; but if he received any such benefit, no matter how small, the plea of failure of consideration could not be sustained, and the defendant was forced to his separate action.[30] If the contract was for the sale or lease of lands, there could be no total failure of the consideration if the purchaser was put in possession[31] and enjoyed the estate without liability to a stranger for the rents and profits,[32] in case the title was not such as he might demand, *e. g.*, a life estate instead of an estate in fee. This seems to have been the rule, even though the purchaser was evicted by the real owner. But now, by virtue of statutes in many of the American States,[33]

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ties, however, go but little further than the general proposition that knowledge of the defect or incumbrance at the time of the purchase does not affect the purchaser's right to recover on the covenants.

[28] In Stelzer v. La Rose, 79 Ind. 435, it was held that a purchaser under the circumstances stated in the text could not detain the purchase money so long as he had suffered no loss or injury on account of the incumbrance.

[29] Shannon v. Marselis, Saxt. (N. J.) 413, 426. Ante, § 104.

[30] Chitty Cont. (10th Am. ed.) 815. An exception exists in the case of a breach of warranty of chattels where the defendant returned the goods. Id. 491.

[31] Moggridge v. Jones, 3 Camp. 38.

[32] Jenness v. Parker, 24 Me. 295.

[33] Thus, in Virginia (Code, 1887, § 3299), it is provided that: "In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such

the defendant in any action on a contract is allowed to file a special plea, setting up as a defense any matter which would entitle him to damages at law for breach of the contract, or to relief in equity against the obligation thereof. In some of the States, however, no such statutes exist, or, at least, none that permit the defendant to set up a claim for unliquidated damages as a defense to an action on a contract. In such States, the defendant, in an action for the contract price of lands, if he has been evicted from the premises and has a present right to recover damages on the covenants of his grantor, is allowed to set up those facts in recoupment of the plaintiff's demand, even though he may

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breach of any warranty to him of the title, or the soundness of personal property for the price or value whereof he entered into the contract, or any other matter as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter arising under the contract existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter as would entitle him to such relief in equity." The object of this statute was to abolish the common-law rule that the defendant could not in effect have at law a rescission of a contract, the benefits of which he had partly enjoyed, and to admit of the defense of partial failure of consideration by way of set-off. A similar statutory provision, it is believed, exists in most of the States. In Alabama, the early rule was that unliquidated damages could not be set off against a demand for the purchase money. Dunn v. White, 1 Ala. 645. The removal of an outstanding incumbrance by a purchaser of land having a covenant against incumbrances was held to be within the rule. Cole v. Justice, 8 Ala. 793. A subsequent statute authorized the set off of not only mutual debts, but liquidated or unliquidated demands not sounding in damages merely. Rev. Code Ala. § 2642. It was held that the amount paid by a purchaser to extinguish an ontstanding vendor's lien was within this statute, and should be allowed as a set-off. Holley v. Younge, 27 Ala. 203. So, also, a breach of warranty arising from a deficiency in the quantity of land sold. Bell v. Thompson, 34 Ala. 633; Nelms v. Prewitt, 37 Ala. 389. So, also, a cross-demand growing out of a defect in the vendor's title is available as a set-off in an action on the notes for the purchase money, although the purchaser is in possession. Martin v. Wharton, 38 Ala. 637. In Eads v. Murphy, 52 Ala. 525, the fact that the vendors could not make a good title to the land was held a good set-off to an action for the purchase money. Under a statutory provision that a counterclaim must be one "existing in favor of a defendant and against a plaintiff, between whom several judgments might be had in the action," a sub-purchaser, against whom no personal judgment is asked, cannot defend, by way of counterclaim, an action to foreclose a purchase-money mortgage on the have had possession of the premises, and consequently may have received some benefit from the contract.[34]

"Recoupment differs from set-off in this respect; that any claim or demand the defendant may have against the plaintiff may be used as a set-off, while it is not a subject for recoupment unless it grows out of the very same transaction which furnishes the plaintiff's cause of action.[35] The defense of set-off did not exist at common law, but a right to *reduce* or *defeat* the plaintiff's demand on account of some matter connected therewith was conceded to the defendant.[36] Thus, in an action for work done, the defendant might deduct from the damages the value of material supplied by him,[37] and, in an action to recover money for dyeing goods, the defendant was permitted to show a custom which allowed him to deduct from the price of the work the amount of damage done to the goods while being dyed.[38] The extension of this principle, so as to allow the defendant in an action on a contract to set up as a defense unliquidated damages resulting from the plaintiff's nonperformance of the contract, has produced the modern doctrine of recoupment.[39] That defense is permitted for the purpose of avoid-

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ground that he had been evicted by paramount title, when that title was acquired through a sale for taxes which were incumbrances at the time of the plaintiff's grant. In other words, the counterclaim could be availed of only by the original purchaser. Nat. Fire Ins. Co. v. McKay, 21 N. Y. 191.

[34] In Doremus v. Bond, 8 Blackf. (Ind.) 368, it was said: "In just the amount, then, that the vendors have suffered the purchaser to pay by compulsion, to secure the benefit of their covenants of title and possession, have those covenants failed as a consideration; and that failure being perfected before the payment of all the purchase money, it may be recouped out of the original consideration. The defendant is not bound to plead the matter by way of set-off, springing, as it does, out of the default of the vendors in relation to the original contract, and not from any new or subsequent dealing on his part." In Texas, it is provided by statute that, if "a suit be founded on a certain demand, the defendant shall not be permitted to *set off* unliquidated damages founded on a tort or breach of covenant on the part of the plaintiff." Rev. St. Tex. 649. Howard v. Randolph, 73 Tex. 454. It may be doubted whether this statute would exclude the defense of recoupment. The statute seems to be directed against demands disconnected with the contract.

[35] Black Law Dict. *nom.* Recoupment.

[36] Chitty Cont. (10th Am. ed.) 946, 948.

[37] Newton v. Foster, 12 M. & W. 772.

[38] Bamford v. Harris, 1 Stark. 343.

[39] In Waterman on Set-Off (2d ed.), p. 575, it is said: "As a general rule,

ing circuity of action; and, after all, the true test of its availability is not so much whether there has or has not been a mere partial failure of the consideration, as whether the defendant has a present right to recover substantial damages from the plaintiff for breach of covenant; for, if he have such right, it would be not only unjust but contrary to public policy to compel him to pay over money which he could immediately recover from the payee.[40]

§ 184. **RECOUPMENT IN FORECLOSURE SUIT.** The defense of set-off, recoupment or counterclaim may be as freely made in an action to foreclose a purchase-money mortgage or vendor's lien as elsewhere.[41] But if no personal decree or judgment against the defendant, in case of a deficiency, is sought, the defense of *recoupment* for damages occasioned by a failure of the title will, as a general rule, be rejected, for the reason that such a proceeding is essentially *in rem;* that the vendor is only seeking to reach what he had sold, and that it is immaterial to the purchaser whether the title in such a case be good or bad.[42] The defense of set-off or

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after the purchase has been carried into execution by the delivery of the deed, if there has been no ingredient of fraud and the purchaser is not evicted, the insufficiency of title is no ground for relief against a security given for the unpaid purchase money." This is, undoubtedly, the general rule. It is, also, an equally well-established rule that where there has been an eviction to which the covenants of the grantee extend, he may recoup the damages thence sustained in an action for the purchase money. Rawle Covts. for Title (5th ed.), § 326. Consequently the reason given by Mr. Waterman for the rule as stated by him is somewhat unsatisfactory. He says: "The reason is that the bond and mortgage for the payment of the purchase money, and the covenant of warranty from the grantor, are separate and independent covenants and the breach of one cannot be urged as a defense to an action upon the other." Citing Timms v. Shannon, 19 Md. 296, 81 Am. Dec. 632; Grant v. Tallmans, 20 N. Y. 191. Such a reason would apply as well where there was an actual eviction as where the possession of the grantee has not been disturbed, and would be subversive of the rule which, to prevent a circuity of action, permits the evicted purchaser to retain the unpaid purchase money instead of turning him around to his action for breach of covenant.

[40] See further, Sawyer v. Wiswall, 9 Allen (Mass.), 39; Stacy v. Kemp, 97 Mass. 166; Carey v. Guillow, 105 Mass. 18, 7 Am. Rep. 494.

[41] 2 Jones Mort. (3d ed.) §§ 1496, *et seq.* Roake v. Sullivan, 125 N. Y. Supp. 835.

[42] Jones v. Fulghum, 3 Tenn. Ch. 193; Cohen v. Woolard, 2 Tenn. Ch. 686; Hurley v. Coleman, 3 Head (Tenn.), 265, which was a suit to enforce a vendor's lien; Curd v. Davis, 1 Heisk. (Tenn.) 574; Williams v. Sax (Tenn.),

counterclaim obviously stands on different grounds.[43] But if the conveyance under which the defendant held contained covenants for title, and there had been such a breach of them as to give him a present right to recover damages against the plaintiff, he may

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43 S. W. Rep. 868. See, also, post, § 333. Rawle Covts. (5th ed.) § 351; Hubbard v. Chappel, 14 Ind. 601; Rogers v. Place, 29 Ind. 577; Jackson v. Fosbender, 45 Ind. 305; McLeod v. Barnum, 131 Cal. 605, 63 Pac. Rep. 924. In Reed v. Tioga Manfg. Co., 66 Ind. 27, a personal judgment was sought against the defendant, but the rule stated in the text was admitted. Ludlow v. Gilman, 18 Wis. 552; Peters v. Bowman, 98 U. S. 56; Hulfish v. O'Brien, 5 C. E. Green (N. J.), 230; Kuhner v. Parker, 56 N. J. Eq. 286, 38 Atl. Rep. 641; Ratkewicz v. Kara, 88 N. J. Eq. 201, 103 Atl. 912. In the following New York cases, the court refused to stay the enforcement of purchase-money mortgages upon the mere ground that the title was defective: Platt v. Gilchrist, 3 Sandf. Ch. (N. Y.) 118; Griffith v. Kempshall, 1 Clarke Ch. (N. Y.) 571; Hoag v. Rathbun, 1 Clarke Ch. (N. Y.) 12; Farnham v. Hotchkiss, 2 Keyes (N. Y.), 9; York v. Allen, 30 N. Y. 105; Parkinson v. Sherman, 74 N. Y. 88; 30 Am. Rep. 268; Ryerson v. Willis, 81 N. Y. 277; Gifford v. Society, 104 N. Y. 139, 10 N. E. Rep. 39; Soule v. Dixon, 1 N. Y. Supp. 697; Wright v. Phipps, 90 Fed. 556, 98 Fed. 1007; Beebe v. Swartwout, 3 Gilm. (Ill.) 177, where it was said: "It will be observed that S. (the vendor) does not seek to collect the purchase money in this case; he simply asks to have the equity of redemption foreclosed if the purchase money is not paid. He cannot obtain a judgment against B. (the purchaser) and pay himself out of the general property of B. If he obtained any money at all, it is out of the special fund, the land, upon which he holds a mortgage. In this view of the case, the failure of title in his grantor can hardly affect him. His equity of redemption is worthless if the legal title to the premises fail." It is true that, if the mortgagor had paid a part of the purchase money, he would have an equitable interest in the property to that extent; but, in view of the fact that he could only obtain relief against a demand for the purchase money by showing a clear outstanding title in a stranger and an imminent danger of eviction from the premises, and that he would be liable over to the real owner for the mesne profits, there would be little to gain by resisting the foreclosure of a mortgage, if the mortgagee does not seek to hold him liable for a deficiency. If the purchaser had given a mortgage on other property to secure the purchase money, a different question would be presented. So, also, if the objection to the foreclosure is that there are incumbrances on the property which the covenantor is bound to remove.

[43] In Hooper v. Armstrong, 69 Ala. 343, it was held that a suit to foreclose a vendor's equitable lien for purchase money, was not a proceeding *in rem*, but a proceeding *in personam* in which the defense of set-off can be made. But see Parker v. Hart, 32 N. J. Eq. 225.

avail himself of that defense by way of recoupment,[44] even though, it would seem, no personal judgment is sought against him.[45] If there be a prior incumbrance on the premises, it seems to be generally conceded that the purchase money may be detained until the covenantor removes the incumbrance, or reduces it to a sum not exceeding the unpaid purchase money.[46] If the incumbrance is less in amount than the balance of purchase money due, and the covenantee chooses himself to remove it, he immediately becomes entitled to substantial damages for breach of the covenant against incumbrances, and may avail himself of that defense in the suit to foreclose, or he may apply the purchase money to the discharge of incumbrances, as far as it will go, and obtain an injunction until the residue of the lien is removed by the covenantor.[47] Another reason why a mortgagor or vendee in possession cannot be allowed to set up an outstanding title in another in bar of a bill to foreclose a purchase-money mortgage, or to enforce a vendor's lien for the purchase money, is, that he stands in the relation of a tenant to the vendor and is estopped to deny the title of the latter.[48]

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[44] 2 Jones Mort. (3d ed.) § 1500, and cases cited, ante, § 180. Hoffman v. Kirby, 136 Cal. 26, 68 Pac. Rep. 321; Williams v. Baker, 100 Mo. App. 284, aff'd 73 S. W. Rep. 339; Brady v. Bank of Com., 41 Okl. 473, 138 Pac. 1020. If no such breach of the covenants for title had occurred, the defendant would have no ground for recoupment and would not be allowed to make that defense, though there might be a personal decree against him for a deficiency. Edwards v. Bodine, 26 Wend. (N. Y.) 109; Leggett v. McCarty, 3 Edw. (N. Y.) 124.

[45] For example, if the defendant, the mortgagor, had been compelled to buy in adverse claims to protect his title, it would be clearly inequitable to deprive him of his right to recoup the damages so incurred, merely because the plaintiff asked no personal judgment against him. Therefore, where, in a proceeding in equity to enforce a purchase-money lien, in which it appeared that the vendor had expended moneys in getting in the title of an adverse claimant of part of the land, it was held error to enter a decree for the plaintiff, without directing a reference to a master to ascertain whether such adverse title was paramount or not, and whether the purchaser was entitled to an abatement. Smith v. Parsons, 33 W. Va. 644; 11 S. E. Rep. 68.

[46] Post, §§ 332, 335. Buell v. Tate, 7 Bl. (Ind.) 55; Smith v. Fiting, 37 Mich. 148, *semble*; Hughes v. McNider, 90 N. C. 248; McCrath v. Myers, 126 Mich. 204, 85 N. W. Rep. 712.

[47] Jones Mort. § 1504; Whisler v. Hicks, 5 Bl. (Ind.) 100; 33 Am. Dec. 454; Smith v. Ackerman, 5 Bl. (Ind.) 541; Oldfield v. Stevenson, 1 Ind. 153; Small v. Reeves, 14 Ind. 164; Potwin v. Blasher, 9 Wash. 460; 37 Pac. Rep. 710.

There are cases which declare that in a suit for the foreclosure of a mortgage given for the purchase money, the mortgagor, though personally liable for the debt, cannot set up want of title in the vendor as a defense, unless he has been evicted from the possession. These decisions are rested precisely upon the same grounds as those which deny the right of the covenantee to detain the purchase money unless he has been evicted, and would seem to admit of the same exceptions where the vendor is insolvent or a non-resident, and suit is being actually prosecuted or threatened by an adverse claimant.[49] If the purchaser has paid a part of the purchase money, or has expended money in improving the premises, so as to entitle him to an equitable lien thereon, there are cases which hold that these facts may be availed of by him in a suit to foreclose the mortgage.[50] If the grantee has been evicted from a part of the premises, he may set up that fact as a defense in foreclosure proceedings. But in such a suit he cannot claim an abatement of the purchase money of land actually sold and conveyed to him on account of the failure of title to other land which was not in fact sold, though it was inadvertently conveyed to him.[51]

In the State of Virginia the enforcement of a security for the purchase money by a sale of the premises, is not permitted in any case in which the title is in doubt. This, however, is in the interest of all parties, that there may be no sacrifice of the premises, and that a doubtful title may not be forced upon a purchaser at the sale.[52]

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[48] Bigelow on Estoppel (3d ed.), 427, citing, among other cases, Strong v. Waddell, 56 Ala. 471, and Wallison v. Watkins, 3 Peters (U. C.), 43, 52. In the last case the mortgage does not appear to have been given to secure purchase money.

[49] Banks v. Walker, 2 Sandf. Ch. (N. Y.) 344; Davison v. De Freest, 3 Sandf. Ch. (N. Y.) 456; Falkner v. Hackett, 104 Wis. 608, 80 N. W. Rep. 940; Nathans v. Steinmeyer, 57 S. C. 386, 35 S. E. Rep. 733; Moore v. Beard, 91 S. C. 496, 74 S. E. 1062; Paine v. Kemp, (Fla.) 82 So. 53; Burke v. Timber Co., 224 Fed. 591. The same rule applies in a suit to enforce a vendor's lien. Young v. Figg, (Neb.) 100 N. W. Rep. 311.

[50] Rockwell v. Wells, (Mich.) 62 N. W. Rep. 165; Dayton v. Melick, 32 N. J. Eq. 570; De Kay v. Bliss, (N. Y.) 34 N. E. Rep. 300; Jones Mortg. (4th ed.) 1490.

[51] Elder v. First Nat. Bank, 91 Tex. 423, 44 S. W. Rep. 62.

§ 185. **PARTIAL FAILURE OF THE CONSIDERATION.** The consideration which passes from the grantor to the grantee upon a conveyance of lands with unlimited covenants for title is, according to the better opinion, not the mere covenants for title which the conveyance contains, but the transfer of an indefeasible estate, so that if the purchaser be evicted from the premises by one claiming under a paramount title, there is a clear failure of the consideration,[53] though, it seems according to common law, not an *entire* failure, possession once had under the contract being a partial enjoyment of the consideration unless the grantee was liable for the rents and profits. The modern doctrine, however, at least, so far as it is exemplified by the American decisions, is that an eviction from the premises by an adverse claimant produces a total failure of the consideration. One of the principal reasons for the rule that the covenantee cannot detain the purchase money so long as he is in possession of the premises is, that until he is actually or constructively evicted there is only a partial failure of the consideration of his promise to pay.[54] The detention of the purchase money is in effect a species of rescission of the contract, and there can be no rescission of a contract while either party is in the enjoyment of any of its benefits.[55] Hence, it follows that there may be only a partial failure of the consideration in a case in which the title has entirely failed.[56] *Partial failure of title* is sometimes spoken of in the cases; apparently in the sense of partial failure of the consideration;[57] but it is an expression likely to lead to confusion of ideas, for strictly speaking there is no such thing as a partial failure of title, though, of course, there may be a failure of title to part of the subject. Accordingly there are many cases in which the right of the covenantee to resist the payment of the purchase money while he is in the undisturbed possession of the premises is denied upon the ground that there has been no more than a partial failure of the consideration, though there has been a complete and palpable failure of the title.[58]

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[52] Post, § 337. Peers v. Barnett, 12 Grat. (Va.) 415, where it was said by the court: "A distinction seems to have been taken by some of the reported cases as to the relief a court of equity will extend to a vendee who has accepted his deed with covenants of general warranty, where he seeks to enjoin a judgment for, or the collection of, the purchase money, and the case where the vendor, instead of proceeding against the vendee personally, is attempting to sell the land under a deed of trust or by bill in equity; that although the facts may not authorize the court to enjoin the collection of the purchase money by a proceeding against the vendee at law, yet as a court of equity reprobates a sale of land when clouds are hanging over the title, it will, for the benefit of the parties and the security of the purchaser at any sale of the subject enjoin or refuse to decree a sale of the land until the title is cleared up. The case of Beale v. Seively, 8 Leigh (Va.), 658, is a case of the first class. It was there decided that where a vendee is in possession of land under a conveyance with general warranty, and the title has not been questioned by any suit prosecuted or threatened, such vendee has no claim to relief in equity against the payment of the purchase money unless he can show a defect of title respecting which the vendor was guilty of fraudulent concealment or misrepresentation, and which the vendee had at the time no means of discovering. In Ralston v. Miller, 3 Rand. (Va.) 44; 15 Am. Dec. 704; Koger v. Kane, 5 Leigh (Va.), 606; Clarke v. Hardgrove, 7 Grat. (Va.) 399, this court has extended the relief to cases where the vendee, placing himself in the position of the superior claimant, can show clearly that the title is defective. The principle that a court will not sell or permit a sale of land with a cloud hanging over the title, is affirmed in Lane v. Tidball, Gilm. (Va.) 130; Gay v. Hancock, 1 Rand. (Va.) 72; Miller v. Argyle, 5 Leigh (Va.), 460."

[53] Rawle Covt. (5th ed.) § 327. Cook v. Mix, 11 Conn. 432; Knapp v. Lee, 3 Pick. (Mass.) 459; Rice v. Goddard, 14 Pick. (Mass.) 293; Trask v. Vinson, 20 Pick. (Mass.) 110; Tilotson v. Grapes, 4 N. H. 448; Deal v. Dodge, 26 Ill. 458; Tyler v. Young, 2 Scam. (Ill.) 445; 35 Am. Dec. 116; Thompson v. Shoemaker, 68 Ill. 256; Dunning v. Leavitt, 85 N. Y. 34, 39 Am. Rep. 617. A contrary view was expressed in the early cases of Lloyd v. Jewell, 1 Gr. (Me.) 352; 10 Am. Dec. 73, and Gridley v. Tucker, 1 Freem. Ch.

(Miss.) 211, but these cases are overruled by or are inconsistent with the later cases cited above.

[54] There can never be a total failure of the consideration of a conveyance with covenant of warranty, until the covenantee has been actually or constructively evicted. Key v. Hansom, 17 Ark. 254; McDaniel v. Grace, 15 Ark. 487. Contra, Cook v. Mix, 11 Conn. 437.

[55] Whitney v. Lewis, 21 Wend. (N. Y.) 131. Patton v. England, 15 Ala. 69; Stark v. Hill, 6 Ala. 785.

[56] Thus, it has been held that if the estate transferred turn out to be a life interest instead of a fee, and the covenantee be put in possession, there is no entire failure of the consideration since he derives some benefit from the conveyance. Bowley v. Holway, 124 Mass. 395; Greenleaf v. Cook, 2 Wh. (U. S.) 13.

[57] As in Bowley v. Holway, 124 Mass. 396.

[58] 2 Kent Com. (12th ed.) 473, 3 Sedg. Dam. (8th ed.) § 1083; Waterman

In other cases, however, the doctrine that a partial failure of the consideration cannot be availed of by the defendant in an action for the purchase money of land, has been denied,[59] and in a few cases a total failure of the title has been treated as a total failure of the consideration, without regard to the question of eviction.[60] There would seem to be no occasion to invoke the doctrine of partial failure of the consideration in behalf of the plaintiff so long as the right of the defendant to detain the purchase money may be satisfactorily denied upon another ground, namely, that until the covenantee has been evicted by an adverse claimant where the covenants are of warranty or for quiet enjoyment, or has suffered actual damages from an incumbrance on the premises, where the covenant is against incumbrances, there can be no right to recover substantial damages as for a breach of those covenants, and, consequently, nothing to recoup from the plaintiff's demand. Where there has been a partial failure of the consideration, in the sense of a loss of

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Set-Off (2d ed.), § 560; Rawle Covts. (5th ed.) § 330, *et seq.* Moggridge v. Jones, 3 Camp. 38; 14 East, 486; Greenleaf v. Cook, 2 Wh. (U. S.) 13; Scudder v. Andrews, 2 McL. (U. S.) 464, and analogous cases there cited. Freeligh v. Platt, 5 Cow. (N. Y.) 494; Whitney v. Lewis, 21 Wend. (N. Y.) 131; Tallmadge v. Wallis, 25 Wend. (N. Y.) 113; Lamerson v. Marvin, 8 Barb. (N. Y.) 11; Farnham v. Hotchkiss, 2 Keyes (N. Y.), 9; Tibbetts v. Ayer, Lal. Supp. (N. Y.) 176; Parkinson v. Sherman, 74 N. Y. 88, 30 Am. Rep. 268; Ryerson v. Willis, 81 N. Y. 277; Bowley v. Holway, 124 Mass. 395; Glenn v. Thistle, 23 Miss. 42; Leal v. Terbush, 52 Mich. 100, 17 N. W. Rep. 713; Hunt v. Middleworth, 44 Mich. 448; Peden v. Moore, 1 Stew. & P. (Ala.) 71, 21 Am. Dec. 649.

In Reese v. Gordon, 19 Cal. 149, it was said: "In cases of fraud or *warranty*, or where the consideration is divisible or capable of apportionment, a partial failure may sometimes be given in evidence in reduction of damages; but the practice in this respect proceeds upon the principle of a cross-action, and an affirmative right of action must exist in favor of a party seeking relief in that form." The "partial failure" here mentioned must mean a case in which the purchaser has been evicted from part of the premises; otherwise the two propositions contained in the remarks of the court would be, as respects the covenant of warranty, contradictory and inconsistent; for unless the purchaser had been evicted from the premises in whole or in part there could be no "affirmative right of action" against the covenantor.

[59] Frisbie v. Hoffnagle, 11 Johns. (N. Y.) 50; James v. Lawrenceburg Ins. Co., 6 Bl. (Ind.) 525; Cook v. Mix, 11 Conn. 438; Moon v. Ellsworth, 3 Conn. 483; Dahle v. Stakke, 12 N. Dak. 325, 96 N. W. Rep. 353; Black Hills Nat. Bank v. Kellogg, 45 Dak. 312; 56 N. W. Rep. 1071.

[60] Frisbie v. Hoffnagle, 11 Johns. (N. Y.) 50; Cook v. Mix, 11 Conn. 438.

a part of the warranted premises, by eviction under an incumbrance or a paramount title, there can be no doubt of the covenantee's right, according to the rule prevailing in America, to recoup the damages thus sustained, in an action for the purchase money.[61]

In New York a partial failure of the consideration of an agreement to pay the purchase money for lands conveyed with covenants of warranty and for quiet enjoyment cannot be pleaded in bar, but must be availed of by way of recoupment or counterclaim, with notice that such defense is intended to be made.[62] But if the consideration has totally failed, that is, if the covenantee has been evicted from the whole premises, that fact may be pleaded in bar to an action for the purchase money.[63]

In some cases it has been held that damages resulting from a partial failure of the consideration cannot be recouped in an action for the purchase money, upon the ground that the doctrine of recoupment or set-off is of equitable origin and cognizable only in a court of equity.[64] These decisions do not appear to have been followed in the other States.

§ 186. **ASSUMPSIT TO TRY TITLE.** An objection to the admission of the defense of complete failure of the title in an action for the purchase money, *where the defendant has not been evicted,* which has been frequently made, is, that the court cannot undertake in such an action to try the title; in other words, that title to land cannot be tried in an action of assumpsit.[65] This is undoubtedly true where the plaintiff, a stranger, asserts a title paramount to that of the defendant, *e. g.,* where he seeks to recover the rents and profits of the land enjoyed by the defendant.[66] But this doctrine, in its application to the defense of failure of title in an action to recover the purchase money of lands, has been criticised, in that it assumes an eviction of the defendant to be conclusive of the question of title, and of the right to detain the purchase money.[67] It is familiar law that the defendant must show, either by the judgment of a court of record, or by evidence *aliunde,* that the eviction was under a title paramount to that of the covenantor, Hence, in the latter case, the court must necessarily pass upon the title and the rights of strangers in determining the sufficiency of the defense; and this is constantly done. Besides the objection in question would apply as well where the contract is executory as where it has been executed by a conveyance with covenants for title, and if it were insuperable, would in any and every case destroy the right of the purchaser to detain the purchase money upon a clear failure of the title, or to avail himself of the doctrine of marketable title in an action at law, unless the failure of the title had been established by the judgment of a court of record.

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[61] McHenry v. Yokum, 27 Ill. 160; Dahle v. Stakke, 12 N. Dak. 325, 96 N. W. Rep. 353.

[62] Lewis v. McMillen, 41 Barb. (N. Y.) 420; McCullough v. Cox, 6 Barb. (N. Y.) 386; Tibbetts v. Ayer, Lal. Supp. (N. Y.) 176.

[63] Tallmadge v. Wallis, 25 Wend. (N. Y.) 116.

[64] Wheat v. Dotson, 12 Ark. 699; McDaniel v. Grace, 15 Ark. 487; Key v. Hanson, 17 Ark. 254.

[65] Leal v. Terbush, 52 Mich. 100, 17 N. W. Rep. 713; Dennis v. Heath, 11 Sm. & M. (Miss.) 206, 49 Am. Dec. 51.

[66] Marshall v. Hopkins, 15 East, 309; Newsome v. Graham, 10 B. & C. 234; Baker v. Howell, 6 S. & R. (Pa.) 481; Hogsett v. Ellis, 17 Mich. 351; Codman v. Jenkins, 14 Mass. 93; Boston v. Binney, 11 Pick. (Mass.) 1.

§ 187. **WHAT CONSTITUTES EVICTION — PURCHASE OF OUTSTANDING TITLE.** The failure of title to real estate may be palpable and complete, as where the vendor, undertaking to convey a fee with warranty, had only a term for years which had expired, yet until the grantee has been actually or constructively evicted by an adverse claimant under color of title there is no breach of the covenants of warranty or for quiet enjoyment, no right to recover damages against the covenantee, and, consequently, no right to detain the unpaid purchase money. What constitutes a breach of those covenants has been already considered,[68] and it only remains for the sake of convenience, to consider here briefly the application of the principles there discussed to the defense of failure of title in actions to recover the purchase money. Among the most important of these principles is that which allows the purchaser to deduct from the purchase money any sum that it may have been necessary for him to pay to adverse claimants in order to protect his title. If he buys in an adverse title to prevent eviction, that is held the equivalent of an eviction, as respects the right to detain the purchase money. He cannot be turned around to his action on the covenant for indemnity.[69] But unless the rights of the paramount claimant have been fixed by judgment in a possessory action, recovered after notice to the covenantor, so as to make the judgment conclusive upon him, the covenantee will have the burden of establishing the superiority of the title acquired by him from the adverse claimant.[70] If there has been no eviction or disturbance of the covenantee in his possession of the estate, and it does not appear that the adverse claimant could in all probability have recovered the land, the covenantee will not be reimbursed for the amount paid by him to get in the alleged outstanding title.[71] The covenantee cannot, of course, claim the benefit of the title so acquired, except as a set-off against the purchase money to the amount paid by him to the adverse claimant. He cannot set up such title adversely to that of his grantor.[72] Nor can he escape the application of this rule by procuring a third person to get in the outstanding title.[73] The covenantee may also surrender the possession to a paramount claimant, and set up that fact as a defense to an action for the purchase money. He is not bound to await an actual eviction by the real owner. But he will have the burden of showing that the surrender was in good faith, and that the title of the adverse claimant was one to which he must have inevitably yielded.[74]

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[67] Rawle Covts. for Title (5th ed.), § 334, n., where the author says: "It may be observed that the objection to trying the title to land in an action for its contract price must equally apply in every case where the paramount title had not been established by a judgment of a court of record. Yet to give to such judgment a conclusive effect would be, when the vendor had not been vouched or notified, contrary to well-established principle, and it is apprehended that in every such case the purchaser would be bound to make out the adverse title under which he had been evicted, or to which he had yielded, with as much particularity as if suing on the covenants; and there would seem to be no greater objection to the question of title being brought before the court in the form of one action than in the other." See, also, further observation at p. 631, n., same volume. In Redding v. Lamb, (Mich.) 45 N. W. Rep. 997, it was said by LONG, J.: "The general rule is that damages for breach of covenant of seisin in a conveyance of land are only recoverable in an action for breach of covenant, as titles to land are not properly triable in actions of *assumpsit;* but I can see no good reason for remitting a party to another action where the action is brought to recover the purchase price of the land sold and there is failure of title. If the title has failed absolutely, then there is no consideration for the note, and the money recovered thereon would have to be repaid when the facts were established in an action for breach of covenant."

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[68] Ante, § 142. Dower recovered against the covenantee constitutes a good defense to an action for the purchase money. McHenry v. Yokum, 27 Ill. 160.

[69] Rawle Covts. (5th ed.) § 334; Dart Vend. (5th ed.) ch. 15, § 7. Ante, § 150; Brandt v. Foster, 5 Iowa, 287; Stelzer v. Rose, 79 Ind. 435; Denson v. Love, 58 Tex. 468.

[70] Ante, § 151.

[71] Ante, § 151. Blair v. Perry, 7 J. J. Marsh. (Ky.) 152.

[72] 1 Sugd. Vend. (8th ed.) 533 (355). Post, § 202.

The laws of the United States forbid the sale and transfer of mere pre-emption rights of public lands, and make the land so sold liable to resale in the hands of the purchaser as public lands. Such a resale, it has been frequently held, is equivalent to an eviction for the reason that it carries with it a constructive dispossession of the original purchaser, the government having the right to regain the possession by a summary proceeding without suit. Consequently, in such a case, the covenantee, holding under a conveyance from the pre-emptor with covenant of warranty, may detain the purchase money though he has not been actually evicted from the premises.[75]

At one time it was held that a covenantee, seeking to detain the purchase money, must show an eviction by legal process, but that doctrine has been modified, and it is now considered that an eviction by an adverse claimant, under color of title, satisfies the rule. An eviction, whether actual or constructive, entitles him to detain the purchase money.[76] In New York taxes *assessed* to the vendor but *laid* by the board of supervisors after the purchaser buys and receives a conveyance, must be paid by the vendor. In other words, the person owning the property at the time fixed by law for determining who shall be taxed therefor as owner, must pay the tax. If the purchaser be compelled to pay them to prevent a tax sale, the covenant of warranty is constructively broken, and the covenantee may recover the amount so expended as damages,[77] or detain the purchase money to that extent.

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[73] Brodie v. Watkins, 31 Ark. 319, 34 Am. Rep. 49, where it was said that a covenantee who procures a third person to buy in the premises at a sale under an outstanding incumbrance, may avail himself of the amount so paid out, as a recoupment in an action for the purchase money, but cannot set up the title so acquired to defeat the recovery of the balance of the purchase money.

[74] Ante, § 148. Garvin v. Cohen, 13 Rich. L. (S. C.) 153; Drew v. Towle, 30 N. H. 531, 27 N. H. 412.

[75] Glenn v. Thistle, 1 Cush. (Miss.) 42. The following cases are cited to the same proposition in Rawle Covt. (5th ed.) p. 573: McDaniel v. Grace, 15 Ark. 489; Fisher v. Salmon, 1 Cal. 413, 54 Am. Dec. 297; Slack v. McLagan, 15 Ill. 242; Dodd v. Toner, 3 Ind. 427; Bradt v. Foster, 5 Clark (Io.), 298; Hobein v. Drewell, 20 Mo. 450; Tibbetts v. Ayer, Hill & Den. Supp. (N. Y.) 174; Blair v. Claxton, 4 N. Y. 529, but few, if any of them, will be found directly in point.

[76] Ante, § 145. Rawle Covts. for Title (5th ed.), § 132.

We have seen that a covenant of warranty is broken only by an eviction, actual or constructive. Nevertheless it has been held that the covenantee cannot be compelled to pay the purchase money while a suit against him by an adverse claimant to recover the premises is still pending and undetermined,[78] nor where an adverse claimant is in possession of the premises.[79]

It sometimes happens that the covenantee does not get the number of acres called for by his deed. It seems that if the boundaries set forth in the deed do not contain the number of acres mentioned there is no breach of the covenant of warranty. Consequently the covenantee cannot at law detain the purchase money.[80] But if the boundaries contain the full number of acres called for, and there be no title to part of them, and the covenantee be evicted from or unable to get possession of that part, the covenant is broken and he may detain the purchase money to that extent. If the boundaries set forth do not contain the specified number of acres, where the sale is by the acre, then the executed contract is liable to rescission in equity on the ground of fraud or mistake. It has been held, however, that if the covenants were obviously intended to secure to the purchaser a specific number of acres or quantity of land, he would be entitled to relief upon the covenants in case of a deficiency.[81]

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[77] Rundell v. Lakey, 40 N. Y. 517. See ante, § 150.

[78] Jaques v. Esler, 3 Gr. Ch. (N. J.) 465. See, post, ch. 26.

[79] Pryse v. McGuire, 81 Ky. 608; English v. Thomasson, 82 Ky. 280; Laevison v. Baird, 91 Ky. 204, 15 S. W. 252.

[80] 2 Warvelle Vend. 839; Rawle Covts. (5th ed.) § 298. Ante, § 135; Young v. Lofton, (Ky.) 12 S. W. Rep. 1061; Carter v. Beck, 40 Ala. 599. Compare Beach v. Waddell, 4 Halst. Ch. (N. J.) 308. In Koger v. Kane, reported in note to Long v. Israel, 9 Leigh (Va.) 569, CABEL, J. (dissenting), held that the covenantee was entitled to detain the purchase money if any deficiency in the quantity of the land existed, whether arising from the fact that the boundaries did not contain the stipulated quantity or that a portion of the land so contained was embraced by the superior title of others. In Comegys v. Davidson, 154 Pa. St. 534, 26 Atl. Rep. 618, where the contract had been executed by a conveyance, and it appeared that there was a deficiency in the width of the lot conveyed, the court, without adverting to the presence or absence of covenants for title, held that if the deficiency in the property conveyed was so serious that it might be regarded as evidence of imposition or fraud, the rule was to allow such a reduction of the purchase money as will compensate the purchaser for the value of the land lost. Practically this is administering equitable relief in an action for the purchase money. In Pennsylvania, however, there is no separate system of equitable procedure.

§ 188. **DISCHARGE OF INCUMBRANCES.** If the purchaser be compelled to pay off incumbrances on the premises he becomes immediately entitled to recover substantial damages for breach of the covenant against incumbrances, and may recoup the damages so incurred in an action for the purchase money.[82] If the deed contains a covenant of warranty, but no covenant against incumbrances, the same rule applies if the money was paid to prevent an eviction by the incumbrancer. An eviction consequent upon the foreclosure of an incumbrance is as much a breach of the covenant of warranty as an eviction by one claiming under paramount title.[83] The mere existence of an incumbrance upon the premises, which is a breach of the covenant against incumbrances, is no ground upon which to detain the purchase money; for, if the covenantee were to sue for the breach he could recover only nominal damages so long as he had sustained no actual damage from the incumbrance.[84] And as the recoupment of the breach, when sued for the purchase

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[81] Leonard v. Austin, 2 How. (Miss.) 888.

[82] Nesbit v. Campbell, 5 Neb. 429; Davis v. Bean, 114 Mass. 358. This case is said by Mr. Sedgwick to be inconsistent with Bowley v. Holway, 124 Mass. 395, where it was held that in an action for the purchase money failure of title could not be set up as a defense by way of recoupment if there had been no eviction, for then there would be only a partial failure of the consideration. The two cases would seem distinguishable in this, that the defense in the first case was more in the nature of set-off than recoupment, for the sum paid to remove the incumbrance could scarcely be termed unliquidated damages. And, further, in this, that in the second case there had been no breach of the covenant of warranty, while in the first case the covenant had been broken and actual damages incurred; and if the incumbrance had equalled the purchase money in amount there would have been a total failure of the consideration. Where the incumbrance discharged is less than the purchase money the case would stand upon much the same ground as that in which recoupment is allowed when the covenantee is evicted from a *part* only of the premises, namely, that to that extent there is a complete failure of the consideration. See 3 Sedg. Dam. (8th ed.) 267, 268; Owens v. Salter, 38 Pa. St. 211; Kelly v. Low, 18 Me. 244; Brooks v. Moody, 20 Pick. (Mass.) 475; Baker v. Railsback, 4 Ind. 533; Small v. Rieves, 14 Ind. 163; Holman v. Creagmiles, 14 Ind. 177; Bowen v. Thrall, 28 Vt. 382; Delavergne v. Norris, 7 Johns. (N. Y.) 357; 5 Am. Dec. 281. Schumann v. Knoebel, 27 Ill. 177, the court saying: "The pleas allege the existence of a certain incumbrance by mortgage, which the defendant had to pay and discharge, and thereby extinguish the incumbrance. To the extent then of this incumbrance there was a failure of consideration. Morgan v. Smith, 11 Ill. 199; Whisler v. Hicks, 5 Bl. (Ind.) 100, 33 Am. Dec. 454; Smith v. Acker, 5 Bl. (Ind.) 541; Buell v. Tate, 7 Bl. (Ind.) 54; Pomeroy v. Burnett, 8 Bl. (Ind.) 142. We

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think, too, the defendant, under the pleadings, might have *recouped* the amount thus paid. Babcock v. Tria, 18 Ill. 420. There is a natural equity as to claims arising out of the same transaction, that one claim should compensate the other, and that the balance only should be recovered. The damages claimed by the defendant grew out of the contract for the sale of the land, and present a plain case for *recouping* damages. * * * The defendant should have been allowed, either under his plea of partial failure of consideration, or on the principle of *recoupment* under the other pleas, the amount he paid to extinguish the mortgage set out in his plea, and the plaintiff should have had a judgment for the balance only." It has been held that a purchaser of mortgaged premises taking a deed subject to the mortgage, and assuming to pay the mortgage, is estopped to contest the consideration and validity of the mortgage. Parkinson v. Sherman, 74 N. Y. 92, 30 Am. Dec. 268; Ritter v. Phillips, 53 N. Y. 586; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Freeman v. Auld, 44 N. Y. 50; Shadbolt v. Bassett, 1 Lans. (N. Y.) 121; Dahle v. Stakke, 12 N. Dak. 325, 96 N. W. Rep. 353.

[83] Ante, § 150. Coleman v. Insurance Co., 26 Ky. Law Rep. 900, 82 S. W. 616. In Alden v. Parkhill, 18 Vt. 205, it was held that a purchaser, taking a deed with covenants of warranty, could not, in an action for the purchase money, show under the general issue a breach of the covenant against incumbrances; but that he might set-off the amount paid by him to remove the incumbrance in order to prevent an eviction.

[84] Jones Mortg., § 500; a perspicuous statement of the rule as follows: "Where the grantee in a warranty deed, conveying premises on which there is a prior mortgage, remains in the undisturbed possession of the premises, and the mortgage debt is unpaid and no suit has been brought to collect it, or foreclose the mortgage or to evict the purchaser, it is no defense to a foreclosure suit against him, to secure the purchase money, that such prior mortgage is an outstanding incumbrance, unpaid and unsatisfied." Mills v. Saunders, 4 Neb. 190; Pomeroy v. Burnett, 8 Bl. (Ind.) 142; Mitchell v. Dibble, 14 Ind. 526; Martin v. Foreman, 18 Ark. 249, where it was held that an unsatisfied judgment, binding the warranted premises, constituted no defense to an action for the purchase money. Gager v. Edwards, 26 Ill. App. 490.

money, is in substance a cross-action by the purchaser on the covenant, it devolves on him to show that he has discharged the incumbrance or has been evicted by the incumbrancer.[85] Hence, it has been held that the mere existence of a right of dower in the premises, whether inchoate or consummate, is no defense to an action for the purchase money if the purchaser holds under a conveyance with covenant against incumbrances, and has not been evicted by the dowress, nor paid her a sum in gross in commutation of her dower right.[86] An apparent exception to the rule above exists in those cases in which the incumbrance exceeds the purchase money, and the grantee is allowed a temporary injunction until the vendor pays the excess.[87] It is to be observed that the right to detain the purchase money is either to detain it permanently in case of an actual loss of the entire estate by reason of a paramount title in a stranger, or to detain it temporarily until an objection to the title is removed. The purchaser may retain so much of the purchase money as may be sufficient to secure him against pecuniary incumbrances on the land, especially when the grantor is insolvent, and no adequate remedy can be had upon his covenants.[88] If a covenantee pays off an incumbrance on the land he can have credit only for the actual amount disbursed for that purpose. He cannot buy up the lien at a discount and have the benefit of its face value against the grantor.[89] If the purchaser accept a deed from a third party instead of the vendor he cannot recover from the latter moneys paid in removing incumbrances.[90]

The purchaser takes the risk of the validity of the incumbrance which he discharges. The vendor may always show that he was not bound to discharge the incumbrance, from some illegality in the consideration, or other cause.[91] If the purchase money be secured by trust or mortgage which the vendor is proceeding to enforce, the purchaser can have, of course, no means of availing himself of his right to a set-off or allowance for money paid in removing incumbrances which should have been discharged by the vendor, except by way of injunction to prevent the sale.[92] The injunction would be denied, it is apprehended, unless all the purchase money had been paid, except so much as may have been applied to the incumbrance.

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[85] Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456; Bryan v. Swain, 56 Cal. 618.

[86] Whisler v. Hicks, 5 Blackf. (Ind.) 100; 33 Am. Dec. 454; Smith v. Ackerman, 5 Blackf. (Ind.) 541.

[87] Post, §§ 332, 335.

[88] Bowen v. Thrall, 28 Vt. 382, citing Tourville v. Naish, 3 P. Wms. 307; Warren v. Stoddart (Idaho), 59 Pac. Rep. 540.

[89] McDowell v. Milroy, 69 Ill. 498. Ante, § 130.

[90] Herryford v. Turner, 67 Mo. 296.

[91] Norton v. Jackson, 5 Cal. 262.

As the duty devolves upon the covenantor to remove incumbrances, the covenantee cannot be held responsible for an increase in the cost and charges of removal, which might have been avoided by prompt action. Thus, where a tax lien might have been removed at a cost of $14 by the covenantee, but on account of a forfeiture to the State for non-payment in due time, he was compelled to pay $150 to redeem the forfeiture, it was held that he was entitled to set off the amount so paid against the unpaid purchase money.[93]

§ 189. **RULE IN TEXAS.** In Texas a purchaser who has accepted a conveyance with general warranty, may resist the payment of the purchase money in case of a failure of the title, though there has been no eviction, but he is required to show that such failure consists of an indisputable superior outstanding title under which he is liable to be evicted,[94] and that he accepted the conveyance in ignorance of the defective title.[95] He will be charged with notice of defects which lay in the vendor's chain of title unless his

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[92] Post, § 332.

[93] William Farrel, etc., Co. v. Deshon, 65 Ark. 103, 44 S. W. Rep. 1036.

[94] Cooper v. Singleton, 19 Tex. 260, 70 Am. Dec. 333; Tarpley v. Poage, 2 Tex. 139; Woodward v. Rogers, 20 Tex. 176; Cook v. Jackson, 20 Tex. 209; Johnson v. Long, 27 Tex. 21; Demaret v. Bennett, 29 Tex. 263; Johnston v. Powell, 34 Tex. 528; Fisher v. Dow, 72 Tex. 432, 10 S. W. Rep. 455; Haralson v. Langford, 66 Tex. 111, 18 S. W. Rep. 339; Groesbeck v. Harris, 82 Tex. 411 (1891); 19 S. W. Rep. 850; Hubert v. Grady, 59 Tex. 502; Blanks v. Ripley, (Tex. Civ. App.) 27 S. W. Rep. 732; Doughty v. Cottraux, (Tex. Civ. App.) 27 S. W. Rep. 914; McLean v. Connerton (Tex. Civ. App.) 78 S. W. Rep. 238; Wilson v. Moore, (Tex. Civ. App.) 85 S. W. Rep. 25; Adams v. Jordan, (Tex. Civ. App.) 136 S. W. 499. He must show a reasonable certainty of eviction. Price v. Blount, 41 Tex. 472. He may resist the payment of the purchase money without showing a liability to eviction where fraud was used to induce him to accept the title. Norris v. Evans, 60 Tex. 83. The Texas doctrine is thus stated in Cooper v. Singleton, 19 Tex. 267, 70 Am. Dec. 333, the leading case in that State: "The difference between the liabilities of the vendee under an executory and executed

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contract is this: That in the former he should be relieved by showing defect of title, unless on proof by the vendor that this was known at the sale, and it was understood that such title should be taken as the vendor could give. In the latter the vendee should establish, beyond doubt, that the title was a failure in whole or in part: that there was danger of eviction, and also such circumstances as would *prima facie* repel the presumption that at the time of the purchase he knew and intended to run the risk of the defect." So in Demaret v. Bennett, 29 Tex. 268, it is said: "A purchaser who has gone into possession under a deed with warranty, without any notice of a defect in the title, may resist the payment of the purchase money by showing his title to be worthless, and the existence of a superior outstanding title by actual ouster, or what is tantamount to the same, an indisputable superior outstanding title, and that he is liable to be evicted. He must return the possession of the premises, and the deed for cancellation. In Preston v. Breedlove, 45 Tex. 47, it was held that a party in possession claiming under complete and recorded conveyances, could not be affected by a decree of foreclosure against a remote vendor alone, and that a sale thereunder being ineffectual to cut off his defenses against the lien, he could not set up such sale as a defense to an action against him for the purchase money, citing Mills v. Traylor, 36 Tex. 7, and other cases. It was also held in this case that the fact that suit had been brought against the maker of a note, secured by vendor's lien, to recover the land, was not sufficient evidence of failure of title to enable him to detain the purchase money.

[95] Brock v. Southwick, 10 Tex. 65; Demaret v. Bennett, 29 Tex. 263; Bryan v. Johnson, 39 Tex. 31; Price v. Blount, 41 Tex. 472; Herron v. De Bard, 24 Tex. 181; May v. Ivie, 68 Tex. 379; 4 S. W. Rep. 641; Twohig v. Brown, 85 Tex. 51; Fagan v. McWhirter, 71 Tex. 567, 9 S. W. Rep. 677; Moore v. Vogel (Tex. Civ. App.), 54 S. W. Rep. 1061; Knight v. Coleman, (Tex. Civ. App.), 51 S. W. Rep. 258; Frantz v. Masterson, (Tex. Civ. App.) 133 S. W. 740. Upon this point the leading case is Brock v. Southwick, 10 Tex. 65. It is there said: "The proof shows a contract of purchase and a conveyance subsequently executed with warranty of title and possession. The defendant accepted the conveyance with a knowledge of the defect of title. He was put upon inquiry and was informed that the title was defective. He nevertheless made the purchase and accepted the conveyance without objection, relying, doubtless, upon his chances to perfect the title, or upon the security afforded by the covenants in his deed of conveyance. It is fair to conclude that he considered his purchase worth, or that he was willing to give, the stipulated price notwithstanding the defect of title; or that he chose to take the chances as to the title, and have his recourse upon the covenants in his deeds in case of eviction." The purchaser's pleadings must aver such want of notice. Carson v. Kelly, 57 Tex. 379. So in the recent case of Neyland v. Neyland, 70 Tex. 24, 7 S. W. Rep. 651. The purchaser holding under a deed from three grantors with general warranty, resisted payment on the ground that a fourth person owning an equal interest in the property had not been procured to execute the con-

attention was diverted from them by the artifices of the vendor.[96] A purchaser availing himself of this defense must surrender possession to the grantor and give up the deed to be canceled,[97] and an answer setting up such a defense and containing no offer to reconvey is insufficient.[98] But he may, nevertheless, surrender the possession to an adverse claimant, and detain the purchase money though he has thereby incapacitated himself from placing the vendor *in statu quo,* provided he can show absolutely that the vendor had no title, or that he did not have such title as he professed to sell.[99] He may also buy up the rights of an adverse claimant to prevent inevitable eviction,[1] but this, however, is held to be equivalent to an actual eviction.[2] It may be observed that in this State, though a conveyance has been executed to the purchaser, the contract is held to be executory so long as the purchase money remains unpaid.[3]

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veyance as agreed. The court said: "The plea does not aver a want of knowledge of defect of title at the time of the purchase, nor does it state when the defect came to his knowledge. He alleges that the appellee is insolvent, but does not allege that the other two vendors are insolvent. The circumstances recited in the plea indicate that he was as well advised of the defect in the title and the insolvency of the appellee at the time he purchased as he was at the time he executed the note. He admits that he is in possession of the land under a deed with warranty. He does not allege that there were fraudulent representations or even concealment on the part of his vendors at the time he purchased. He certainly should aver that he did not know of the defect at the time of his purchase, and also allege the insolvency of all of his vendors. Being in possession under a deed with covenant of warranty, appellant cannot be released from payment of the purchase money unless there was fraud on the part of his vendors at or before the sale, or in case of defect not known to him at the time he purchased."

[96] Haralson v. Langford, 66 Tex. 113, citing Woodward v. Rogers, 20 Tex. 176, where, however, the point does not seem to have been distinctly ruled.

[97] Demaret v. Bennett, 29 Tex. 263; Haralson v. Langford, 66 Tex. 111, 18 S. W. Rep. 339; Ogburn v. Whitlow, 80 Tex. 239, 15 S. W. Rep. 807, citing Smith v. Nolan, 21 Tex. 497.

[98] Ogburn v. Whitlow, 80 Tex. 239, 15 S. W. Rep. 807.

[99] Fisher v. Dow, 72 Tex. 432, 10 S. W. Rep. 455.

[1] Clark v. Mumford, 62 Tex. 531.

[2] Rawle Covts. (5th ed.) § 146.

[3] Kennedy v. Embry, 72 Tex. 387; 10 S. W. Rep. 88; Ogburn v. Whitlow, 80 Tex. 241; 15 S. W. Rep. 807; Lanier v. Forest, 81 Tex. 189, 16 S. W. Rep. 994.

If the purchaser take a conveyance without covenants for title, the rule in Texas is the same as that which generally prevails elsewhere, namely, that in the absence of fraud he is without relief in case the title fails.[4]

It is not necessary that the purchaser should make the holder of an outstanding paramount title a party to the proceeding in order to avail himself of the existence of such title as a defense to an action for the purchase money.[5] But it is not a sufficient defense to show merely that at one time the title was outstanding in a stranger; he must show also that such title has never been acquired by the vendor.[6] It seems that in this State the existence of a valid incumbrance upon the premises, is, equally with failure of the title, a ground for detaining the purchase money, provided the conveyance with warranty was accepted without notice of the incumbrance.[7]

§ 190. **RULE IN SOUTH CAROLINA.** In South Carolina a purchaser who has taken a conveyance with general warranty, which in the State embraces the five common law covenants,[8] may, for any defect of title embraced by those covenants,[9] defend an action at law for the purchase money, though there has been no eviction, if he can show that the defect consists of an outstanding paramount title to which he must inevitably yield.[10] But he cannot, in such a case, go into a court of equity and obtain a rescission of the contract so long as he remains in undisturbed possession of

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[4] Rhode v. Alley, 27 Tex. 445; Baldwin v. Drew, (Tex. Civ. App.) 180 S. W. 614. But it has been recently there held that an ignorant man who could neither read nor write and who relied upon the vendor's representations, made in good faith, that the title was good, when in fact it was bad, was entitled to a rescission of the contract and return of the purchase money, although he had taken a conveyance with special warranty only. Fahy v. Kaies, (Tex. Civ. App.) 181 S. W. 782.

[5] Fisher v. Abney, 69 Tex. 416, 9 S. W. Rep. 321.

[6] Haralson v. Langford, 66 Tex. 111, 18 S. W. Rep. 339.

[7] Tarlton v. Daily, 55 Tex. 92.

[8] Evans v. McLucas, 12 S. C. 56; Lessly v. Dowie, 24 S. C. 197, 3 S. E. Rep. 199.

[9] Rogers v. Horn, 6 Rich. Eq. (S. C.) 362; Evans v. Denby, 2 Spears (S. C.), 10, 13 Am. Dec. 356.

[10] Thompson v. McCord, 2 Bay (S. C.), 76; Taylor v. Fulmore, 1 Rich. Eq. (S. C.) 52; Sumter v. Welsh, 1 Brev. (S. C.) 539; Johns v. Nixon, 2 Brev. (S. C.) 472; Van Lew v. Parr, 2 Rich. Eq. (S. C.) 340, and Rawle Covts. 569, n., where it is said: "Since Furman v. Elmore (A. D. 1819, reported in a note to Mackey v. Collins, 2 Nott & McC. 189), it has been

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the settled law of South Carolina that a covenant of warranty possessed also the properties of a covenant for seisin, and an eviction was not, therefore, considered necessary to its breach. Hence, it was held that if a purchaser when sued for the purchase price, could establish to the satisfaction of the jury that he took nothing by his purchase, and that he would be ousted by the paramount title, they might find a verdict for the defendant, not on the ground that the failure of title was a rescission of the contract, but because the damages on the covenants were exactly equal to the purchase money and interest, and it followed that where a portion of the land was so covered by paramount title damages could be assessed *pro tanto*, and such is the law at the present day," citing Farrow v. Mays, 1 Nott & McC. 312; Hunter v. Graham, 1 Hill, 370; Van Lew v. Parr, 2 Rich. Eq. 337; Jeter v. Glenn, 9 Rich. L. 378. It is worth while to consider how far the rule thus stated by Mr. Rawle has been modified by more recent cases. In Lessly v. Bowle, 27 S. C. 193, 3 S. E. Rep. 199, which was an action to foreclose a purchase-money mortgage, a purchaser with general warranty resisted the payment of the purchase money on the ground of an outstanding paramount title in a stranger. Not having been evicted or disturbed in the possession it was held that he was not entitled to relief. The court after observing: "There has been much discussion in our courts as to whether a purchaser of land who is in possession under general warranty may defeat an action for the purchase money by showing paramount outstanding title in another before he has been actually evicted," continued: "It certainly is remarkable that no case can be found in our reports in which damages to the extent of the purchase money have been recovered for a mere technical breach of the covenant of seisin alone, without actual damage sustained, or eviction. Indeed, the distinguished Chancellor JOHNSTON, in delivering the judgment of the old Court of Errors, in the case of Van Lew v. Parr, 2 Rich. Eq. (S. C.) 340 (1846), said: 'Arguments were drawn by counsel from a very extensive and critical examination of the laws and decisions of this State to show that as the law courts in certain cases allow damages upon breach of the covenants of deeds conveying lands, where there has been no previous eviction, equity should rescind the contract where the remedy at law is incomplete. * * * The law courts seem to have been struggling for years to get clear of the early decisions allowing recoveries on the ground of failure of title without eviction, and they appear to have settled, at least in this result, that in actions brought for the purchase money, the purchaser may make a clearly subsisting outstanding title the ground of abatement for the contract value of such part of the premises as it may cover. It has been proposed as a just inference from this that where, from the remoteness or contingency of the outstanding title, law cannot give damages, equity should interfere and rescind the contract. But apart from the incompetency of a court of equity to try the validity of the outstanding title, is it not obvious that the remoteness and contingency which renders it inapplicable at law, must necessarily make it equally uncertain what degree of importance should be the premises, in the absence of fraud or insolvency on the part of the vendor.[11] Judgment liens binding the warranted premises

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attached to it as a ground for rescission in equity? If the defect of title be such as authorizes a court of law to interfere, be it so. That is one of the advantages of his covenant to which equity leaves the purchaser. But if it be of such a nature that law declares him entitled to no relief in virtue of the security he has himself selected, as was the case in this instance, it seems a strained inference that the declaration entitles him to relief elsewhere. But without reopening the argument, we think the question has been finally settled by the more recent and well-considered cases, which concur in holding that, while a purchaser of land remains in quiet possession thereof he cannot sustain a bill for a rescission or abatement of price on the ground of an outstanding title, unless on the score of fraud.'" See, also, Childs v. Alexander, 22 S. C. 169 (1884); Bethune v. McDonald, 35 S. C. 88 (1891); 14 S. E. Rep. 674; Munro v. Long, 35 S. C. 354 (1891); 15 S. E. Rep. 553, each of which was an action to foreclose a purchase-money mortgage. In Munro v. Long, supra, it was said: "It will be observed that this is not a case for the enforcement of an executory contract of sale, but it is an action for the purchase money of the property sold, of which the party is in the undisturbed, and, so far as the testimony shows, the unchallenged possession." In Gray v. Handkisson, 1 Bay (S. C.), 278, it was held that the purchaser was entitled to a rescission of an executed contract in case of an outstanding paramount title, though he had been evicted, but this case and those which follow it were subsequently disapproved in Johnson v. Purvis, 1 Hill (S. C.), 326, and the rule established that the purchaser was entitled to an abatement of the purchase money to the extent of the outstanding title, but not to a rescission of the contract. See, also, Van Lew v. Parr, 2 Rich. Eq. (S. C.) 337; Westbrook v. McMillan, 1 Bailey (S. C.), 259; Bordeaux v. Carr, 1 Bailey (S. C.), 250; Carter v. Carter, 1 Bailey (S. C.), 217. In Poyas v. Wilkins, 12 Rich. (S. C.) 420, it appeared that part of the premises purchased was, at the time of purchase, in possession of a third person claiming under a prior conveyance, which conveyance did not in fact include the premises in dispute, and that such third person had acquired title thereto by adverse possession, without fault on the part of the vendor. It was held that these facts constituted no defense to an action for the purchase money.

[11] Whitworth v. Stuckey, 1 Rich. Eq. (S. C.), 408, the leading case, citing and approving Bumpus v. Platner, 1 Johns. Ch. (N. Y.) 213; Van Lew v. Parr, 2 Rich. Eq. (S. C.) 337; Maner v. Washington, 3 Strobh. Eq. (S. C.) 171; Kebler v. Cureton, Rich. Eq. Cas. (S. C.) 143; Gillam v. Briggs, Rich. Eq. Cas. (S. C.) 143; Evans v. McLucas, 12 S. C. 56; Lessly v. Bowie, 27 S. C. 193 (1887); 3 S. E. Rep. 199; Childs v. Alexander, 22 S. C. 169 (1884); Bethune v. McDonald, 35 S. C. 88 (1891); 14 S. E. Rep. 674; Munro v. Long, 35 S. C. 354 (1891); 15 S. E. Rep. 553; Means v. Bricknell, 2 Hill (S. C.), 143; Abercrombie v. Owings, 2 Rich. L. 127. Purchaser taking a warranty deed with knowledge of an outstanding dower interest in the vendor's wife, cannot have an abatement of the purchase money unless he

constitute no ground for detaining the purchase money, unless the purchaser has discharged them.[12]

The law courts in this State adopt the civil law rule of implied warranty in the sale and conveyance of lands. Where, however, the sale is by a sheriff, the common-law maxim *caveat emptor* applies, and the purchaser must pay the purchase money, though the title completely fails. The same exception will extend, it is apprehended, to all sales made in a representative or ministerial capacity.[13]

§ 191. **PLEADINGS.** The defendant in an action for the purchase money of lands, setting up a breach of the covenants in his deed as a defense, must file with his pleadings the original or a copy of that deed,[14] or set out the same, or the essential parts thereof, in the pleadings.[15] When the purchaser seeks to detain the purchase money, he must not only allege a failure of the title, but he must show a breach of covenant or fraud on the part of the vendor. A mere averment that the title has failed is insufficient.[16] If the purchaser intends to rely on a breach of the covenants for title as a defense to an action for the purchase money, his pleadings must aver the existence of the covenants. Thus, in an action to foreclose a purchase money mortgage, an answer that the defendant has been compelled to pay off liens on the premises, without showing that the conveyance to him contained a covenant against incumbrances, was held bad. Inasmuch as his plea is virtually a cross-action upon the warranty, it should contain the same averments as would a declaration upon the covenant.[17] The purchaser may avail himself of a defective title as a defense to an action for the purchase money, without averring that he was ignorant of the

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has extinguished the dower interest, or has been evicted thereunder. Coleman v. Whittle, 79 S. C. 212, 60 S. E. 523, 128 Am. St. Rep. 841.

[12] Gourdine v. Fludd, Harp. L. (S. C.) 232.

[13] Davis v. Murray, 2 Const. Rep. (S. C.) 143, 12 Am. Dec. 661; Herbemont v. Sharp, 2 McCord L. (S. C.) 265.

[14] Starkey v. Neese, 30 Ind. 222; Patton v. Camplin, 63 Ind. 512.

[15] In Howard v. Randolph, 73 Tex. 454, 11 S. W. Rep. 495, failure to describe the instrument containing the warranty was held fatal.

[16] Grantland v. Wight, 5 Munf. (Va.) 295; Moss v. Davidson, 1 Sm. & M. (Miss.) 112; Laughery v. McLean, 14 Ind. 106.

[17] Jenkinson v. Ewing, 17 Ind. 505. Ante, § 176.

defects at the time of the sale. It is for the plaintiff to reply and prove knowledge of the condition of the title by the defendant.[18]

§ 192. **RESUMÉ.** From the principles discussed in the foregoing pages it would seem to follow, that if the covenantee was never able to get possession of the land, the possession and paramount title being in another, there would be a total failure of the consideration, which he might plead, even at common law, as an *absolute bar* to an action for the purchase money. If, on the other hand, he got possession and was afterwards evicted by the real owner, he would, at common law, be compelled to pay the purchase money and look to his covenants for redress; while in the American States he would be permitted to recoup, in an action for the purchase money, the damages sustained from the plaintiff's breach of covenant; or, by statute, to avail himself of that defense by special plea in the nature of a plea of set-off. And, lastly, if the defendant was in possession under a conveyance with covenants of warranty, for quiet enjoyment, or against incumbrances, and there had been no such breach of these covenants as to give him a present right to recover substantial damages against the plaintiff, the absolute failure of the title, or the existence of an incumbrance on the premises, could not be availed of as a defense to an action for the purchase money, whether by way of recoupment, statutory set-off, counterclaim or otherwise.

The question whether a grantee may detain the unpaid purchase money upon a breach of the covenant of seizin, on condition that he surrender the premises to the grantor, is discussed in a subsequent part of this work.[19]

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[18] Taul v. Bradford, 20 Tex. 264; Hurt v. McReynolds, 20 Tex. 595.

[19] Post, ch. 26.

OF AFFIRMANCE OF THE CONTRACT BY PROCEEDINGS IN EQUITY.

CHAPTER XVII.

SPECIFIC PERFORMANCE OF EXECUTORY CONTRACTS AT THE SUIT OF THE PURCHASER.

IN GENERAL. § 193.
PAYMENT OF THE PURCHASE MONEY AS CONDITION PRECEDENT. § 194.
LACHES OF PURCHASER. § 195.
DAMAGES IN EQUITY. § 196.

§ 193. **IN GENERAL.** We have thus far considered the remedies of the purchaser of lands in affirmance of the contract by action at law where the title has failed, both where the contract is executory and where it has been executed by the delivery and acceptance of a conveyance. We proceed now to consider the remedies of the purchaser in affirmance of the contract by proceedings in equity, and such rights of the vendor as are incidental to those remedies. We shall consider the subject under the general head, "Specific performance of executory contracts at the suit of the purchaser;" and then under the subdivisions, "The right of the purchaser to take the title with compensation for defects;"[1] and "The right of the purchaser to perfect the title, and to require a conveyance from the vendor."[2]

A purchaser of a defective title may, where the contract has been executed by a conveyance with covenants for title, invoke the aid of a court of equity to compel the specific performance of a covenant for further assurance, or to require the grantor to remove an incumbrance from the premises.[3] If the contract is executory he has his election either to proceed at law to recover damages for a breach of the contract, or to recover back the purchase money, or to proceed in equity for a specific performance of the contract, with compensation for defects.[4] But the greater number of suits by the purchaser for the specific performance of the contract are instances in which the vendor, having a perfect title, wrongfully and wilfully refuses to convey. If the vendor has no title or a bad title, the court will not, as we shall presently see, compel him to execute a conveyance. Hence, it will be found that the proceedings of the purchaser in equity in affirmance of the contract, where the title is defective, consist chiefly of cases in which he insists upon the right to apply the purchase money to the discharge of incumbrances upon the estate, or to the removal of objections to the title, or where he himself has so applied the purchase money and seeks the sanction of a court of equity; or where he asks that the vendor be compelled to discharge an incumbrance on the premises, or to procure a release from some one claiming an interest therein.[5]

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[1] Post, ch. 18.

[2] Post, ch. 19.

[3] Rawle Covts. (5th ed.) §§ 104, 362; Sugd. Vend. (14th ed.) 613.

[4] 2 Story Eq. Jur. § 779; Bispham's Eq. (3d ed.) § 380; Fry Sp. Perf. (3d Am. ed.) § 1174.

The purchaser may, if he chooses, waive his objections to the title and insist upon specific performance by the vendor.[6]

A court of equity will not compel the vendor to execute a conveyance of the premises if he have no title, and cannot obtain it by ordinary process of law or equity, for that would be a vain and useless act.[7] Neither will specific performance be decreed if the equitable title is in a stranger, of whose rights the complainant had notice when he entered into the contract.[8] He cannot be placed in a better position than his vendor. On the contrary, if he took a conveyance with actual notice that the equitable title was in a stranger, he would himself be compelled to convey to him, for in such a case he would be regarded as a mere trustee of the legal title.[9]

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[5] In Gotthelf v. Stranahan, 138 N. Y. 345, 24 N. E. Rep. 286, it was held that an agreement to convey free from all incumbrances by warranty deed, did not require the vendor to satisfy assessments for "contemplated improvements," which the city might abandon, but that he must remove an assessment made between the date of the contract and the time fixed for the conveyance, for a local improvement made before the contract was entered into. If the vendor agree to pay all taxes accruing before completion of the contract, and fail so to do, the purchaser may maintain an action for specific performance, and is not confined to an action at law on the agreement. Stone v. Lord, 80 N. Y. 60.

[6] Ogooshevitz v. Warijes, 203 Mich. 664, 169 N. W. 820, although he may have previously refused to perform and demanded the return of his deposit. Wittenberg v. Groves, (Tex.) 208 S. W. 901. If he fails to establish an outstanding title, which he has acquired, against the vendor, he cannot afterwards elect to take such title as the vendor has. Wittenberg v. Groves, (Tex.) 208 S. W. 901.

[7] 1 Sugd. Vend. (8th Am. ed.) 329 (217); Adams Eq. m. p. 81; Crop v. Noston, 2 Atk. 74; Cornwall v. Williams, Col. P. C. 390; Bennet Col. v. Cary, 3 Bro. C. C. 390; Tendring v. London, 2 Eq. Cas. Abr. 680; Bryan v. Lewis, 1 Moo. & Ray, 386; Snell v. Mitchell, 65 Me. 48; Smith v. Kelly, 56 Me. 64; Hurley v. Brown, 98 Mass. 547; Pack v. Gaither, 73 N. C. 95;

The general rule is that specific performance cannot be decreed against the vendor if he has parted with the legal title.[10] But if the vendor disable himself from performing the contract by conveying the premises to a third person, who has notice of the purchaser's equities, the latter may maintain a bill for specific performance against his vendor and the subsequent purchaser. A second purchaser, with notice, takes subject to the first purchaser's rights, and may be compelled to perform the original contract.[11]

Chartier v. Marshall, 51 N. H. 400; Jordan v. Deaton, 23 Ark. 704; Gaither v. O'Doherty, (Ky.) 12 S. W. Rep. 306; Ormsby v. Graham, 123 Iowa 202, 98 N. W. Rep. 724; Pub. Service Corp'n v. Meadows Co., 72 N. J. Eq. 285, 64 Atl. 976.

[8] Franz v. Orton, 75 Ill. 100. A purchaser who has agreed to be "at one-half the expense of procuring a title" cannot demand specific performance until he has paid his part of the expense of procuring title. Hutchinson v. McNutt, 1 Ohio, 14.

[9] 1 Sugd. Vend. (8th Am. ed.) 352; 2 Story Eq. Jur. (13th ed.) § 788; Fewster v. Turner, 6 Jur. 144; Champion v. Brown, 6 Johns. Ch. (N. Y.) 402, 10 Am. Dec. 343; Stone v. Buckner, 12 Sm. & M. (Miss.) 73; Hunter v. Bales, 24 Ind. 299. See, also, Jacques v. Vigo County, 2 Blackf. (Ind.) 403. Of course one who acquires the legal title without notice of the equitable rights of a prior purchaser cannot be required to convey to such purchaser. Cunningham v. Depew, Morris (Iowa), 463.

[10] Davenport v. Latimer, 53 S. C. 563, 31 S. E. 630.

[11] Story Eq. Jur. §§ 395, 396. Estell v. Cole, 52 Tex. 170; Austin v. Ewell, 25 Tex. Supp. 407; White v. Mooers, 86 Me. 62, 29 Atl. Rep. 936; Bates v. Swiger, (W. Va.) 21 S. E. Rep. 874; Meyers v. Markham, 90 Minn. 230, 96 N. W. Rep. 787.

But in a case in which the purchaser had rejected the title as unmarketable by reason of liens on the property, it was held that he could not, after waiting a year or more, and after a number of the liens had been satisfied, maintain a bill for specific performance against the vendor and one to whom the vendor had sold the property in good faith, though the second purchaser had notice of the prior contract. Oliver Mining Co. v. Clark, 65 Minn. 277, 68 N. W. Rep. 23.

The vendor cannot defend a suit for specific performance on the ground that he has only the equitable title; it is his buisiness to obtain the concurrence of the person having the legal title.[12] But it is error for the court to decree that the defendant convey within a certain time when the bill shows that he has not the legal title.[13]

If the title of the vendor be equitable only, the purchaser will stand in the vendor's shoes and be entitled to all of his remedies and may maintain a suit for specific performance against his vendor and the original vendor.[14]

If the purchaser sues the vendor for specific performance, it is a good defense by the latter that he has not and cannot procure the title.[15] If it be practicable, however, for him to procure the title[16] upon fair terms,[17] it seems that he will be required so to do, unless, it is presumed, the amount necessary to be expended for that purpose should exceed the purchase money. "In equity" an answer by the vendor that he cannot make title "will not suffice, otherwise a seller who had altered his mind might very easily get rid of the contract; but the courts of equity say he shall answer on oath, first to a bill filed against him, then on examination before a master whether a title cannot be made. The courts often make a way to obviate apparent difficulties and compel the seller to procure conveyances in order to complete his title, and the seller's declaration that he rescinds the contract will not at all defeat the purchaser's right."[18] A provision in the contract that if the vendor cannot deduce a good title, or the purchaser shall not pay the money on the appointed day, the agreement shall be void, will not entitle the vendor to rescind if the purchaser makes objections to the title.[19] And where the contract provided that the purchaser should pay the purchase money within a reasonable time after the tender of a marketable title, and no such title was tendered by the vendor, he was not entitled to rescind on the ground that the purchase money had not been paid.[20] Generally, it may be said that non-payment of the purchase money at the time stipulated does not entitle the vendor to rescind if he be unable to render performance on his part at that time.[21]

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[12] 1 Sugd. Vend. (8th Am. ed.) 332, 525, citing Crop v. Norton, 2 Atk. 74; Costigan v. Hastler, 2 Sch. & Lef. 160.

[13] Compton v. Nuttle, 2 Ind. 416.

[14] 1 Sugd. Vend. (8th Am. ed.) 571 (381); Schreck v. Pierce, 3 Iowa, 350.

[15] Swepson v. Johnson, 84 N. C. 449; Williams v. Mansell, 19 Fla. 546; Ormsby v. Graham, 123 Iowa 202, 98 N. W. Rep. 724.

[16] Love v. Camp, 6 Ired. Eq. (N. C.) 209, 51 Am. Dec. 419.

[17] Love v. Cobb, 63 N. C. 324.

[18] Roberts v. Wyatt, 2 Taunt. 268.

[19] Language of MANSFIELD, C. J., in Roberts v. Wyatt, supra. A provision in the contract that the vendor shall have a specified time in which to cure

It has been held that if the vendor have not title the purchaser is, nevertheless, in his suit for specific performance, entitled to a decree that the vendor make a reasonable effort to acquire the title and perform his contract.[22]

If the objection to the title be one which the vendor can remove, he will be required to remove it.[23]

The fact that the purchaser files a bill for specific performance when he knows that a good title cannot be made, is no ground upon which to compel him to take such title as can be made.[24]. He must, however, submit to the alternative of taking that title or having his bill dismissed.[25]

But while specific performance cannot be decreed against a vendor who has no title, it is no objection that he had no title when the contract was made, if he has since acquired it. The purchaser's equity is complete if the vendor have title at the time of the decree.[26] It has been held, however, that if the vendor

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defects, the contract to be void if the defects be not cured in that time, is for the protection of the purchaser, and does not give the vendor the option of curing the defects or rescinding the contract. Otto v. Young, 227 Mo. 193, 127 N. W. 9.

[20] Lockhart v. Ferrey, 59 Oreg. 179, 115 Pac. 431.

[21] Diamond v. Shriver, 114 Md. 643, 80 Atl. 217.

[22] Wellborn v. Sechrist, 88 N. C. 287. In this case the vendor had disabled himself from performing the contract by conveying to a stranger.

[23] Ogooshevitz v. Arnold, 197 Mich. 203, 163 N. W. 946.

[24] 1 Sugd. Vend. (8th Am. ed.) 528. Stapylton v. Scott, 16 Ves. 272.

[25] 1 Sugd. Vend. (8th Am. ed.) 528. Nicholson v. Wadsworth, 2 Swanst. 365.

[26] Graham v. Hackwell, 1 A. K. Marsh. (Ky.) 423; Tysen v. Passmore, 2 Barr (Pa.), 122, 44 Am. Dec. 181; Trask v. Vinson, 20 Pick. (Mass.) 109, the court saying: "We know of no rule of law or principle of sound policy which prohibits a person from agreeing or covenanting to convey an estate not his own. He might have authority from the owner to sell, or he might have the refusal of the estate, or he might rely upon his ability to purchase

agree to convey by quit claim, the agreement has reference only to such title as he may then have, and not to a title thereafter acquired, and that he cannot be compelled to convey such after-acquired title to the purchaser.[27]

The purchaser may, of course, file his bill requiring the vendor to remove an incumbrance from the premises, unless the purchase was made subject to incumbrances.[28] But the court cannot enter a decree requiring the vendor to remove an incumbrance which he has not a legal right to discharge.[29] Nor can the vendor be required to remove incumbrances or cure defects in the title where the sale was not made upon a consideration deemed valuable in law.[30]

If the contract provides only that the vendor shall make a good and sufficient deed, and that the earnest money shall be refunded if the title proves to be not good, the purchaser cannot, if he is dissatisfied with the title, refuse to accept a conveyance with general warranty, reject an offer to return the purchase money, and require the vendor to remove objections to the title. The vendor, under such circumstances, has a right to treat the contract as rescinded, and to seek another purchaser.[31] Where a contract for

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it in season to execute his contract. If he fairly performs the terms of the stipulation it matters nothing to the purchaser that the title was acquired after the contract."

[27] Woodcock v. Bennet, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568. This is closely analogous to the rule that a quit-claim conveyance will not estop the grantor from setting up an after-acquired title to the estate. Post, § 218. In Mitchell v. Woodson, 37 Miss. 567, it was held that an agreement to quit claim would not prevent the vendor from acquiring and holding another title before the time for making the quit claim. Citing Bush v. Cooper, 26 Miss. 599, 59 Am. Dec. 270; Jackson v. Wright, 14 Johns. (N. Y.) 193; Bank v. Mersereau, 3 Barb. Ch. (N. Y.) 568; Jackson v. Hubbell, 1 Cow. (N. Y.) 613.

[28] 2 Sugd. Vend. (8th Am. ed.) 191, 192 (548). Bennett v. Arams, 41 Barb. (N. Y.) 625.

[29] Jerome v. Scudder, 2 Rob. (N. Y.) 169.

[30] 2 Story Eq. 793b. Froman c. Froman, 13 Ind. 317.

[31] Brizzolara v. Mosher, 71 Ill. 41; Long v. Miller, 46 Minn. 13, 48 N. W. 409; Friendly v. Elwert, 57 Oreg. 599, 105 Pac. 404, Ann. Cas. 1913 A. 357.

In a case in which the contract provided that the vendor should return the deposit and should not be liable for damages in case the purchaser should be warranted in rejecting the title as unmarketable, it was held that the purchaser, on finding the title unmarketable, might complete the contract, the sale of land provided that if the title should not be good and should be refused by the purchaser, the contract should be void and the purchase money returned, it was held that the vendor was not thereby obligated to cure defects in the title, and that if the title was rejected he might terminate the contract and repay the purchase money. The purchaser refused to proceed with the purchase because there was an incumbrance on the premises.[32] And if the purchaser by his acts or conduct manifestly abandons the contract, as by submitting to a forfeiture of the earnest money, he cannot afterwards elect to affirm the agreement and have a specific performance in equity. This species of relief is a matter of sound judicial discretion, and where the court perceives that the purchaser has virtually rescinded the contract it will not interfere in his favor, especially if in the meanwhile the property has materially increased in value. He cannot keep the agreement open indefinitely so as to avail himself of a rise in value, or to escape loss in case of a depreciation.[33] On the other hand, a rapid, unexpected and unprecedented increase in the value of the property while the title is being perfected will not justify the vendor in refusing to complete the contract, where the purchaser has waived none of his rights, and has been guilty of no laches or unjustifiable delay in seeking specific performance.[34]

There must, of course, be an unconditional acceptance of an offer to sell before the purchaser can maintain a bill for specific performance. Therefore, where the acceptance by the purchaser was qualified by the addition "provided the title is perfect," it was held that a suit for specific performance could not be maintained by the purchaser.[35]

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take a conveyance, and rely on the grantor's covenants for title, or that he might rescind and receive back his deposit; but having elected to rescind he could not afterward refuse to receive back his deposit and insist upon specific performance by the vendor. Johnson v. Fuller, 55 Minn. 269; 56 N. W. 813.

[32] Long v. Miller, 46 Minn. 13, 48 N. W. Rep. 409.

[33] Presbrey v. Kline, 20 D. C. 513; Giltner v. Rayl, (Iowa) 61 N. W. Rep. 225; Simpson v. Atkinson (Minn.), 39 N. W. Rep. 323.

[34] Keim v. Lindley, (N. J. Eq.) 30 Atl. Rep. 1063. In this case the premises in controversy consisted of a narrow strip of water front that became very valuable as a seaside resort.

[35] Corcoran v. White, 117 Ill. 118, 57 Am. Rep. 858.

The vendor cannot put the purchaser in default by tendering a conveyance so long as there are outstanding mortgages on the property which have not been satisfied on the record.[36]

The purchaser, by making reasonable objections to the title, does not thereby waive his right, when the objections shall have been found untenable, to require specific performance of the contract.[37]

§ 194. **PAYMENT OF THE PURCHASE MONEY AS CONDITION PRECEDENT TO SPECIFIC PERFORMANCE.** If the payment of the purchase money and the conveyance of title by the vendor are to be simultaneous and concurrent acts, neither party can demand a specific performance by the other unless he has tendered performance on his part.[38] If the vendor has executed a bond to convey or make title at a specified time after payment of the purchase money, the retention of the title is his security for payment, and he cannot be compelled to convey unless the purchaser has paid or offered to pay the purchase money.[39] A recovery of the premises from the purchaser in ejectment, for failure to pay the purchase money, does not necessarily deprive him of the right to compel a specific performance of the contract. Thus, where the purchaser declined to pay the purchase money on the ground that the property was incumbered, and the vendor declared a forfeiture and recovered the premises in ejectment, it was held that the purchaser might waive his right to insist upon a perfect title, pay the balance of the purchase money, less the amount of the incumbrance, and compel a conveyance from the vendor with covenants stipulated for in the contract.[40]

As a general rule, in the English practice, a purchaser who has been put in possession, will be required to pay the purchase money into court pending his suit for specific performance.[41] The exceptions to this rule have been thus summarized; where the vendor has thought proper to put the purchaser into possession, upon an understanding between them that the latter shall not pay the purchase money until he has a title, the purchaser cannot be called upon to pay the money into court; and the reason is that the understanding becomes a matter of contract which the vendor must abide by, and he cannot call upon the court to interfere and compel the purchaser to part with his money before he has a title.[42] Nor will the purchaser be compelled to pay the purchase money into court before the completion of the title, where the vendor has voluntarily permitted him to take possession without any stipulation or agreement about paying the purchase money.[43] And, as a general rule, the court will not order purchase money to be paid before a title is given, unless under special circumstances —such as taking possession contrary to the intention or against the will of the vendor, or where the purchaser makes frivolous objections to the title, or throws unreasonable obstacles in the way of completing the purchase, or is exercising improper acts of ownership, by which the property is lessened in value.[44] If the purchaser be in possession under a title anterior to the contract, or if possession were given independently of the contract, and there is laches on the part of the vendor in completing the title, the court will not order the purchase money to be paid in.[45]

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[36] Tucker v. Thraves, 50 Okl. 691, 151 Pac. 598; Bateman v. Hopkins, 157 N. C. 470, 73 S. E. 133; Ann. Cas. 1913 C. 232.

[37] Wilson v. Seybold, 216 Fed. 975.

[38] Ante, §§ 86, 88; post, § 253.

[39] Mix v. Beach, 46 Ill. 316. Where a contract for the sale of land had been rescinded by agreement between the vendor and the administrator of the vendee after part of the purchase money had been paid, it was held that the heirs of the vendee, who repudiated the rescission, could not compel specific performance of the contract until they should pay or tender the residue of the purchase money. Strange v. Watson, 11 Ala. 324.

[40] Wallace v. McLaughlin, 57 Ind. 53.

The purchaser, of course, will not lose his right to a specific performance of the contract by failing to make a formal tender of the purchase money if he has notice that the vendor cannot or will not carry out the agreement.[46]

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[41] Birdsall v. Walton, 2 Edw. Ch. (N. Y.) 315.

[42] Gibson v. Clarke, 1 Ves. & B. 500.

[43] Clarke v. Elliott, 1 Mad. C. R. 606.

[44] 1 Sugd. Vend. (8th Am. ed.) 229, 345. Bonner v. Johnston, 1 Meriv. 366; Boothby v. Waller, 1 Mad. C. R. 197.

[45] Freebody v. Perry, Coop. 91; Fox v. Birch, 1 Meriv. 105.

[46] Ante, § 87. Shattuck v. Cunningham, 166 Pa. St. 368, 31 Atl. Rep. 136; Wheeling Cr. Gas Co. v. Elder, 54 W. Va. 335, 46 S. E. 357; Lathrop v. Collieries Co., 70 W. Va. 58, 73 S. E. 299. Thus, where, at the time fixed for performance, the vendor repudiated the contract and refused to perform,

§ 195. **LACHES OF PURCHASER.** The purchaser's application for specific performance must be seasonably made. He cannot delay the payment of the purchase money after the time fixed for completing the contract and then, when the circumstances of the parties, and perhaps the value of the land, have changed, call upon the vendor for a conveyance.[47] This rule applies with peculiar force where the vendor notifies the purchaser to complete the contract within a specified time under penalty of rescission.[48] But the purchaser will not be chargeable with laches where he has delayed paying the purchase money on account of doubts as to the title; the title itself being in litigation or dispute.[49]

§ 196. **DAMAGES IN EQUITY.** As a general rule a court of equity will not entertain a suit by the purchaser of a defective title, if no other relief is asked than damages for breach of the contract.[50] Therefore, it has been frequently held that if he files a bill seeking specific performance or damages in lieu thereof, when he knows specific performance is impossible by reason of the fact that the defendant had conveyed the premises to an innocent third party, he will be denied relief, because such a proceeding is

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he could not afterwards put the purchaser in default by tendering a deed and demanding the purchase money which then the purchaser was unable to produce. Bateman v. Hopkins, 157 N. C. 252, 73 S. E. 133.

[47] Shorthall v. Mitchell, 57 Ill. 161; Melton v. Smith, 65 Mo. 355, a case in which the vendor failed to show laches. Pomeroy v. Fullerton, 131 Mo. 581; 33 S. W. Rep. 173.

[48] Chabot v. Winter Park Res. Co., 34 Fla. 258, 15 So. Rep. 756.

[49] Galloway v. Barr, 12 Ohio, 354; Keim v. Lindley, (N. J. Eq.) 30 Atl. Rep. 1063, where the subject was considered at length. Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. Rep. 966. *Cf.* Barbour v. Hickey, 2 App. Cas. (D. C.) 207.

[50] 1 Sugd. Vend. (8th Am. ed.) 350 (233); Rawle Covts. (5th ed.) § 351. Courts of equity in England are empowered by "Lord Cairns' Act" (21, 22 Vict. c. 27, 1858) to give damages, but the jurisdiction is limited to cases in which specific performance is also prayed. Fry Sp. Perf. (3d Am. ed.) p. 607, notes; Hatch v. Cobb, 4 Johns. Ch. (N. Y.) 559; Kempshall v. Stone, 5 Johns. Ch. (N. Y.) 193; Morse v. Elmendorf, 11 Paige Ch. (N. Y.) 279; Wiswall v. McGowan, 2 Barb. (N. Y.) 270; Hill v. Fiske, 38 Me. 520; Smith v. Kelly, 56 Me. 64; Doan v. Mauzy, 33 Ill. 227; McQueen v. Choteau, 20 Mo. 222; 64 Am. Dec. 178. Though the bill prays compensation in damages in case a marketable title cannot be given, it cannot be entertained as a bill to recover damages, the remedy of the plaintiff being at law. Van Keuren v. Siedler, 73 N. J. Eq. 239, 66 Atl. 920.

practically a suit for damages only.[51] The same rule will apply, it is apprehended, if the purchaser knows, or is bound to know, that the vendor from any other cause, will be unable to perform the decree of the court. But damages may always be recovered in equity as an alternative or incident to some other relief which is in good faith the object of the suit.[52] If the vendor in his answer, himself asks for specific performance and a decree for the purchase money, he waives the objection that the purchaser's remedy is at law; and the court may retain the action for the purpose of awarding damages.[53] If the vendor fail to complete his contract at the appointed time, the purchaser may have specific performance in equity; or, if the title be defective and performance be impossible, he may have damages in lieu thereof,[54] unless the plaintiff knew when he brought his suit that there could be no performance.[55] If the purchaser is first informed of the defective title by the vendor's answer or other pleading, the jurisdiction to award damages will be clear.[56] And if the vendor convey the premises to an innocent party pending the suit for specific performance, the purchaser will be entitled to damages.[57] In a few cases damages have been awarded the plaintiff though he knew when he brought his suit that the defendant had rendered specific performance impossible by conveying the premises to a purchaser without notice;[58] but in most of them the objection that the court had no jurisdiction does not appear to have been made, and the great weight of authority without doubt supports the rule heretofore stated.

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[51] Sims v. Lewis, 5 Munf. (Va.) 29; Bullock v. Adams, 5 C. E. Gr. (N. J.) 367; Lewis v. Gale, 4 Fla. 437; Levy v. Knepper, 102 N. Y. Supp. 313, 117 App. Div. 163; Pub. Service Corp'n v. Meadows Co., 72 N. J. Eq. 285, 64 Atl. 976.

[52] Cases cited in notes above. 2 Story Eq. Juris, 794, 799; 3 Pom. Eq. Jur. (2d ed.) § 1410, note 1. Slaughter v. Tindle, 1 Litt. (Ky.) 358; Fisher v. Kay, 2 Bibb (Ky.), 434; Scott v. Bilgerry, 40 Miss. 119; Chinn v. Heale, 1 Munf. (Va.) 63; Taylor v. Rowland, 26 Tex. 293; O'Beirne v. Bullis, 80 Hun (N. Y.), 570; 30 N. Y. Supp. 588; Margraf v. Muir, 57 N. Y. 155; Miles v. Furnace Co., 125 N. Y. 294, 26 N. E. Rep. 261. If a vendor is unable from want of title at the time of making the contract to carry it out, a court of equity in a suit by the purchaser for specific performance, will award him damages, provided he commenced the suit in good faith, without knowledge of the disability. Ryan v. Dunlap, (Mo.) 20 S. W. Rep. 29; McQueen v. Chouteau, 20 Mo. 222, 54 Am. Dec. 178; Hamilton v. Hamilton, 59 Mo. 232. In New York in a suit for specific performance, if the defendant be unable to perform, the purchaser may have an order or judgment for the return of his purchase money, the defendant not having demurred on the ground that the action was improperly brought, or that the plaintiff had an adequate remedy at law. Styles v. Blume, 30 N. Y. Supp. 409. In Currie v. Cowles, 6 Bosw. (N. Y.) 452, it was said by ROBERTSON, J., that if the complainant in a suit for specific performance does not allege that good title cannot be made, and merely seeks a conveyance, he cannot in the absence of fraud on the part of the vendor waive the relief asked for, show defendant's want of title, and charge him with the value of the land. The authority of this *dictum* may be doubted.

[53] Snow v. Monk, 80 N. Y. Supp. 719; 81 App. Div. 206.

[54] Fry Sp. Perf. (3d Am. ed.) § 1227. McFerran v. Taylor, 3 Cranch (U. S. S. C.) 270; Pratt v. Campbell, 9 Cranch. (U. S. S. C.) 456, 494. County of Mobile v. Kimball, 102 U. S. 691, 706. Stevenson v. Buxton, 37 Barb.

It has been held that if the complainant fail to make out a case entitling him to specific performance, the bill may, nevertheless, be retained for the purpose of allowing him compensation if he has not a full and adequate remedy at law.[59] The converse of this proposition, also, has been decided, namely, that the court will

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(N. Y.) 13. Taylor v. Rowland, 26 Tex. 293. In Fisher v. Kay, 2 Bibb (Ky.), 436, it was said that there was no principle better settled than that the obligee of a title bond might resort to a Court of Chancery in order to enforce specific performance, and that in the event of the obligor's being unable to convey, to pray for a compensation in damages, which, the court being in possession of the whole case, would allow. In Welsh v. Bayard, 6 C. E. Gr. (N. J. Eq.) 186, specific performance was denied the purchaser, (1) because the contract was not in writing; and (2) because the title to the premises was in the defendant's wife. The purchaser asked a decree for repayment of the purchase money, but this was refused on the ground that his remedy was at law. It does not appear that he was advised of the true state of the title when he brought his suit. If he was not so advised, the case is at variance with the current of authority.

[55] 2 Story Eq. Jur. 794, *et seq.*

[56] 3 Pom. Eq. Jur. § 1410. Milkman v. Ordway, 106 Mass. 232.

[57] This, however, in England seems to be only by force of a statute (1858) 21 & 22 Vict. c. 27 ("Lord Cairns' Act"), enlarging the jurisdiction of the Chancery Courts. 1 Sugd. Vend. (8th Am. ed.) 352.

[58] Woodcock v. Bennet, 1 Cow. (N. Y.) 711; 13 Am. Dec. 568. Gibbs v. Champion, 3 Ohio, 337. Cunningham v. Depew, Morris (Iowa), 462.

[59] Aday v. Echols, 18 Ala. 353; 52 Am. Dec. 225. Specific performance was denied in this case because it did not appear that all the purchase money had been paid.

entertain a bill solely for compensation and damages provided specific performance can be decreed.[60]

The court, instead of giving compensation in damages for a portion of the land to which title cannot be made, has no power to decree that the vendor shall make up the deficiency out of other adjoining lands to which he has title, but which were not embraced in the contract.[61]

The measure of damages for which a vendor, acting in good faith, is liable if he be unable to convey a good title, is the same in equity as at law; namely, the purchase money with interest and costs.[62] But if the vendor be guilty of fraud,[63] or if he disabled himself from performing the contract by conveying the premises to an innocent purchaser, the complainant will be entitled to a decree for the loss of his bargain, that is, the increased value of the property. If the vendor received a profit at the second sale, it will be decreed to the complainant.[64]

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[60] Berry v. Van Winkle, 1 Gr. Ch. (N. J.) 269; Copper v. Wells, Saxt. N. J. Eq.) 10.

[61] Kelly v. Bibb, 3 Bibb (Ky.), 317.

[62] Bain v. Fothergill, L. R., 7 H. L. 158; Burrow v. Scammell, 19 Ch. Dec. 175, 181, 223.

[63] Ante, § 97.

[64] Sugg v. Stone, 5 Jones Eq. (N. C.) 126; Taylor v. Kelly, 2 Jones Eq. (N. C.) 240. Graham v. Hackwith, 1 A. K. Marsh. (Ky.) 424; Rutledge v. Lawrence, 1 A. K. Marsh. (Ky.) 390; Gerault v. Anderson, 2 Bibb (Ky.), 543.

CHAPTER XVII.

OF THE RIGHT OF THE PURCHASER TO TAKE TITLE WITH COMPENSATION FOR DEFECTS.

GENERAL RULE. § 197.
INDEMNITY AGAINST FUTURE LOSS. § 198.
INDEMNITY AGAINST DOWER. § 199.
EXCEPTIONS TO GENERAL RULE. § 200.
RIGHT OF VENDOR TO RESCIND ON FAILURE OF TITLE. § 201.

§ 197. **GENERAL RULE.** We shall see that if the title to a substantial part of the subject fails or if an incumbrance other than a trifling or inconsiderable charge on the premises is discovered after the purchase money has been paid, the purchaser may rescind the contract, if executory, and cannot be required to take the title with compensation for defects.[1] Yet there is no obligation upon him to rescind; as a general rule he may compel the vendor to convey to him that part to which the title is good, with compensation, or abatement of the purchase money for the portion to which the title failed, or he may take such estate as the vendor may have in the entire premises, though less than that which was sold, and have an abatement of the purchase money according to the difference in value of the two estates.[2] The same rule has been applied in a case where the contract had been executed with covenants for title in which the parties were mutually mistaken in respect to the title of a part of the land. It was considered that the grantee might hold the part to which the title was good and recover on

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[1] Post, § 326.

[2] 1 Sugd. Vend. (8th Am. ed.) 479, 466, 480; 2 Story Eq. 779; 2 Beach Eq. Jur. § 627; Pomeroy Sp. Perf. § 438; Bisp. Eq. (3d ed.) 390; Dart's Vend. (5th ed.) p. 1066; Waterman on Sp. Perf. § 499. Wood v. Griffith, 1 Swanst. 54, per Lord ELDON, who said: "No one will dispute this proposition that if a man offers to sell an estate in fee simple, and it appears that he is unable to make a title to the fee simple, he cannot refuse to make a title to all that he has. The purchaser may insist on having the estate, such as it is. The vendor cannot say that he will give nothing because he is unable to give all that he has contracted to give. If a person possessed of a term for 100 years contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey the term, and this court will arrange the equities between the parties." Wheatley v. Slade, 4 Sim. 126; Hill v. Buckley, 17 Ves. 394, *semble;* Bradley v. Munton, 15 Beav. 460; Mortlock v. Buller, 10 Ves. Jr. 316; Mawson v. Fletcher, L. R., 6 Ch. App. 91; Paton v. Rogers, 1 Ves. & Bea. 352; James v. Lichfield, L. R., 9 Eq. 51; Barnes v. Wood, L. R., 8 Eq. 424; Whittemore v. Whittemore, L. R., 8 Eq. 603; Horrocks v. Rigby, L. R., 9 Ch. D. 180; Burrow v. Scammell, L. R., 19 Ch. D. 175.

In Williams v. Edwards, 2 Sim. 98, where there was a stipulation that errors in the description should not vitiate the agreement, but that, if the purchaser's counsel should be of opinion that the title was not marketable, the agreement should be void, and the counsel was of opinion that title could be made to two-thirds of the property only, the purchaser was refused specific performance with an abatement. To the text: Morgan v. Morgan, 2 Wh. (U. S.) 302, n. Morss v. Elmendorf, 11 Paige (N. Y.), 277; Westervelt v. Mattheson, 1 Hoff. Ch. (N. Y.) 37; Jerome v. Scudder, 2 Rob. (N. Y.) 169; Bostwick v. Beach, 103 N. Y. 414. Felix v. Devlin, 86 N. Y. Supp. 12; 90 App. Div. 103. Jones v. Shackleford, 2 Bibb (Ky.), 411; McConnell v. Dunlap, Hard. (Ky.) 41; 3 Am. Dec. 723; Step v. Alkire, 2 A. K. Marsh. (Ky.) 259; Rankin v. Maxwell, 2 A. K. Marsh. (Ky.) 494; 12 Am. Dec. 431. Graham v. Gates, 6 Harr. & J. (Md.) 229; Drury v. Connor, 6 Harr. & J. (Md.) 288. Evans v. Kingsberry, 2 Rand. (Va.) 120; Chinn v. Heale, 1 Munf. (Va.) 63; White v. Dobson, 17 Grat. (Va.) 262. Hudson v. Max Meadows L. & I. Co., 97 Va. 341; 33 S. E. Rep. 586. Satterfield v. Spier, 114 Ga. 127; 39 S. E. Rep. 930. Henry v. Liles, 2 Ired. Eq. (N. C.) 407; Wilcoxon v. Galloway, 61 N. C. 463. Tilley v. Land Co., 136 N. C. 437; 48 S. E. Rep. 824. Austin v. Ewell, 25 Tex. Supp. 403, where there was a mistake as to boundaries; Roberts v. Lovejoy, 60 Tex. 253. Collins v. Smith, 1 Head (Tenn.), 251; Topp v. White, 12 Heisk. (Tenn.) 165; Moses v. Wallace, 7 Lea (Tenn.), 413. Wetherell v. Brobst, 23 Iowa, 586. Luckett v. Williamson, 31 Mo. 54. Adams v. Messenger, 147 Mass. 185; 17 N. E. Rep. 491; 9 Am. St. Rep. 679. Tobin v. Larkin, 183 Mass. 389; 67 N. E. Rep. 340. See, also. Massachusetts cases cited, infra. "Indemnity against contingent right of dower." To the text: Swain v. Burnett, 76 Cal. 299; 18 Pac. Rep. 394; Marshall v. Caldwell, 41 Cal. 614; Morenhout v. Barron, 42 Cal. 591. Florence Oil, etc., Co. v. McCandless, 26 Colo. 534; 58 Pac. 1084. Rohr v. Kindt, 3 W. & S. (Pa.) 563; 39 Am. Dec. 53; Barnes' Appeal, 46 Pa. St. 350; Erwin v. Myers, 46 Pa. St. 96. Wallace v. McLaughlin, 57 Ill. 53. Cowan v. Kane, 211 Ill. 572; 71 N. E. Rep. 1097. Lounsbery v. Locander, 25 N. J. Eq. 555; Meleck v. Cross, 62 N. J. Eq. 545; 51 Atl. 16. Wilson v. Cox. 50 Miss 133. Moses v. Wallace, 7 Lea (Tenn.), 413. Gartrell v. Stafford, 12 Neb. 545; 11 N. W. Rep. 732. Beck v. Bridgman, 40 Ark. 382. Vagueness and uncertainty in the pleadings and proof, or a variance between them as to whether the vendor covenanted to convey the entire interest in lands, or only his undivided interest, is no objection to a decree for specific performance, since the court can only compel him to convey such interest as he may have. Bogan v. Baughdrill, 51 Ala. 312, citing 3 Pars. Cont. 354. The purchaser has a right to accept an undivided interest, with compensation in lieu of the entirety. Covell v. Cole, 16 Mich. 223. In Cady v. Gale, 5 W. Va. 547, one who had sold his wife's separate estate as his own was compelled to convey his life estate by the

the warranty as to the residue.[3] The purchaser may insist upon specific performance with an abatement of the purchase money, if he be unable to obtain the benefit of an easement appurtenant to the premises. Thus, where the owner of land sold it as building lots, bounding the lots on streets of a specified width, as laid down on a map but not actually opened, and the vendor did not own all the streets designated on the map, and hence could not be compelled to open them, the purchaser was held entitled to an abatement of the price to the extent of the loss sustained on that account.[4]

If the purchaser elects to take such interest as the vendor has, he cannot afterwards change that election.[5]

A subsequent conveyance by the vendor is no ground for refusing specific performance if the purchaser be willing to accept what remains of the land, with an abatement of the purchase money;[6] and this, though the subsequent conveyance were made with his consent.[7] The vendor cannot object to specific performance on the

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curtesy, the purchaser electing to take such estate. The purchaser cannot maintain a suit for specific performance against the vendor and a third person in adverse possession of part of the land under a title adverse to that of the vendor, and, in case the adverse claim is sustained, to have an abatement of the purchase money. His remedy is in ejectment. Lang v. Jones, 5 Leigh. (Va.), 192.

Recent Cases. Cashman v. Bean, 226 Mass. 198; 115 N. E. 574; Brisbane v. Sullivan, 83 N. J. Eq. 182; 93 Atl. 705; Eppstein v. Kuhn, 225 Ill. 115; 80 N. E. 80; Campbell v. Cronley, 150 N. C. 457; 64 S. E. 213; Flowe v. Hartwick, 167 N. C. 448; 83 S. E. 841; Farber v. Blubaker Coal C., 216 Pa. 209; 65 Atl. 551; Barthel v. Engle; 261 Mo. 307; 168 S. W. 1154; Baldwin v. Brown, 48 Wash. 303; 93 Pac. 413; Lathrop v. Collieries Co., 70 W. Va. 58; 73 S. E. 299; Osborne v. Fairley, (Ark.) 211 S. W. 917; Hazzard v. Morrison, (Tex. Civ. App.) 130 S. W. 244.

[3] Butcher v. Peterson, 26 W. Va. 447; 53 Am. Rep. 89, citing Atty.-Gen. v. Day, 1 Ves. 218. Beverly v. Lawson, 3 Munf. (Va.) 317. Brady v. Bank of Com. 41 Okl. 473; 138 Pac. 1020. Compare Silliman v. Gillespie, 48 W. Va. 374; 37 S. S. Rep. 669. See, also, Clark v. Hardgrove, 7 Grat. (Va.) 399. But see post, this chapter. "Exceptions," as to mistake.

[4] Leiker v. Henson, (Tenn.) 41 S. W. Rep. 862.

[5] Farber v. Blubaker Coal Co., 216 Pa. 209; 65 Atl. 551, citing Baney v. Killman 1 Pa. 141; 44 Am. Dec. 100; Pence v. Langdon, 99 U. S. 578; 25 L. Ed. 420; Clough v. London, etc., Ry Co., L. R. 7 Ex. 26.

[6] Wingate v. Hamilton, 7 Ind. 73. Bass v. Gilliland, 5 Ala. 761.

[7] Waters v. Travis, 9 Johns. (N. Y.) 450.

ground that he holds a bare legal title in trust for another, if the purchaser be willing to accept such title.[8] Nor can he object that the title is outstanding in a third person.[9] The purchaser may take the equitable title if he chooses, though, as will be seen hereafter, he cannot be compelled to accept such a title.[10] The purchaser may compel a surviving tenant in common to convey, though the heir of the deceased tenant in common cannot be compelled to complete the contract.[11] If the parties are mutually mistaken as to the vendor's title to a part of the land, the purchaser, having improved the premises, may compel the vendor to convey the other part, and have a ratable abatement of the purchase money for the deficiency.[12] The vendor cannot refuse to convey on the ground that the property is incumbered. The purchaser has a right to insist upon the application of the unpaid purchase money to the incumbrance.[13] A charge upon the premises for the maintenance of a third person is no reason why the contract should not be specifically performed, if the purchaser be willing to take the title with warranty.[14]

The basis upon which compensation or abatement for the part to which a title cannot be made will be decreed, is the actual value of the part lost, and not merely the average price per acre agreed to be paid for the whole tract.[15] The rule in this respect is the same as in actions at law for breach of the covenants for title.[16] If the title to the entire premises is good, but there is a deficiency in the acreage or quantity purchased, the question whether the purchaser will be entitled to an abatement of the purchase money depends upon whether the contract was one of hazard as to the quantity, or whether the purchaser is entitled under the contract to demand a specific number of acres or other measure of quantity. The question is somewhat foreign to the plan and scope of this work. The cases, in great numbers, will be found collected in the standard text books.[17]

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[8] Hyde v. Kelly, 10 Ohio, 215. Lathrop v. Collieries Co., 70 W. Va. 58; 73 S. E. 299.

[9] 1 Sugd. Vend. (8th Am. ed.) 525, 532 (349, 355).

[10] Post, ch. 31, § 290.

[11] Atty.-Gen. v. Day, 1 Ves. 218.

[12] Voorhees v. De Meyer, 3 Sandf. Ch. (N. Y.) 614.

[13] Jerome v. Scudder, 2 Rob. (N. Y.) 169. Hunt v. Smith, 139 Ill. 296; 28 N. E. Rep. 809.

[14] Bates v. Swiger, (W. Va.) 21 S. E. Rep. 874.

[15] Jacobs v. Locke, 2 Ired. Eq. (N. C.) 286. Moses v. Wallace, 7 Lea (Tenn.), 413. Cypress Lumber Co. v. Tiller, 73 Ark. 354; 84 S. W. Rep. 490.

[16] Ante, § 170. Doctor v. Hellberg, 65 Wis. 415; 27 N. W. Rep. 176. In determining the compensation, the peculiar value of the tract, if unincumbered, to the complainant in connection with his other land, cannot be considered. Capstick v. Crane, 66 N. J. Eq. 341; 57 Atl. Rep. 1045.

If the purchaser when sued for the purchase money by the vendor or his assignee, elect to keep the premises though the title be defective, he cannot afterwards, when a bill is filed to subject his equitable interest in the premises to the payment of the judgment for the purchase money, avail himself of want of title in the vendor as a defense.[18]

A decree for specific performance should not direct that the vendor procure releases from parties over whom he has no control; but it should direct an inquiry by a master as to defects and incumbrances, and order that the purchase money be abated or paid to a referee or other officer of the court, or be brought into court, to be applied, as far as necessary, to the discharge of incumbrances, and the balance, if any, be paid over to the vendor.[19]

The purchaser in possession and insisting upon specific performance of the contract with abatement of the purchase money as to that part of the land to which the title had failed, must surrender that part to the vendor. He cannot refuse to pay the purchase money and at the same time retain possession.[20]

The purchaser cannot maintain a suit to have the depreciation in value of the premises, by reason of defects in the title, deducted from the price, and to compel a conveyance on payment of the residue.[21]

The fact that the purchaser agrees to take the title subject to an incumbrance and does not insist upon an abatement of the purchase price, does not justify the inference that he intended to stand the loss resulting from the incumbrance.[22]

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[17] Fry Sp. Perf. (3d ed.) p. 578, *et seq.;* 1 Sugd. Vend. (8th Am. ed.) 491 (324); 2 Story Eq. Jur. ch. 19. See Ketchum v. Stout, 20 Ohio, 453, where the subject is elaborately discussed, and many authorities collected.

[18] Dart v. McQuilty, 6 Ind. 391.

[19] Jerome v. Scudder, 2 Rob. (N. Y.) 169.

[20] Lanyon v. Chesney, 186 Mo. 540.

[21] Leerburger v. Watson, 134 N. Y. Supp. 818; 75 Misc. Rep. 3.

The purchaser must, within a reasonable time, elect whether he will take the title with abatement of the purchase money or compensation for defects; and in default of such election the vendor may treat the contract as abandoned and otherwise dispose of the property.[23]

§ 198. **INDEMNITY AGAINST FUTURE LOSS.** The purchaser cannot demand an indemnity other than that afforded by the covenants for title, against a possible loss from a defect in the title to the estate,[24] or an incumbrance on the property, except in the case of an inchoate right of dower in the premises,[25] if indeed the detention of the purchase money to the extent of the present value of that right be regarded as indemnity and not compensation. Perhaps the most important case that has arisen in the United States illustrating this principle, is that of Refeld v. Woodfolk, 22 How. (U. S.) 318. There the purchaser of a large estate paid the purchase money in full, knowing that there was an incumbrance on the property amounting to $60,000. Afterwards he filed a bill for specific performance, and that the vendor be compelled to remove the incumbrance from the property or to indemnify him against it when it should mature and become enforceable. The court decreed that the vendor convey the property with general warranty; that he remove the incumbrance when it should mature, and that in the meanwhile he deposit State bonds, to the amount of the incumbrance, with the clerk of the court as an indemnity against the possible enforcement of the incumbrance. This decree was reversed on appeal, the court holding that the purchaser had no right to any other or greater indemnity than that afforded by the covenant of warranty which his contract entitled him to demand. A different rule has been held to prevail, where the contract has been executed by the delivery of a conveyance with a covenant against incumbrances. The reason given for the distinction is that in an executory contract for the sale of lands there can be no implication of an agreement to provide an indemnity against an immature or doubtful incumbrance upon the estate.[26]

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[22] Paris v. Golden, 96 Kan. 668; 153 Pac. 528.

[23] Neill v. McClung, 71 W. Va. 458; 76 S. E. 878.

[24] Sugd. Vend. (8th Am. ed.) 467 (306) 574 (383); Fry Sp. Perf. (3d Am. ed.) § 1245; Batten Sp. Perf. Law Lib. 171. Balmanno v. Lumley, 1 Ves. & Bea. 225, per Lord ELDON; Paton v. Brebner, 1 Bligh, 66; Aylett v. Ashton, 1 Myl. & Cr. 105; Bainbridge v. Kinniard, 32 Beav. 346; Ross v. Boards, 3 Nev. & Per. 382; Lawrenson v. Butler, 1 Sch. & Lef. 13; Mortlock v. Butler, 10 Ves. 292; Colver v. Clay, 7 Beav. 188. Lounsbery v. Locander, 25 N. J. Eq. 554.

[25] Young v. Paul, 10 N. J. Eq. 415; 64 Am. Dec. 456. Post, this chapter.

§ 199. **INDEMNITY AGAINST INCHOATE RIGHT OF DOWER.** If the wife refuse to join with her husband in the conveyance, she cannot be compelled so to do.[27] The purchaser may of course elect to accept the conveyance of the husband alone.[28] Whether, in such a case, he may demand an abatement of the purchase money, as an indemnity against a possible claim for dower in the future, is a question upon which there is a conflict of decision; but the weight of authority and the better view seems to be that the purchase money may be abated.[29] If the written contract between the parties contain no stipulation for a deed with a covenant against incumbrances, and there is no provision in the contract as to the contingent right of dower of the vendor's wife, the purchaser, knowing of the existence of such right, cannot insist upon

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[26] In Thomas v. St. Paul's M. E. Church, 86 Ala. 138; 5 So. Rep. 508, the vendor was required to provide the purchaser with an indemnity against an incumbrance on the premises. The case was distinguished from Refeld v. Woolfolk, supra, by the fact that the contract had been executed by conveyance with covenant against incumbrances, while in the latter case the contract was merely executory. The former case may, therefore, be regarded as establishing the proposition that in case of a contract executed with a covenant against incumbrances, the grantee may in equity require the vendor either to remove the incumbrance, or provide an indemnity against it. There is also an intimation in this case that if the contract had provided that if the purchaser had received a conveyance with a covenant against incumbrances, the vendor might have been compelled to provide an indemnity against an existing incumbrance, though the contract was still executory.

[27] 2 Story Eq. Jur. § 731. Troutman v. Gowing, 16 Iowa, 415. Hanna v. Phillips, 1 Grant (Pa.), 253. Allison v. Shilling, 27 Tex. 450; 86 Am. Dec. 622. Yost v. Devault, 9 Iowa, 60. Richmond v. Robinson, 12 Mich. 193. Aiple Real Est. Co. v. Spelbrink, 211 Mo. 671; 111 S. W. 480; Saldutti v. Flynn, 72 N. J. Eq. 157; 65 Atl. 246.

[28] Zebley v. Sears, 38 Iowa, 507. Corson v. Mulvany, 49 Pa. St. 88; 88 Am. Dec. 485. Steadman v. Handy, (Va.), 46 S. E. Rep. 380. Aiple Real Est. Co. v. Spelbrink, 211 Mo. 671; 111 S. W. 480; Lazzell v. Keenan, 77 W. Va. 180; 87 S. E. 80.

[29] 1 Sugd. Vend. (8th Am. ed.) 465, *semble*, citing Wilson v. Williams, 3 Jur. N. S. 810. Davis v. Parker, 14 Allen (Mass.), 94; Woodbury v. Luddy, 14 Allen (Mass.), 1; 92 Am. Dec. 731. Wright v. Young, 6 Wis. 127; 70 Am. Dec. 453. Sanborn v. Nockin, 20 Minn. 178. Troutman v. Gowing, 16 Iowa,

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415; Leach v. Forney, 21 Iowa, 271; 89 Am. Dec. 574; Presser v. Hildebrand, 23 Iowa, 484; Zebley v. Sears, 38 Iowa, 507. Wingate v. Hamilton, 7 Ind. 73. See, also, Wilson v. Brumfield, 8 Bl. (Ind.) 146; Baker v. Railsback, 4 Ind. 553; Hazelrig v. Hutson, 18 Ind. 481; Martin v. Merritt, 57 Ind. 34; 26 Am. Rep. 45. An ingenious view of this question has been taken in a note to the case of Humphrey v. Clement, 44 Ill. (2d ed.) 300. The annotator concludes that a case in which the release of the contingent right of dower cannot be procured, is one for decreeing damages against the vendor rather than compensation or indemnity to the purchaser; and for this purpose he considers it unnecessary that the value of the contingent right of dower shall be capable of computation. "The damages would be the injury to the vendee by virtue of being obliged to take the estate subject to the inchoate right, not the value of the dower to the wife. If a jury in an action at law could estimate the injury to the vendee at $250, why could not a chancellor estimate the deduction which should be made from the purchase money at the use of the $250 so long as the wife should live?" It has been since held in this State, that the purchaser cannot insist upon a conveyance with abatement of the purchase money to the extent of the present value of the inchoate right of dower. Cowan v. Kane, 211 Ill. 572; 71 N. E. Rep. 1097. In Heimburg v. Ismay, 35 N. Y. Super. Ct. 35, it was held that an inchoate right of dower in the wife of the vendor was an incumbrance constituting a breach of a contract to convey free from incumbrances; and that the purchaser was entitled to more than nominal damages, the vendor having entered into the contract with full knowledge that his power to convey was contingent. See, also, Williams v. Pope, Wright (Ohio), 406; Reynolds v. Clark, Wright (Ohio), 656.

The cases in which the right of the purchaser to specific performance with abatement of the purchase money, or decree for damages on account of an inchoate right of dower, is denied, have been in some instances rested upon the supposed want of means for ascertaining the amount which the purchaser may detain; and in others, upon the idea that the wife is in effect morally coerced to join in the deed, by a decree directing that her husband shall pay damages in the event of her refusal. Bitner v. Brough, 1 Jones (Pa.), 138; Riddleberger v. Mintzer, 7 Watts (Pa.), 143; Willer v. Weyand, 2 Grant (Pa.), 103; Shurtz v. Thomas, 8 Barr (Pa.), 363; Clark v. Seirer, 7 Watts (Pa.), 107; 32 Am. Dec. 745; Riesz's Appeal, 73 Pa. St. 485; Burk's Appeal, 75 Pa. St. 141; 15 Am. Rep. 587; Burk v. Serrill, 80 Pa. St. 413; 21 Am. Rep. 105. Lucas v. Scott, 41 Ohio St. 636. People's Sav. Bank v. Parisette, 68 Ohio St. 450; 67 N. E. Rep. 896; Phillips v. Stanch, 20 Mich. 369. Hopper v. Hopper, 16 N. J. Eq. 147. Hawralty v. Warren, 18 N. J. Eq. 124; Reilly v. Smith, 25 N. J. Eq. 158. Humphrey v. Clement, 44 Ill. 299; Cowan v. Kane, 211 Ill. 572; 71 N. E. Rep. 1097. Barbour v. Hickey,

a conveyance with abatement of the purchase money as indemnity.[30] The sum which the purchaser may detain is the money value of the contingent interest of the wife, calculated according to some one of the standard tables of longevity.[31] It is to be observed that the abatement of the purchase money does not affect

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2 App. Cas. (Dist. of Col.), 207; Sternberg v. McGovern, 56 N. Y. 12; Dixon v. Rice, 16 Hun (N. Y.), 422. Swepson v. Johnston, 84 N. C. 449. Stewart v. Gillette, 139 N. Y. Supp. 583; 79 Misc. Rep. 93; Dalrymple v. Cole, 170 N. C. 102; 86 S. E. 988; Bethell v. McKinney, 164 N. C. 71; 80 S. E. 162; Haden v. Falls, 115 Va. 779; 80 S. E. 576; Leo v. Deitz, 63 Oreg. 261; 127 Pac. 550 Kuratli v. Jackson, 60 Oreg. 203; 118 Pac. 192; Ann. Cas. 1914 A, 203; Long v. Chandler, 10 Del. Ch. 339; 92 Atl. 256; Crosby v. Evans (Mo. App.) 195 S. W. 514; Bartak v. Isvolt, 261 Ill. 279; 103 N. E. 967. In Leo v. Deitz, 63 Oreg. 261; 127 Pac. 550, it was hed that the purchaser could not be compelled to take the title with abatement of the purchase money as protection against a possible claim on the part of the husband to an estate by the curtesy in the property. In Sternberger v. McGovern, 56 N. Y. 12, which was a suit to enforce specific performance of a contract for the exchange of lands, it was held that the plaintiff could not have a decree against the defendant, whose wife refused to join in a conveyance by him, for the difference between the value of the property with a release of the inchoate right of dower, and the value without such release. In Dixon v. Rice, 16 Hun (N. Y.), 422, and Martin v. Colby, 42 Hun (N. Y.), 1, it was held that if the wife refused to join in the conveyance, the purchaser could not take a conveyance from the husband alone with damages or compensation for the wife's contingent right of dower, but must abandon his claim for specific performance and sue at law for damages alone. It may be doubted whether a court in such a case, as against a vendor acting in good faith, would give damages beyond the present value of the wife's inchoate right of dower. And if the plaintiff could recover such damages at law, no reason is perceived why the same should not be allowed by way of compensation or abatement in his suit for specific performance, as a matter of ancillary relief.

[30] People's Sav. Bank v. Parisette, 68 Ohio St. 450; 67 N. E. Rep. 896.

[31] The rule for calculating the present value of the wife's contingent right of dower was thus stated in Jackson v. Edwards, 7 Paige Ch. (N. Y.) 408. "Ascertain the present value of an annuity for her life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband; and the difference between those two sums will be the present value of her contingent right of dower (McKean's Pr. L. Tables, 23, § 4; Hendry's Ann. Tables, 87, Prob. 4.)" Of course in a suit for specific performance against the husband, the object in ascertaining the present value of the wife's interest, is not to compel her to take it, but to arrive at the sum which the purchaser may detain as an indemnity against a possible claim of dower.

the rights of the wife. She is no party to the proceeding, and, if she were, she could not be compelled to accept a sum of money in lieu of her contingent right of dower; for that in effect would be to compel her to perform specifically the contract of her husband.[32] As to the rights of the vendor; it is true that he may survive his wife, by which the necessity for any indemnity would be removed; but the decree might provide for that contingency by directing that the purchaser shall give bond with security to pay the abated sum with interest upon the death of the wife living the husband.[33] As to the rights of the purchaser; it is true that the right of dower may become consummate by the death of the husband immediately after the deed has been accepted, so that the amount abated from the purchase money might prove an inadequate indemnity; but that is the purchaser's concern, and if he chooses to accept a conveyance upon those terms there is nothing of which he can complain. The sum abated from the purchase money, as an indemnity against the wife's inchoate right of dower, remains, of course, in the hands of the purchaser, and is not paid over to the wife in satisfaction of her interest unless, indeed, she should choose to accept it. The courts cannot compel her to part with her contingent interest.[34] If the vendor's wife refuse to join in the deed through his fraudulent procurement, specific performance will be granted the vendee with indemnity against the wife's interest.[35]

The purchaser cannot require the vendor to execute a bond to protect him against any claim to dower in the future, since that would be to make for the parties an agreement which they did not make for themselves.[36]

In some of the States it has been held that the husband cannot be compelled to specifically perform a contract for the sale of the "homestead" estate of himself and wife. This, however, is not upon the ground that there is no means of ascertaining the value of the interest; but for the reason that her interest is vested and certain, and cannot be taken or sold without her consent.[37] Where the right of dower has become consummate by the death of the husband, there can be, of course, no doubt of the right of the purchaser to a decree against her heirs for a specific performance, with compensation.[38] While the better opinion seems to be that the purchaser may elect to take the title with an abatement of the purchase money as an indemnity against a possible claim for dower in the future, he cannot be compelled so to do. It is well settled that a purchaser cannot be compelled to take the property with indemnity against any loss that may accrue from a defective title.[39]

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[32] Cases cited, ante, note 29.

[33] Humphrey v. Clement, 44 Ill. 299.

[34] In Maine, however, she is compelled by statute to accept a certain proportion of the purchase money in satisfaction of her contingent interest, provided the sale be approved by one of the Justices of the Supreme Court. Handy v. Rice, 98 Me. 504; 57 Atl. Rep. 847.

[35] Young v. Paul, 10 N. J. Eq. 401; 54 Am. Dec. 456, where the wife assented to the sale in the first instance, and afterwards, at the instigation of her husband, refused to relinquish her right. Peeler v. Levy, 26 N. J. Eq. 330.

[36] Long v. Chandler, 10 Del. Ch. 339; 92 Atl. 256.

§ 200. **EXCEPTIONS TO GENERAL RULE.** The exceptions to the rule that the purchaser may elect to take such title as the vendor can make, with compensation for defects, are, where the vendor's title being good only to a small portion of the estate, *e. g.*, the mansion house and curtilage, the effect of enforcing the rule would be to leave the large appurtenant estate, sold with the mansion, on the hands of the vendor with the proclaimed doubtful title. In such a case, according to Sir Edward Sugden, the rule does not apply.[40] Neither does it apply where the conditions of sale provide that the vendor may rescind if the title be found defective.[41] It has also been held that the purchaser cannot have specific performance with compensation if he knew at the time the contract was made that the interest of the vendor was partial, or that his title was defective.[42] This exception, however, seems not to have been recognized in those cases in which specific performance in favor of the purchaser with indemnity against an inchoate right of dower has been decreed.[43] Nor does the rule apply where, by reason of the purchaser's delay in seeking specific performance the vendor has been placed in a worse situation than if he had been called upon to perform his contract, at the time stipulated.[44] Nor where the contract is to convey the fee upon a contingency which has not happened; in such case the purchaser cannot insist on the conveyance of a less estate, with abatement of the purchase money.[45] Nor where the defect in the title is such that the resulting difference in value between the interest contracted for and that to be conveyed is not susceptible of computation.[46] Where the contract provides that if the title be not good and cannot be made good within a specified time the agreement shall be at an end when that time expires, the vendor cannot if the title be incapable of being perfected within the time agreed, elect to take such title as the vendor can make; for the contract in that event is absolutely at an end.[47] So, also, where the agreement provides that if counsel shall be of the opinion that the title is not marketable the contract shall be void, and counsel reports the title unmarketable as to part of the property, the purchaser cannot elect to take the rest with compensation for defects.[48]

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[37] Brewer v. Wall, 23 Tex. 585; 76 Am. Dec. 76; Allison v. Shilling, 27 Tex. 450; 86 Am. Dec. 622.

[38] Springle v. Shields, 17 Ala. 295. In this case it was held that the purchaser could not demand a gross sum as the present value of the dower right, but should be relieved from payment of one-third of the value of the land at the time of the contract, until the death of the dowress.

[39] Post, § 327.

[40] 1 Sugd. Vend. (8th Am. ed.) 480. In Bailey v. James, 11 Grat. (Va.) 468; 62 Am. Dec. 659, it was held that if a contract for the sale of land is entire, for a specific sum of money, and the title to a part of it fails from a cause of which both parties were ignorant, it is ground for rescinding the whole contract; and the vendee cannot elect to take the part to which the title is good, and rescind as to the other part.

[41] Williams v. Edwards, 2 Sim. 78.

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[42] Pomeroy Sp. Perf. § 442. Lucas v. Scott, 41 Ohio St. 635. Love v. Camp, 6 Ired. Eq. (N. C.) 209. James v. Lichfield, L. R., 9 Eq. 51. Moore v. Lutjeharms, 91 Neb. 548; 136 N. W. 343; Knox v. Spratt, 23 Fla. 64; 6 So. 924; Joyner v. Crisp, 158 N. C. 190; 73 S. E. 1004; Peeler v. Levy, 26 N. J. Eq. 32, where it was said: "Generally compensation will be denied where the party asking it had notice at the time the contract was made, that the vendor was agreeing for more than he could give or convey, and it appears the vendee has not, in consequence of the contract, placed himself in a situation from which he cannot extricate himself without loss. 2 Chitty Cont. (11th Am. ed.) 1490; Fry on Spec. Perf. § 795, n. 2. Nelthrop v. Howgate, 1 Coll. 223. Harnett v. Yielding, 2 Sch. & Lef. 559. Wiswall v. McGowan, 1 Hoff. Ch. (N. Y.) 131. Thomas v. Dering, 1 Keen, 747. This rule has the support of the clearest dictates of justice. It is unconscionable for one man to take the promise of another to do a particular thing, which the promisee knows at the time the promise was made, the promisor cannot perform except by the consent or concurrence of a third person, and then, when consent or concurrence is refused by the third person in good faith, to demand a strict and literal fulfillment of the promise. He contracts with full notice of the uncertainty or hazard attending the promisor's ability to perform, and has no right, therefore, to ask the extraordinary aid of a court of conscience in repairing the loss he has sustained by non-fulfillment of the contract."

[43] Ante, "Indemnity against Dower," § 199. And see Frey Sp. Perf. (3d Am. ed.) § 1231, where it is said that the fact that the purchaser was from the first aware of objections to the title, will not, as a general rule, affect his right to require a conveyance with compensation for defects.

[44] Voorhees v. De Meyer, 2 Barb. (N. Y. S. C.) 37. Planer v. Eq. Life Assur. Soc. (N. J. Eq.), 37 Atl. Rep. 668.

[45] Weatherford v. James, 2 Ala. 170. Here the vendor agreed to sell the interest of his wife, an Indian woman, provided he could obtain authority from congress. He failed in this, and the purchaser asked that he be compelled to convey his life estate as tenant by the curtesy. Specific performance was refused.

The right of the purchaser to take such title as the vendor can make is of course dependent upon the existence of a valid contract between the parties. The contract consists in an offer to sell on the one part and an unconditional acceptance on the other, and will not be deemed complete if the acceptance be conditioned upon the state of the title, to be afterwards ascertained. Thus, where the offer to sell was accepted "provided the title is perfect," the court refused to compel the vendor to accept the purchase money and convey the property to the purchaser, holding the contract to be incomplete.[49] But it has been held that a condition in the offer stands upon a different ground from a condition in the acceptance. Thus, where the vendor proposed that the purchaser should forfeit $500 on failure to perform the contract in thirty-five days, provided a certain lawyer pronounced the title good, and the purchaser agreed to such proposition it was held that the contract was complete, and that the vendor could not insist that there was no unconditional acceptance of his offer.[50]

It has been said that if, at the time of the contract, the purchaser is fully aware that the vendor cannot execute the agreement, it will be presumed that the agreement is founded in mistake; and the purchaser cannot insist upon a performance as to the interest to which the vendor may be actually entitled.[51] The purchaser seeking specific performance with compensation for defects, must show not only that he has performed or offered to perform all that is to be done on his part, but that before the filing of his bill, he had by notice and demand given the vendor an opportunity to perform the contract and make the appropriate abatement or compensation. He should not needlessly involve the vendor in the expense of a chancery suit.[52] If the purchaser elect to take title to part of the premises with compensation for part to which title cannot be had, he must take the whole of that part to which the title is good. He cannot require a conveyance of choice portions, and reject a deed which conveys all that part to which the vendor has title.[53]

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[46] Milmoe v. Murphy, 56 Atl. Rep. 292; 65 N. J. Eq. 767.

[47] Post, this chapter; Mackey v. Ames, 31 Minn. 103.

[48] Williams v. Edwards, 2 Sim. 78.

[49] Corcoran v. White, 117 Ill. 118; 7 N. E. Rep. 525; 57 Am. Rep. 858.

[50] Howland v. Bradley, 38 N. J. Eq. 288.

§ 201. **RIGHT OF VENDOR TO RESCIND WHERE THE TITLE IS DEFECTIVE.** The purchaser cannot, of course, elect to take the title such as it is, if the vendor has reserved the right to rescind the contract in case it should appear that the title is defective.[54] But if the contract provide that the purchase money shall be refunded if the title prove defective,[55] or that in such event the purchaser shall not be required to pay the purchase money,[56] the vendor cannot avail himself thereof to rescind the contract without the consent of the purchaser. Inasmuch as the purchaser has, generally, the right to take such title as the vendor can make, or to take title to a part with compensation for a deficiency, it would seem that the vendor could in no case elect to rescind the contract on the ground that the title had failed,[57] unless he could show a mutual mistake of fact or fraud[58] on the part of the purchaser with respect to the title, or unless he had reserved the right to rescind if the title should prove defective. Even though he reserve that right, it has been held that he must make reasonable efforts to perfect the title before he will be permitted to rescind.[59] Where the parties continued their negotiations for more than a year after maturity of the right to rescind, it was held that they thereby waived that right.[60]

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[51] 1 Sugd. Vend. (8th Am. ed.) 467, citing Lawrenson v. Butler, 1 Sch. & Lef. 13; Mortlock v. Butler, 10 Ves. 292; Colyer v. Clay, 7 Beav. 189. Planer v. Eq. Life Assur. Soc. (N. J. Eq.) 37 Atl. Rep. 668. But see Fry Sp. Perf. (3d Am. ed.) § 1231.

[52] Bell v. Thompson, 34 Ala. 633; Long v. Brown, 4 Ala. 626.

[53] Perkins v. Hadley, 4 Hayw. (Tenn.) 148.

[54] Mawson v. Fletcher, L. R., 10 Eq. 212; Woolcot v. Peggie, L. R., 15 App. Cas. 42. Old Colony Tr. Co. v. Chauncey, 214 Mass. 271; 101 N. E. 423. A provision that the contract shall be void if the vendor be unable to perfect the title within 30 days, is for the benefit of the purchaser and cannot be availed of by the vendor. Leonard v. King, (Tex. Civ. App.) 164 S. W. 1110. Where the parties stipulated for the removal of liens within a specified time, and in case of the inability of the vendor to remove them in that time, the sale to be rescinded, it was held that the vendor was not entitled to rescind by showing that he had brought a suit to vacate the liens, when he knew that the suit could not be determined within the specified time, and when he might have removed the liens by paying them off. Sykes v. Robbins, 125 Fed. Rep. 433.

[55] Hale v. Cravener, 128 Ill. 408; 21 N. E. Rep. 534. See, also, Sloane v. Wells, (Ill.) 30 N. E. Rep. 1042. Hale v. Cravener, supra, was distinguished in Terte v. Maynard, 48 Mo. App. 463, where the following proposition was in substance laid down: If the contract contains no distinct and independent agreement to convey, and such agreement as it does contain is conditioned

In England it is customary to insert in the common conditions of sale a provision to the following effect: "If the purchaser shall insist on any objection or requisition in respect of the title which the vendor shall be unable or unwilling to remove or comply with, the vendor shall be at liberty, by notice in writing, to rescind this agreement." In a case in which there was a private right of way over the premises, of which both parties were ignorant, it was held that such a condition entitled the vendor to rescind.

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on there being a good title, and the contract contains a further provision that the agreement shall be null and void if the title turns out to be defective and cannot be perfected within a specified time, the vendor cannot be held liable in damages if the title be defective and cannot be cured within such time.

[56] Roberts v. Wyatt, 2 Taunt. 268.

[57] Rohr v. Kiendt, 3 W. & S. (Pa.) 563; 39 Am. Dec. 53.

[58] If the parties during their negotiations assume the existence of an incumbrance on the estate or of a defect in the title, whereby the vendor is induced to sell at a lower price, and the purchaser knows that neither the incumbrance nor the defect exists, it is presumed that he would be deemed guilty of a fraud upon the vendor if he did not disclose his information. But in such a case it has been held that the court would not rescind the contract, if the seller might easily have ascertained the facts as to the incumbrance. Drake v. Collins, 5 How. L. (Miss.) 253.

[59] Bibb v. Wilson, 31 Miss. 624. But see Old Colony Tr. Co. v. Chauncey, 214 Mass. 271; 101 N. E. 423.

[60] Hazzard v. Morrison, (Tex. Civ. App.) 130 S. W. 244.

though another clause of the contract provided that if any error in the description of the property be found, the same should not annul the sale, but compensation should be allowed in respect thereof.[61] If the contract has been executed by a conveyance with covenants of warranty, the vendor cannot, in the absence of fraud or mistake, rescind on the ground that the title has failed. The purchaser has a right to retain the possession and defeat the adverse claim if he can, or if evicted, to recover on the warranty of the grantor.[62] But if judgment in ejectment be recovered against the grantee, and the grantor satisfies his warranty by returning the purchase money, with interest, to the grantee, he will be entitled to a reconveyance of the premises.[63]

If the vendor ask, and is allowed, time in which to perfect the title, he cannot afterwards elect to rescind and put the purchaser to his action for damages in lieu of a suit for specific performance of the contract.[64]

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[61] Ashburner v. Sewell, L. R., 3 Ch. Div. 405 (1891). We have seen that in America the purchaser cannot insist on specific performance where the contract provides that the agreement shall be at an end if the title be found to be not good. Ante, § 201. In a case in which the contract provided that if the vendor should be unable or unwilling to remove the objections to the title, he might annul the sale and return the purchaser's deposit without interest or costs, notwithstanding any previous negotiation or litigation, it was held that the vendor could not, for the purpose of avoiding costs, exercise this power after judgment had been rendered against him for the deposit at the suit of the purchaser. In re Arbib, L. R., 1 Ch. Div. 601 (1891).

[62] Trevino v. Cantu, 61 Tex. 88, the court saying: "No allegation of fraud on the part of the purchaser is made, nor is it charged that there was any mistake of fact occurring at the time of the conveyance made between the parties. It is averred that the vendor was mistaken in supposing that the original grantee, under whom he claimed, had a good title from the State. Whether this was a mistake of fact or of law does not appear. And even if the former, it is against just such mistakes that purchasers protect themselves by requiring covenants of warranty from their vendors. It would be the height of injustice to allow a warrantor to be relieved from an obligation on account of the happening of a contingency against which the obligation was specially intended to provide. In this case it would relieve the vendor from the payment of a sum which he virtually admits in his pleadings he justly owed the purchaser under the express terms of the contract, the contingency upon which it was to be paid having occurred. It is not the province of equity to change the contract of a party and relieve him from an obligation fairly undertaken, especially after he has received the consideration which induced him to accept it. It can compel execution of agreements, but not substitute one agreement for another. Wilgus v. Hughes, 2 A. K. Marsh. (Ky.) 328.

[63] Williams v. Pendleton, 1 T. B. Mon. (Ky.) 188.

The vendor electing to rescind the contract where he has reserved that privilege, must, of course, return the purchase money if any has been paid.[65] He cannot maintain an action to remove the cloud on his title arising from his contract with the purchaser until he has returned the purchase money, or any obligations which he may hold for the same.[66] On rescission of a contract, each party must, as far as possible, be placed *in statu quo.*

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[64] Price v. Immel, 48 Colo. 163; 109 Pac. 941.

[65] Benson v. Shotwell, 87 Cal. 49; 25 Pac. Rep. 249. Drew v. Smith, 7 Minn. 301 (231).

[66] Dahl v. Pross, 6 Minn. 89 (38).

CHAPTER XIX.

OF THE RIGHT OF THE PURCHASER TO PERFECT THE TITLE.

BY THE PURCHASE OF ADVERSE CLAIMS. § 202.
BY THE DISCHARGE OF LIENS OR INCUMBRANCES. § 203.
SUBROGATION OF PURCHASER. § 204.

§ 202. **BY THE PURCHASE OF ADVERSE CLAIMS.** The purchaser may always apply the unpaid purchase money to the acquisition of a valid, outstanding, paramount title to the land.[1] But he cannot use the title so acquired to defeat the vendor's claim to so much of the purchase money as may remain unexpended in his hands,[2] unless he has been legally evicted, and has repurchased the property under a new and distinct title.[3] Of course he may rescind the contract, surrender the possession, and then acquire the adverse title and set it up against the vendor.[4] But for obvious reasons he cannot do this where he elects to affirm the contract. The money paid by him to the adverse claimant will be treated, for the purpose of this question, as money paid to the use and benefit of the vendor. Hence, it follows that the purchaser cannot claim the benefit of the title so acquired, except to the extent of the amount disbursed by him to the adverse claimant, such amount to be availed of as a set-off *pro tanto* to the unpaid purchase

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[1] Corbally v. Hughes, 59 Ga. 493. Hill v. Samuel, 31 Miss. 306. Ash v. Holder, 36 Mo. 163. It is said in this case that the rule is different where a conveyance has been made "because then the vendee owes the vendor no faith or allegiance, but holds adversely to him and all the world."

[2] 1 Warv. Vend. §§ 13, 14; 1 Sugd. Vend. (8th Am. ed.) 533 (355), where it is said: "If a right be outstanding in a third person, which the purchaser relies on as an objection to the title, and then purchases the interest for his own benefit, the court will not permit him to avail himself of the purchase against the vendor, but, allowing him the price paid for it, will compel him to perform his original contract." Citing Murrell v. Goodyear, 21 Giff. 51; affd., 1 DeG., F & J. 432; Lawless v. Mansfield, 1 Dru. & War. 557. Harper v. Reno, 1 Freem. Ch. (Miss.) 323; Hill v. Samuel, 31 Miss. 305; Hardeman v. Cowan, 10 Sm. & M. (Miss.) 487; Champlin v. Dotson, 13 Sm. & M. (Miss.) 554; 53 Am. Dec. 102; Harkreader v. Clayton, 56 Miss. 383. Mitchell v. Barry, 4 Hayw. (Tenn.) 136; Meadows v. Hopkins, 19 Tenn. (Meigs) 181; 33 Am. Dec. 140, and Tennessee cases there cited. Bond v. Montague (Tenn. Ch. App.), 54 S. W. Rep. 65; Lewis v. Boskins, 27 Ark. 61; Strong v. Waddell, 56 Ala. 471; Mumford v. Pearce, 70 Ala. 452. Beall v. Davenport, 48 Ga. 165; 15 Am. Rep. 656. Wilkinson v. Green, 34 Mich. 221. Curran v. Banks, 123 Mich. 594; 82 N. W. Rep. 247. Cowdry v. Cuthbert, 71 Iowa, 733; 29 N. W. Rep. 798, where the purchaser bought in a tax title under a tax sale made prior to his purchase. Roller v. Effinger, (Va.) 14 S. E. Rep. 337; Bibb v. Coal & Iron Co., 109 Va. 261; 64 S. E. 32. Morgan v. Boone, 4 Mon. (Ky.) 291, 298; 16 Am. Dec. 153. Cox v. Johnson, 18 Ky. Law Rep. 516; 37 S. W. Rep. 154; Fuson v. Lambdin, 23 Ky. Law Rep. 2245; 66 S. W. Rep. 1004. Wood v. Perry, 1 Barb. (N. Y.) 115, 134; Foster v. Herkimer Mfg. Co., 12 Barb. (N. Y.) 352. Renshaw v. Gans, 7 Pa. St. 117. Ramsour v. Shuler, 2 Jones Eq. (N. C.) 487, a case in which the purchaser got in the outstanding title for a trifling sum, and which well illustrates the justice of the rule. There was a conveyance in this case. The rule stated in the text is the

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same, whether the contract be executory or executed. See cases cited, ante, § 168, and Rawle Covts. (5th ed.) § 192. Baker v. Corbett, 28 Iowa, 317. The purchaser cannot resist the payment of the purchase money on the ground that the vendor failed to procure a conveyance from a third person having an interest in the land, when he himself (the purchaser) has procured a conveyance from such person. Calkins v. Williams, 36 Ill. App. 500. A purchaser at a judicial sale, who is permitted to retain a part of the purchase money with which to pay off liens on the land, cannot become an assignee of the liens, or subrogated to the benefit thereof further than is necessary for his indemnity. Menifee v. Marye, (Va.) 4 S. E. Rep. 726. In Louisiana, the fact that the purchaser buys in the premises at a sale under an incumbrance, does not affect his right to recover back the purchase money paid his vendor. Boyer v. Amet, 4 La. Ann. 721.

[3] Martin v. Atkinson, 7 Ga. 228; 50 Am. Dec. 403. Post, § 219.

[4] Hill v. Samuel, 31 Miss. 305; Murphree v. Dogan, (Miss.) 17 So. Rep. 231. Grundy v. Jackson, 1 Litt. (Ky.) 13. Wilson v. Wetherby, 1 Nott & McC. (S. C.) 373. Thredgill v. Pintard, 12 How. (U. S.) 24, 31, *dictum;* Willison v. Watkins, 7 Wh. (U. S.) 53. If the title fail and the purchaser repurchases from the real owner and enters under the title so acquired, which is hostile to that of the vendor, the latter cannot compel specific performance of the contract. Bensel v. Gray, 80 N. Y. 517. Stephens v. Black, 77 Pa. St. 138. In Hanks v. Pickett, 27 Tex. 97, it was held that a purchaser who declines to do an act necessary to perfect his vendor's title, and which it is his duty to do, cannot recover damages against his vendor for failure to make title. In this case there was an implied undertaking that the purchaser should appear before the county clerk and furnish evidence that he had occupied the land as a pre-emption claim for a certain number of years. See Walker v. Ogden, 1 Dana (Ky.), 247, where it was said that there might be cases where the purchaser might in equity avail himself of a paramount title acquired from a stranger, as against his vendor.

In Shelly v. Mikkelson, (N. Dak.) 63 N. W. Rep. 210, the vendor abandoned the contract and sold and conveyed the premises to a stranger, and the original vendee then bought in the stranger's title so acquired, and it was held that he might set up the same against the vendor when sued upon the original purchase-money notes.

money, if any.[5] A familiar illustration of these principles is afforded by the rule that a purchaser from one who holds under a void patent cannot enter and locate the land for himself, and then seek to rescind his contract and avoid the payment of the purchase money.[6] Of course the legal title acquired by the purchase from the adverse claimant is not affected by the relations existing between the vendor and vendee. Equity may compel the purchaser to pay the vendor the balance justly coming to him under the contract, but cannot divest the purchaser of the title fairly acquired.[7] Nor does the purchase of an outstanding title amount to an election on the part of the purchaser to rescind the contract, nor deprive him of his rights thereunder against the vendor.[8]

In practice the application for specific performance where the purchaser has acquired the adverse title, is usually accompanied by a prayer for an injunction against proceedings to collect the purchase money. Indeed, the acquisition of the adverse title is more frequently availed of as a defense to an action for the purchase money than in any other way; but of course there may be cases in which it may be to the purchaser's interest to seek affirmative relief in equity. In either case the principle upon which relief is afforded the purchaser is the same.

The purchaser will not be entitled to an abatement of the purchase money on account of an outstanding title which he buys in, unless he shows that such title was necessary to protect his own, and was one to which he must have yielded;[9] in other words, the transaction must have been such as would amount to a constructive eviction.[10] In a case in which the purchaser bought in an adverse claim, and it did not appear whether the title so acquired was paramount or not, it was held that the court erred in decreeing against the purchaser without referring the case to a commissioner to inquire into the validity of the adverse claim.[11] The price paid by the purchaser, however, to obtain the outstanding title is not conclusive of the value of that title, and it devolves upon him to show that such price was not in excess of the value of the outstanding interest. He will receive credit on the purchase money only for the actual value of the adverse title so acquired.[12] Where the purchaser buys in an inchoate right of dower, he will not be allowed the sum so expended, unless he shows that such sum was the fair value of the right.[13]

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[5] An exception to this rule exists where the outstanding title acquired is that of the State. Ante, § 168.

[6] Searcy v. Kirkpatrick, 1 Overt. (Tenn.) 421. Galloway v. Finley, 12 Pet. (U. S.) 264, where held also that he could not be allowed for expenses of the entry and survey, the same having been made for the purpose of defeating his vendor's title. Thredgill v. Pintard, 12 How. (U. S.) 24. Gallagher v. Witherington, 29 Ala. 420. Frix v. Miller, 115 Ala. 476; 22 So. Rep. 146. Holloway v. Miller, 84 Miss. 776; 36 So. Rep. 531. See post, "Estoppel," § 219, and ante, § 168.

[7] Language of AGNEW, J., in Thompson v. Adams, 55 Pa. St. 479.

[8] Getty v. Peters, 82 Mich. 661; 46 N. W. Rep. 1036, where it was held that one who buys in land at a tax sale to protect himself as purchaser is not, when sued in ejectment by the vendor, forced to rely on the tax title, and estopped from claiming under the contract of sale.

[9] Nicholson v. Sherard, 10 La. Ann. 533. In Lee v. Porter, 5 Johns. Ch.

In America it is a common practice among conveyancers to procure him whose outstanding interest has been gotten in to join in the conveyance, which, as to such party, is usually a quit claim or release, few persons under such circumstances being willing to convey with general warranty. This, perhaps, is all that is needed where the interest is present and subsisting. If, however, the purchaser desires to guard against a future, anticipated or prospective interest in the party, he should require either a conveyance with general warranty, or one in which the intent to convey an estate of a particular description is clearly manifested, otherwise he may lose the estate, under the general rule that a quit claim or release is insufficient to pass an after-acquired estate.[14]

§ 203. **BY THE DISCHARGE OF LIENS AND INCUMBRANCES.** The purchaser may at all times apply the unpaid purchase money to the discharge of valid incumbrances binding the land in his

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(N. Y.) 268, the chancellor doubted whether relief should be given the purchaser in consequence of an outstanding claim which he for greater caution chooses to buy in before it has received judicial sanction, in a suit to which all persons in interest were parties, or were called upon to assert their title.

[10] Ante, § 150.

[11] Smith v. Parsons, 33 W. Va. 644; 11 S. E. Rep. 68.

[12] Pate v. Mitchell, 23 Ark. 590; 79 Am. Dec. 114.

[13] McCord v. Massey, 155 Ill. 123; 39 N. E. Rep. 592.

[14] Post, "Estoppel," § 218.

hands, and which his vendor is bound to remove.[15] The existence of an incumbrance on the premises is no ground for rescission so long as it may be discharged with the unpaid purchase money.[16] Having paid off the incumbrance, the purchaser may, of course, demand a specific performance of the contract.[17] Such applications, however, are infrequent except in connection with suits to stay the collection of the purchase money. Or in a suit by himself for specific performance, the purchaser may have the purchase money in his hands applied to the discharge of incumbrances.[18] In Alabama it has been held that the amount so disbursed by the purchaser cannot avail him as a set-off in an action for the purchase money, nor as a defense under the plea of failure of consideration, and that his remedy is exclusively in equity.[19] But the rule is doubtless otherwise in the States in which equitable defenses may be made at law.

The purchaser may not only apply the unpaid purchase money to the discharge of valid incumbrances of which he has notice, but he is required so to do; and he cannot defeat an action for the purchase money on the ground of a sale and eviction under an incumbrance, which he might have paid off with the purchase money.[20]

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[15] 2 Sugd. Vend. (8th Am. ed.) 201 (555). Smith v. Pettus, 1 Stew & P. (Ala.) 107. Owens v. Salter, 38 Pa. St. 211, where the purchaser paid off certain tax liens. Smith's Appeal, 177 Pa. St. 437; 35 Atl. 680; Forthman v. Deters, 206 Ill. 159; 69 N. E. Rep. 97. Washer v. Brown, 5 N. J. Eq. 81. Hrdlicka v. Evans, 165 Iowa 207; 145 N. W. 84. In the English practice the purchaser at a judicial sale may apply to the court for leave to pay off incumbrances on the premises, appearing from a report in the cause, and pay the residue of the purchase money into the bank. Where the incumbrance does not appear on the report the leave will not be granted if any of the parties object or are incompetent to consent. 1 Sugd. Vend. (8th Am. ed.) 148.

[16] Greenby v. Cheevers, 9 Johns. (N. Y.) 126. Irvin v. Bleakly, 67 Pa. St. 24.

[17] A purchaser may buy in the land at a foreclosure sale under proceedings against his vendor, and having thus extinguished the incumbrance, require specific performance by the vendor. Berry v. Walker, 9 B. Mon. (Ky.) 464.

[18] As in Washer v. Brown, 1 Halst. (N. J. Eq.) 81.

[19] Cole v. Justice, 8 Ala. 793.

[20] Mellon's Appeal, 32 Pa. St. 121; Clark v. Clark, 1 Grant (Pa.), 33; Harper v. Jeffries, 5 Whart. (Pa.) 26; McGinnis v. Noble, 7 W. & S. (Pa.) 454; Garrard v. Lautz, 2 Jones (Pa.) 186.

This rule, however, does not apply where the purchase money had not become due at the time of sale under the incumbrance,[21] nor where the vendor has expressly agreed to pay off the incumbrance.[22] In a case in which the vendor refused to remove the incumbrance and told the purchaser if he wanted his rights to sue for them, it was held that there was no obligation on the part of the purchaser to apply a part of the unpaid purchase money to the discharge of the incumbrance, and that he was entitled to recover his deposit and expenses.[23] If the purchaser pays money generally to one having an incumbrance on the premises, and also an unsecured debt against the vendor, the money will be held to have been paid in discharge of the incumbrance.[24]

The purchaser takes the risk of the validity of the incumbrance which he removes and of the liability of the vendor therefor.[25] In a case, however, in which the vendor had received an indemnity from *his* vendor against a supposed incumbrance, and upon a resale of the property agreed with his vendee to remove the incumbrance, it was held that he was estopped from denying the validity of the incumbrance as against such vendee who had removed it.[26]

The purchaser must exercise great caution in paying off incumbrances constituting securities for the purchase money and which pass with a transfer of instruments evidencing the purchase-money debt, for example, the transfer of negotiable notes secured by purchase-money mortgage or deed of trust. In such a case, a subpurchaser taking the property charged with a purchase-money mortgage would probably deem himself safe in discharging the mortgage and holding it against his vendor. If, however, the mortgage was made to secure negotiable notes for the purchase money, and these have been before maturity transferred to a purchaser for value, the mortgage might still be enforced in favor of the transferee, notwithstanding payment in full by the subpurchaser to the original vendor, that is, the mortgagee and payee of the notes.[27]

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[21] Dentler v. Brown, 1 Jones (Pa.), 295; McGinniss v. Noble, 7 W. & S. (Pa.) 454.

[22] Stevenson v. Mathers, 67 Iowa, 123.

[23] Green v. Hernz, 37 N. Y. Supp. 887; 2 App. Div. 255.

[24] 2 Sugd. Vend. (8th Am. ed.) 201 (555), citing Brett v. Marsh, 1 Vern. 468; Hayward v. Lomax, 1 Vern. 24; Peters v. Anderson, 5 Taunt. 596.

[25] Ante, §§ 133, 150.

[26] Hardigree v. Mitchum, 51 Ala. 151.

It has been held that a purchaser of lands with notice of a claim against the land, will, if he pays the purchase money to the vendor, be liable to the holder of the claim, to the extent of the purchase money remaining unpaid when he received notice.[28]

The purchaser can have credit on the purchase money for no more than the amount he actually pays out to remove the incumbrance.[29]

§ 204. **SUBROGATION OF PURCHASER.** The purchaser will not only be entitled to credit on the purchase money for incumbrances or liens which he discharges, but he will be subrogated to all the rights, remedies and priorities of the incumbrancer against third persons.[30] As against the vendor, however, as before observed, he can only claim reimbursement to the extent of the amount actually paid out by him in discharge of the incumbrance.[31] But to that extent he will be subrogated to the benefit of the lien or incumbrance as against the vendor as well as third persons. And inasmuch as the doctrine of subrogation is the creature of equity and in nowise dependent upon or arising from contract between the parties, and is enforced in favor of any person who is compelled to discharge a lien or incumbrance for his protection, no reason is perceived why the purchaser would not be entitled to the benefit of a lien which he discharges, though he had accepted a conveyance without covenants for title.[32]

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[27] Windle v. Bonebrake, 23 Fed. Rep. 165. McLain v. Coulter, 5 Ark. 13.

[28] Green v. Green, 41 Kans. 472; 21 Pac. Rep. 586, citing 2 Story Eq. (11th ed.) p. 829; Bush v. Collins, 35 Kans. 535; 11 Pac. Rep. 425, personal property. Dodson v. Cooper, 37 Kans. 346; 15 Pac. Rep. 200; Burke v. Josnson, 37 Kans. 337; 15 Pac. Rep. 204. Hardin v. Harrington, 11 Bush (Ky.), 367.

[29] 2 Sugd. Vend. (8th Am. ed.) 202 (555), and cases there cited. In Bryan v. Salyard, 3 Grat. (Va.) 188, a purchaser who was directed by decree to pay a sum of money to a third person out of the purchase money, and who obtained a compromise of the decree, was allowed only the sum actually paid by him, as a credit on the purchase money.

[30] Sheld. Subrogation, § 28, *et seq.* See cases collected, 24 Am. & Eng. Encyc. L. 253, *et seq.* Downer v. Fox, 20 Vt. 388. Champlin v. Williams, 9 Pa. St. 341. Furnold v. Bank, 44 Mo. 336. Wall v. Mason, 102 Mass. 313. Peet v. Beers, 4 Ind. 46; Troost v. Davis, 31 Ind. 34; Spray v. Rodman, 43 Ind. 225. The purchaser cannot, by virtue of the doctrine of subrogation, enforce against the real owner an incumbrance, which for any reason, the incumbrancer himself could not have so enforced. Brown v. Connell, (Ky.) 12 S. W. Rep. 267.

[31] A vendee purchasing his vendor's title at a sheriff's sale cannot withhold the unpaid purchase money from his vendor, except what he expended in buying in the title. Tod v. Gallaher, 16 Serg. & R. (Pa.) 261; 16 Am. Dec. 571; Harper v. Jeffries, 5 Whart. (Pa.) 26; McGinniss v. Noble, 7 W. & S. (Pa.) 454; Harrison v. Soles, 1 Pa. St. 393; Renshaw v. Gans. 2 Pa. St. 117; Dentler v. Brown, 11 Pa. St. 295; Garrard v. Lantz, 12 Pa. St. 186; Mellon's Appeal, 32 Pa. St. 121.

The purchase money paid by one who purchases at a sale made to enforce a judgment or other lien on security upon land, goes to the discharge of the judgment or security. If, therefore, the sale be void by reason of any error, imperfection or irregularity in the proceedings in which such judgment is obtained, or sale made, the purchaser will be subrogated to the benefit of such judgment or other lien, and by proper proceedings for that purpose, may enforce the same, for his reimbursement.[33]

The doctrine of subrogation is enforced only in courts of equity; hence, he who seeks this form of relief must himself do equity. Therefore, it has been held that a subsequent purchaser, with notice of the prior purchase, who pays off a lien on the land, will not be substituted to its benefit, so as to deprive the first purchaser of his bargain.[34] If, however, he receives notice after he has paid the purchase money, no reason is perceived why he should not be permitted to protect himself by acquiring the rights of outstanding incumbrancers.

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[32] Post, ch. 27, § 267.

[33] Freeman Void Jud. Sales, § 50. Valle v. Fleming, 29 Mo. 152; 77 Am. Dec. 557; Henry v. McKerlie, 78 Mo. 416. Hudgin v. Hudgin, 6 Grat. (Va.) 320; 52 Am. Dec. 124. Blodgett v. Hitt, 29 Wis. 184. Shepherd v. McIntire, 5 Dana (Ky.), 574; McLaughlin v. Daniel, 8 Dana (Ky.), 183. French v. Grenet, 56 Tex. 273.

[34] Bates v. Swiger, (W. Va.) 21 S. E. Rep. 874.

CHAPTER XX.

OF SPECIFIC PERFORMANCE OF COVENANTS FOR TITLE.

GENERAL RULES. § 205.
COVENANT AGAINST INCUMBRANCES. § 206.
CONVEYANCE OF AFTER-ACQUIRED ESTATE. § 207.

§ 205 **GENERAL RULES.** Specific performance of an executory contract for the sale of lands consists, on the part of the vendor, in the delivery of possession to the purchaser and in the execution of a proper deed, conveying such an estate as the contract requires; and on the part of the vendee, in the payment of the purchase money and the acceptance of such conveyance. Applications to equity for specific performance are principally confined to cases in which the contract remains executory, but the jurisdiction is also exercised to compel the grantor to perform certain of his covenants for title.[1]

The covenant for further assurance is, in substance, that the grantor, his heirs, etc., will at any time and upon any reasonable request, at the charge of the grantee, his heirs, etc., do, execute, or cause to be done or executed, all such further acts, deeds and things, for the better, more perfectly, and absolutely conveying and assuring the said lands and premises, etc., as by the grantee, his heirs, etc., his or their counsel in the law, shall be reasonably devised, advised or required.[2] This language clearly embraces the removal of incumbrances upon the premises which may be discovered after the purchase money has been fully paid; and it has frequently been held that the covenantor may, thereunder, be compelled to pay off and discharge all such charges on the land.[3] It has been said, however, that if the other covenants in the deed are special or limited, the grantor can be compelled to remove only such incumbrances as may have been created by himself or those claiming under him.[4]

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[1] Werner v. Wheeler, 127 N. Y. Supp. 158; 142 App. Div. 358.

[2] Va. Code, 1887, § 2451.

[3] Sugd. Vend. (8th Am. ed.) 285; Rawle Covts. (5th ed.) §§ 104, 362. Stock v. Aylward, 8 Ir. Ch. 429. Nelson v. Harwood, 3 Call (Va.), 342, McClaugherty v. Croft, 43 W. Va. 270; 27 S. E. Rep. 246.

The nature and extent of the "further assurance" will of course be governed by that of the estate originally conveyed. The covenantor cannot be compelled to assure to the covenantee a greater estate than that concerning which the covenant was made.[5] It has been said that the jurisdiction of equity in the specific performance of covenants for title has been exercised in marshalling the assets of a bankrupt's or decedent's estate.[6] This, however, seems to involve no principle of specific performance, unless specific performance consist in the payment of damages for a breach of covenant, but rather to consist in the enforcement in equity of a legal liability of the heirs or estate of the covenantee upon his covenants.[7]

The doctrine of specific performance has, of course, no application to the covenants of warranty, of seisin, of good right to convey, and for quiet enjoyment. There is nothing for the covenantor to do in lieu of payment of damages for the breach of these covenants.[8]

By analogy to the rule that a covenantee paying off incumbrances upon the premises cannot recover damages against the covenantor in excess of the purchase money and interest, it would probably be held that the latter could not be compelled to *remove* an incumbrance which exceeded the purchase money and interest.[9]

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[4] Rawle Covts. §§ 105, 363, citing Armstrong v. Darby, 26 Mo. 517, which, however, was not a suit for specific performance, but an action in which the plaintiff sought to recover for an incumbrance on the premises which he had paid off, after requesting the covenantor so to do, which request was refused.

[5] Rawle Covts. (5th ed.) §§ 104, 363. Davis v. Tollemache, 2 Jur. (N. S.) 1181, where it was said: "The utmost extent to which the court has gone, with reference to covenants for further assurance, has been to extend their operation to that very estate and interest which are conveyed by the deed."

[6] Rawle Covts. (5th ed.) § 364.

[7] As in Higgins v. Johnson, 14 Ark. 309; 60 Am. Dec. 544. Haffey v. Birchetts, 11 Leigh (Va.), 83.

[8] Tallman v. Green, 3 Sandf. (N. Y.) 437. Tuite v. Miller, 10 Ohio, 382.

[9] Ante, § 131. The remedy for a breach of warranty is limited to an action to recover damages for the breach; a suit for specific performance of the covenant cannot be maintained. Tropico Land Co. v. Lambourn, 170 Cal. 33; 148 Pac. 206.

It has been so held where the conveyance contained a covenant of *warranty,* but no covenant against incumbrances.[10]

§ 206. **COVENANT AGAINST INCUMBRANCES.** Whether under a covenant against incumbrances alone, the grantor can in equity be compelled to remove an incumbrance on the premises, seems to be a doubtful question. Mr. Rawle expresses his opinion in the negative, conceiving that in equity, as at law, a covenantee who has suffered no actual damages from the presence of the incumbrance, is entitled to no relief.[11] There are cases, however, which hold the affirmative of this question, and, to our mind, establish the better doctrine.[12] There seems to be little reason or justice in a rule which, after the purchaser has exhausted all his resources in paying for the property, requires him to submit to an eviction under an incumbrance which he cannot satisfy, and turns him round to his action upon the covenant, which, for many obvious reasons, may prove unavailing, or, at least, inadequate for his relief.[13]

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[10] East Tenn. Nat. Bank v. First Nat. Bank, 7 Lea (Tenn.), 420. In this case the purchaser took a conveyance with warranty, and afterward discovered that the vendor had fraudulently concealed the existence of a prior vendor's lien on the premises much exceeding the consideration money. It was held that he was entitled to a rescission of the contract on the ground of fraud, but that there being no covenant against incumbrances the grantor could not be required to remove the vendor's lien.

[11] Rawle Covts. for Title (5th ed.), § 361.

[12] Story's Eq. Jur. 717a, where it is said: "There is no pretense for the complaints sometimes made by the common-law lawyers, that such relief (specific performance) in equity would wholly subvert the remedies by actions on the case and actions of covenant; for it is against conscience that a party should have a right of election whether he would perform his covenant, or only pay damages for the breach of it. But, on the other hand, there is no reasonable objection to allowing the other party, who is injured by the breach, to have an election either to take damages at law or to have a specific performance in equity, the remedies being concurrent but not coextensive with each other." See, also, Ranelagh v. Hayes, 1 Vern. 189; 2 Cas. in Ch. 146; Power v. Standish, 8 Ir. Eq. 526. Burroughs v. McNeill, 2 Dev. & Bat. Eq. (N. C.) 297. See, also, other cases cited Rawle Covts. for Title (5th ed.), p. 610, n. Contra, Tallman v. Greene, 3 Sandf. (N. Y.) 437.

[13] It may be thought that these observations would apply as well to the removal of adverse claims to the premises where there is a covenant of warranty instead of a covenant against incumbrances. The cases, however, are not parallel; the difference is, that the incumbrancer is bound to receive payment of his incumbrance from the covenantor, or indeed from any one not a volunteer; while an adverse claimant cannot be compelled to part with his rights for a pecuniary consideration.

§ 207. **CONVEYANCE OF AFTER-ACQUIRED ESTATE.** We shall see that, as a general rule, the effect of a conveyance with covenants for title, and in some cases without covenants, if an intent to pass an estate of a particular description appear, is to estop the grantor from afterwards asserting an after-acquired title to the estate, and that it has been sometimes held that the estoppel itself operates as a conveyance to the covenantee.[14] Nevertheless, under a covenant for further assurance, the grantee may in equity compel the grantor to convey to him the after acquired title, if he should deem such a conveyance necessary or expedient.[15] And even in the absence of a covenant for further assurance, it is apprehended that a court of equity would compel a conveyance of the after-acquired title to the grantee.[16]

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[14] Post, "Estoppel," Ch. 21.

[15] 2 Sugd. Vend. (8th Am. ed.) 294 (613); 3 Washb. R. Prop. (4th ed.) 479 (667); Rawle Covts. (5th ed.) § 362. Taylor v. Debar, 1 Ch. Cas. 274. Heath v. Crealock, L. R., 18 Eq. 215, 242; 10 Ch. App. 30. Gen. Finance Co. v. Liberator Society, L. R., 10 Ch. Div. 15. Lewis v. Baird, 3 McL. (U. S.) 56, 80, *ob. dict.* Reese v. Smith, 12 Mo. 315, *ob. dict.* Henderson v. Overton, 2 Yerg. (Tenn.) 397; 24 Am. Dec. 492, *ob. dict.* Pierce v. Milwaukee R. Co., 24 Wis. 554; 1 Am. Rep. 203.

[16] Steiner v. Baughman, 12 Pa. St. 107, 108, where it was said by GIBSON, C. J., that if the vendor had subsequently purchased a part of the premises, equity would compel him to convey it over again in order to make good his former deed; and this, for the reason that he had received value for it. In 1 Sugd. Vend. (8th Am. ed.) 533, it is said that if a man sell an estate to which he had no title, and *after the conveyance* acquire the title, he will be compelled to convey it to the purchaser. The proposition is not restricted to cases in which there are covenants for title. See, also, Carne v. Mitchell, 10 Jur. 909.

CHAPTER XXI.

ESTOPPEL OF THE GRANTOR.

GENERAL RULES. § 208.

AFTER ACQUIRED ESTATE MUST BE HELD IN SAME RIGHT. § 209.

MUTUAL ESTOPPELS. § 210.

ESTOPPEL OF MORTGAGOR. § 211.

EFFECT OF VOID CONVEYANCE AS AN ESTOPPEL. § 212.

EFFECT OF ESTOPPEL AS AN ACTUAL TRANSFER OF THE AFTER-ACQUIRED ESTATE. § 213.

RIGHTS OF PURCHASER OF THE AFTER-ACQUIRED ESTATE FROM THE COVENANTOR. § 214.

COMPULSORY ACCEPTANCE OF THE AFTER-ACQUIRED ESTATE IN LIEU OF DAMAGES. § 215.

WHAT COVENANTS WILL PASS THE AFTER-ACQUIRED ESTATE. § 216.

ESTOPPEL NOT DEPENDENT ON AVOIDANCE OF CIRCUITY OF ACTION. § 217.

EFFECT OF QUIT-CLAIM BY WAY OF ESTOPPEL. § 218.

ESTOPPEL OF GRANTEE. § 219.

RESUME. § 220.

§ 208. **GENERAL RULES.** Estoppels are of two kinds: 1st. Estoppel *in pais,* or that which arises from the acts and conduct of the party; thus, if I induce another to purchase property by representing that the right of the vendor to sell is clear and undisputed, having myself at that time a claim to that property, I will be estopped or precluded from afterwards asserting that claim as against the vendor or his assigns.[1] 2d. Estoppel by deed, or that which arises from the covenants or recitals in a deed, by which the grantor makes it appear that he is the rightful owner of the estate therein described; in such case if the grantor have no title at the time of the conveyance, but afterwards acquire it, by descent or purchase, the law will not permit him to assert the same against his grantee, he being estopped to deny that he had, at the time when he executed the deed, the title or the estate described therein.[2]

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[1] 2 Sugd. Vend. (8th Am. ed.) 507 (743).

[2] Washb. Real Prop. 69; Bigelow Estoppel, p. 453; Rawle Covt. § 250; Gr. Cruise Dig. ch. 26, § 51; Judge HARE's note, 2 Sm. L. Cas. (ed. 1866) 723.

The reason of this rule in large measure is that circuity of action is thereby avoided, or rather the subsequent acquisition of the estate by the grantor satisfies his covenants and prevents an action by the covenantee where he has sustained no actual damage from a breach

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Watkins v. Wassell, 15 Ark. 73. Doe v. Quinlan, 51 Ala. 539. Croft v. Thornton, 125 Ala. 391; 28 So. Rep. 84. Klumpki v. Baker, 68 Cal. 559; 10 Pac. Rep. 197. O'Bannon v. Paremour, 24 Ga. 489; Linsey v. Ramsey, 22 Ga. 627; Parker v. Jones, 57 Ga. 204. Hoppin v. Hoppin, 96 Ill. 265; Jones v. King, 25 Ill. 384. Whitson v. Grosvenor, 170 Ill. 271; 48 N. E. Rep. 1018; Owen v. Brookport, 208 Ill. 35; 69 N. E. Rep. 952. Glendinning v, Oil Co., 162 Ind. 642; 70 N. E. Rep. 976. Logan v. Steele, 4 T. B. Mon. (Ky.) 430; Dickinson v. Talbot, 14 B. Mon. (Ky.) 49 (65); Logan v. Moore, 7 Dana (Ky.), 74. Benton v. Sentell, 50 La. Ann. 869; 24 So. Rep. 297. Williams v. Williams, 31 Me. 392. Funk v. Newcomer, 10 Md. 301; Williams v. Peters, (Md.) 20 Atl. Rep. 175. Lee v. Clary, 38 Mich. 223; Smith v. Williams, 44 Mich. 240; 6 N. W. Rep. 662. Dye v. Thompson, 126 Mich. 597; 85 N. W. Rep. 1113 Kaiser v. Earhart, 64 Miss. 492; 1 So. Rep. 635. Jewell v. Porter, 11 Fost. (N. H.) 39; Thorndike v. Norris, 4 Fost. (N. H.) 454. Gough v. Bell, 21 N. J. L. 156; Moore v. Rake, 26 N. J. L. 587. Jackson v. Winslow, 9 Cow. (N. Y.) 18. Wellborn v. Finley, 7 Jones L. (N. C.) 228. Hallyburton v. Slagle, 130 N. C. 482; 41 S. E. Rep. 877. Pollock v. Speidel, 27 Ohio St. 86; Broadwell v. Phillips, 30 Ohio St. 255. Taggart v. Risley, 3 Oreg. 306. Harvie v. Hodge, Dudley (S. C.), 23; Reeder v. Craig, 3 McCord (S. C.), 411; Wingo v. Parker, 19 S. C. 9. Johnson v. Branch, 9 S. Dak. 116; 68 N. W. Rep. 173. Robertson v. Gaines, 2 Humph. (Tenn.) 367, where an executor's deed with warranty, was held to estop a devisee, who had shared in the proceeds of the executor's sale, from setting up an after-acquired title to the land. Walker v. Arnold, 71 Vt. 263; 44 Atl. 351. Mann v. Young, 1 Wash. (Ty.) 454. Mitchell v. Petty, 2 W. Va. 470; 98 Am. Dec. 777. Clark v. Lambert, 55 W. Va. 512; 47 S. E. Rep. 312. Yock v. Mann (W. Va.), 49 S. E. Rep. 1019. Balch v. Arnold (Wyo.), 59 Pac. Rep. 434. Wiesner v. Zaun, 39 Wis. 188. Shepherd v. Kahle, (Wis.), 97 N. W. Rep. 506. McWilliams v. Nisley, 2 S. & R. (Pa.) 507; 7 Am. Dec. 654; Logan v. Neill, 128 Pa. St. 457; 18 Atl. Rep. 343. Burtners v. Keran, 24 Grant (Va.), 42; Raines v. Walker, 77 Va. 92. Burkitt v. Twyman, (Tex. Civ. App.) 35 S. W. Rep. 421. The shallow device of taking the after-acquired title in the name of a stranger will not prevent the estate from passing to the original grantee. Quivey v. Baker, 37 Cal. 470. Equity would compel such grantee to convey to the covenantee. Wheeler v. McBain, 43 La. Ann. 859; 9 So. Rep 495. A son conveyed his undivided half interest in his deceased father's property, and afterward purchased his mother's life interest in the property. Held, that such life interest in the half previously conveyed vested in the son's grantee. Carnes v. Swift (Tex. Civ. App.), 56 S. W. Rep 85. Robinson v. Douthit, 64 Tex. 101. The rule stated in the text was applied in a case in which the party estopped acknowledged, but did not sign, the deed. Barsky v. Posey, (Del. Ch.) 98 Atl. 298.

of the covenant.[3] The history of the doctrine of estoppel by deed as derived from common-law sources, is somewhat without the plan and scope of this work. The reader desirous of pursuing his investigations in that direction is referred to the special treatises upon that subject.[4]

It has been held that the covenantee cannot have the benefit of the subsequently acquired title unless he has been evicted from the premises.[5] The decision seems questionable. The authorities cited in support of the ruling are merely to the effect that the covenantee cannot recover on the warranty unless he has been actually or constructively evicted from the premises, and no question of the enurement of a subsequently acquired title to the benefit of the covenantee appears to have been involved.

Recent Cases. Veve v. Sanchez, 226 U. S. 234; 33 S. Ct. 36; Roper Lumber Co. v. Hinton, 260 Fed. 996; Swift v. Doe, 162 Ala. 147; 50 So. 123; Cobb v. Naval Stores Co., (Ala.) 80 S. E. 415; Fox v. Lumber Co.. 85 Ark. 497; 108 S. W. 1137; Colonial etc., Mtge. Co. v. Lee, 95 Ark. 253; 129 S. W. 84; Moralis v. Matheson, 75 Fla. 589; 79 So. 201; Cowart v. Singletary, 140 Ga. 435; 79 S. E. 196; Ann. Cas. 1915 A, 1116; 47 L. R. A. (N. S.) 621; Oliver v. Holt, 141 Ga. 126; 80 S. E. 630; McAdams v. Bailey, 169 Ind. 518; 82 N. E. 1057; 13 L. R. A. (N. S.) 1003; 124 Am. St. Rep. 240; Whitley v. Johnson, 135 Iowa 620; 113 N. W. 550; Stephens v. Boyd, 157 Iowa 570; 138 N. W. 389; Irish v. Steeves, 154 Iowa 286; 134 N. W. 634; Hintz v. Hintz, 176 Iowa 392; 157 N. W. 878; Creekmore v. Bryant, 158 Ky. 166; 164 S. W. 337; Hays v. Lackey, 185 Ky. 17; 213 S. W. 205; Wells v. Blackman, 121 La. 394; 46 So. 437; Wade v. Barlow, 99 Miss. 33; 54 So. 662; Miss. Saw-Mill Co. v. Douglas, 107 Miss. 678; 65 So. 885; Harris v. Byers, 112 Miss. 651; 73 So. 614; Patton v. Forgey, 171 Mo. App. 1; 153 S. W. 575; Collins v. Buffalo etc. Ry Co., 129 N. Y. Supp. 139; 145 App. Div. 148; Cooley v. Lee, 170 N. C. 18; 86 S. E. 720; Ford v. McBrayer, 171 N. C. 420; 88 S. E. 736; James v. Hooker, 172 N. C. 780; 90 S. E. 925; Richardson v. Lumber Corp'n., 93 S. C. 254; 75 S. E. 371; L. R. Ann., 1918 C, 788; Britton v. Hemingway, 104 S. C. 209; 88 S. E. 462; Bird v. Cross, 123 Tenn. 519; 131 S. W. 974; Ferguson v. Prince, 136 Tenn. 543; 190 S. W. 548; Vann v. Denson, 56 Tex. Civ. App. 220. 120 S. W. 1020; Tennison v. Palmer, (Tex. Civ. App.) 142 S. W. 948; Morris v. Short, (Tex. Civ. App.) 151 S. W. 633; Hurley v. Charles, 112 Va. 706; 72 S. E. 689; Blake v. O'Neal, 63 W. Va. 483; 61 S. E. 410; 16 L. R. A. (N. S.) 1147; Irvin v. Stover, 67 W. Va. 356; 67 S. E. 1119; Arnold v. Nichols, 25 Wyo. 458; 172 Pac. 335.

[3] Cases cited in last note. See, also, post, § 217.

[4] Bigelow on Estoppel, p. 329; Rawle Covts. for Title (5th ed.), ch. 11, p. 351.

[5] Donohue v. Vosper, 189 Mich. 78; 155 N. W. 407; citing Matteson v. Vaughn, 38 Mich. 373, and Rawle Covt's for Title, §§ 131, 140.

The estoppel operates to deprive the covenantor of the after-acquired estate as well where he had a present right or interest which passed at the time of the grant as where nothing whatever passed.[6] The rule is otherwise in case of a lease; if the lessor has, at the time of making the lease, any interest in the demised premises, that interest only will pass, and the lease will have no effect by way of estoppel as to any after-acquired interest.[7]

There is no warranty in execution sales; consequently, neither the judgment creditor nor the judgment debtor is estopped to set up an after-acquired title against a purchaser at a sale under execution on the judgment to which they were parties.[8]

If the covenantor discharge an incumbrance on the land, payment of which had been assumed by the grantee, he will not be estopped by his warranty from enforcing such incumbrance by way of subrogation to the rights of the incumbrancer.[9] But if he acquires an incumbrance existing upon the land at the time of the conveyance, the payment of which was not assumed by the grantee, he will be estopped to enforce such incumbrance, even though he conveyed without warranty.[10] The general rule is that the grantor in a warranty deed cannot, as against the grantor, acquire title to the land under foreclosure of a mortgage which was a lien on the land at the date of the deed.[11]

If the covenantor disseise the covenantee and hold the estate until the right of the disseisee to recover the possession is barred by the Statute of Limitations, the title so perfected cannot enure to the benefit of the covenantee.[12] It has been held that this rule does not apply where the covenantor, instead of disseising the covenantee, merely remains in possession, without color of title, for the statutory period.[13]

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[6] House v. McCormick, 57 N. Y. 319.

[7] 4 Kent Com. 98. House v. McCormick, 57 N. Y. 319. Walton v. Waterhouse, 2 Saund. 415.

[8] Post, § 218. Bigelow Estoppel (3d ed.), 333. Henderson v. Overton, 2 Yerg. (Tenn.) 394; 24 Am. Dec. 492. Emmerson v. Sansome, 41 Cal. 552. Frey v. Rawson, 66 N. C. 466. Dougald v. Dougherty, 11 Ga. 578.

[9] Brown v. Staples, 28 Me. 497; 48 Am. Dec. 504. Bolles v. Beach, 2 Zab. (N. J.) 680; 53 Am. Dec. 263.

[10] Flanary v. Kane, 102 Va. 547; 46 S. E. Rep. 681. A tenant in common of separate tracts of land, who conveys his undivided share to his co-tenant with warranty, is estopped to set up against his grantee title to the land acquired by him under a subsequent foreclosure sale. Garner v. Garner, 117 Miss. 694; 78 So. 623.

[11] George v. Brandon, 214 Pa. 623; 64 Atl. 371; Waslee v. Rossman, 231 Pa. 219; 80 Atl. 643.

In a case in which the grantor conveyed vacant and uninclosed lands, and afterwards entered upon and inclosed them and erected buildings upon them, claiming them as his own for the statutory period, it was held that his possession could not be held permissive or subordinate to that of his grantee, and that he was not estopped from setting up the title thus acquired under the Statute of Limitations against his grantee.[14]

The estoppel binds not only the grantor but his heir[15] or devisee and his assigns.[16] The heir or devisee, it seems, is bound only to the extent of assets received from the grantor.[17] Such assets, it is apprehended, will include personal estate, in those States in which the entire estate of a decedent, real as well as personal, is made assets for the payment of his debts. The estoppel does not bind those who are not in privity, in blood or estate, with the grantor.[18]

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[12] Franklin v. Dorland, 28 Cal. 175; 87 Am. Dec. 111. Tilton v. Emery, 17 N. H. 536, the court saying that the covenantor may disseise his covenantee with the same effect as any other. Kent v. Harcourt, 33 Barb. (N. Y.) 491. Cf. Wicklow v. Lane, 37 Barb. (N. Y.) 244. Stearns v. Hendersass, 9 Cush. (Mass.) 497; 57 Am. Dec. 65. Smith v. Montes, 11 Tex. 24; Harn v. Smith, 79 Tex. 310. Hines v. Robinson, 57 Me. 330; 99 Am. Dec. 772. Eddleman v. Carpenter, 7 Jones L. (N. C.) 616. Dillard v. Cochran, (Tex. Civ. App.) 153 S. W. 662.

[13] Johnson v. Farlow, 13 Ired. L. (N. C.) 85. Chatham v. Lonsford, 149 N. C. 363; 63 S. E. 81; 25 L. R. A. (N. S.) 129. But see Sherman v. Kane, 46 N. Y. Super. Ct. 310, where it was held the rule applied as well where possession had not been given as where it had been given and had been followed by an actual disseisin. In Reynolds v. Cathens, 5 Jones L. (N. C.) 438, it was held that a grantee of a covenantee, who had not given possession, would be in under color of title, and that the title, when perfected by the Statute of Limitations, would not enure to the covenantee.

[14] Horbach v. Boyd, 64 Neb. 129; 89 N. W. Rep. 644.

[15] Du Bose v. Kell, 90 S. C. 196; 71 S. E. 371; Buford v. Adair, 43 W. Va. 211; 27 S. E. 260; 64 Am. St. Rep. 854. The heir is not estopped by his ancestor's deed if the estate comes to him otherwise than through the ancestor. Golladay v. Knock, 235 Ill. 412; 85 N. E. 649; 126 Am. St. Rep. 224. See, also, § 209. A husband joining with his wife in a deed of her property with warranty, void for want of proper execution by the wife, is estopped to claim title to the property as her heir. Custer v. Hall, 71 W. Va. 119; 76 S. E. 183. See, also, post, § 218.

[16] Tolliver v. Railway Company, 187 Fed. 795; 109 C. C. A. 643.

[17] 2 Tucker Bl. Com. 303, n. 8. Chauvin v. Wagner, 18 Mo. 531, 553. Nunally v. White, 3 Met. (Ky.) 592. In Logan v. Moore, 1 Dana (Ky.), 57, it was held that the heir was barred to the extent of the value of the land

Lineal and collateral warranties having been very generally abolished by statute in the American States, a deed with full covenants of warranty will not estop the heirs of the grantor, even to the extent of assets descended, from asserting against the grantee a title derived by them through some source other than him, the grantor;[19] though, of course, if they had received assets from the grantor, by descent, they will be liable to that extent for the breach of his covenant.

It has been held that a grantor with warranty will be estopped from setting up a resulting trust in the premises for his own benefit. Thus, he cannot show that after the deed was delivered it was agreed that the grantee should hold the property merely as trustee for sale and payment of the grantor's debts. He cannot by parol do away with his covenant of warranty.[20] Conversely, a grantor by warranty deed of land impressed with a resulting trust in the grantee's hands, is not estopped by his warranty from acquiring the interests of the *cestui que trust*.[21]

No estoppel arises where the grantor's covenants have been extinguished; as where he conveyed the land to one through whom by mesne conveyances he acquire the title.[22] Thus, if A. convey to B. with warranty, and B. convey to C., and then C. conveys to

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at the time he received it from the ancestor, and not merely to the extent of the value at the date of the warranty of the land claimed. The heir had brought ejectment for the land, setting up an after-acquired title.

[18] Newton v. Easterwood, (Tex. Civ. App.) 154 S. W. 646.

[19] Russ v. Alpaugh, 118 Mass. 369; 19 Am. Rep. 464. Foote v. Clark, 102 Mo. 394; 19 S. W. Rep. 981; Whitson v. Grosvenor, 170 Ill. 271; 48 N. E. Rep. 1018.

[20] Rathbun v. Rathbun, 6 Barb. (N. Y.) 107.

[21] Condit v. Bigalow, 64 N. J. Eq. 504; 54 Atl. 160.

[22] Goodel v. Bennett, 22 Wis. 565. In Smiley v. Fries, 104 Ill. 416, where A., owning three-fourths of an estate, conveyed the whole with warranty to B., who owned the other fourth, and who, at the same time, with like warranty, conveyed that fourth to A., it was held that the warranty of the one-fourth from A. to B. was extinguished by B.'s reconveyance to A., so that A.'s after-acquired title could not enure to the benefit of B.

A., the original grantor, A.'s covenants to B. are extinguished, and the title acquired by him from C. cannot enure to the benefit of B. If this were not so, no man could safely purchase property which he had once conveyed away with warranty. In order that a covenant of warranty shall estop the grantor from setting up an after-acquired estate, it must appear that the title to such estate is adverse and not subordinate to the title conveyed by the grantor.[23] To this principle is to be referred the decision that the title acquired by the grantor as purchaser at a sale under a mortgage or trust deed to secure the payment of money, does not enure to the benefit of the grantee.[24] A covenant of general warranty in a deed will not estop the grantor from claiming a breach of explicit conditions in the granting part of the deed restricting the future use of the property.[25]

Neither the grantor nor his heirs or his representatives will be estopped to show that the deed was obtained through fraud of the vendee, even as against a subsequent purchaser without notice, and though the purchase money was received after notice of the fraud.[26] A fraudulent purchaser gets no title to the land, though the vendor gains a good title to the purchase money. The policy of the law is to punish a fraudulent purchaser.[27] No lapse of time nor any act of confirmation by the party defrauded, even with a full knowledge of the facts can restore and make vital a contract dead on account of fraud. A new contract for additional consideration may be made, but the old is forever gone; once a cheat, the thing so remains.[28]

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[23] Thielen v. Richardson, 35 Minn. 509, 29 N. W. Rep. 677. In this case it appeared that in 1851 C. executed to R. a warranty deed to certain lots. In 1857 B. owned these lots, but how, when, or from whom he got title did not appear, nor whether his title was adverse or subordinate to that of C. In 1857 B. conveyed to C. On these facts it was held that C. was not estopped by his warranty to assert against R. the title so acquired from B.

[24] Goode v. Bryant, 118 Va. 314, 87 S. E. 588.

[25] Linton v. Allen, 154 Mass. 432, 28 N. E. Rep. 780.

[26] Jackson v. Summerville, 13 Pa. St. 359.

[27] Id. Gilbert v. Hoffman, 2 Watts (Pa.), 66, 26 Am. Dec. 103; Small v. Jones, 1 W. & S. (Pa.) 138.

[28] Language of COULTER, J., in Jackson v. Summerville, supra, Duncan v. McCullough, 4 S. & R. (Pa.) 485; Chamberlain v. McClurg, 8 W. & S. (Pa.) 36. Co. Litt. 214b.

If land be conveyed by warranty deed subject to a mortgage, or the grantee assumes and agrees to pay the mortgage as a part of the purchase price, the grantor may purchase and enforce the mortgage against the land; he is not estopped by his warranty to set up the title so acquired.[29] But if the only reference in the deed to the mortgage is to except it from the covenant against incumbrances, it has been held that such exception does not extend to or modify the covenant of warranty, and that any title acquired by the grantor on foreclosure of the mortgage would enure to the benefit of the grantee.[30]

The covenantor is estopped to set up the after-acquired estate as well against a remote grantee as against his own grantor in every case in which the remote grantee is entitled to the benefit of the covenants of the original grantor.[31] The fact that one of the intervening deeds in such case was a quit claim conveying only the grantor's right, title and interest in the land, will not prevent the passage of the after-acquired estate of the original grantor and covenantor to the remote grantee.[32]

A covenant of warranty in a deed cannot operate by way of estoppel to confer upon the grantee greater title than the deed itself would have conferred, if effective.[33] Thus, in a case in which joint owners executed a deed with warranty making partition of the land between themselves, and it afterwards developed that one of the grantors had no valid interest in the land, it was held that neither the other grantor, nor his heirs, were estopped by his warranty to assert title to the whole of the land.[34]

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[29] Merritt v. Byers, 46 Minn. 74, 48 N. W. Rep. 417; Walther v. Briggs, 69 Minn. 98, 71 N. W. Rep. 909; Brown v. Staples, 28 Me. 497, 48 Am. Dec. 504; Crosby v. Evans, (Mo. App.) 195 S. W. 514.

[30] Sandwich Mfg. Co. v. Zellner, 48 Minn. 508, 50 N. W. Rep. 379; Rooney v. Koenig, 80 Minn. 483, 83 N. W. Rep. 399.

[31] Johnson v. Johnson, 170 Mo. 34, 70 S. W. Rep. 241, 59 L. R. A. 748.

[32] Johnson v. Johnson, 170 Mo. 34, 70 S. W. Rep. 241, 59 L. R. A. 748; Barada-Ghio R. E. Co. v. Keleher, (Mo.) 214 S. W. 961.

[33] Pritchard v. Fox, (Tex. Civ. App.) 154 S. W. 1058; Newton v. Easterwood, (Tex. Civ. App.) 154 S. W. 646. The grantor is not estopped to set up an after-acquired title to the timber on the land, if the grantee knew, at the time of the deed, that the grantor did not own the timber. Gillen v. Powe, 210 Fed. 553, 127 C. C. A. 321.

[34] Davis v. Agnew, 67 Tex. 206, 2 S. W. Rep. 43, 376; Chace v. Gregg, 88 Tex. 552, 32 S. W. Rep. 520.

If the covenantor reacquire the property in consequence of default of the covenantee in the payment of a purchase-money mortgage, he will not be estopped to set up a title thereafter acquired by him under foreclosure of a mortgage on the land existing at the time of the covenant.[35]

A provision in a statute that an after-acquired title of the grantor shall enure to the benefit of the grantee, refers to acquisition by descent as well as by other methods.[36]

The estoppel of the grantor to set up the after-acquired title enures only to the benefit of the grantee and of those in privity with him; the principle cannot be invoked in favor of one who was not a party, nor privy, to the deed.[37]

The fact that the conveyance and covenant were not made upon a valuable consideration does not affect the operation of the rule that the covenantor is estopped to set up the after-acquired title.[38]

If the estate be acquired through a conveyance under which the grantee is merely momentarily seized for the purposes of a transfer, the title so acquired does not enure to the benefit of one to whom such grantee had previously conveyed the premises.[39]

§ 209. **AFTER-ACQUIRED ESTATE MUST BE HELD IN SAME RIGHT.** The after-acquired estate must be held by the grantor in the same right as that in which the conveyance was made. Thus if he convey in his individual capacity, and reacquire the estate in a fiduciary capacity,[40] *e. g.*, as trustee express or implied,[41] the after-acquired title will not enure to the benefit of the covenantor. Accordingly, where a person took a conveyance in his own name, the consideration for which was advanced by another, and then conveyed to that other, it was held that he was not estopped from afterwards acquiring the title and setting it up against the grantee.[42]

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[35] Crosby v. Evans, (Mo. App.) 195 S. W. 514.

[36] Leflore County v. Allen, 80 Miss. 298, 31 So. Rep. 815.

[37] Jordan v. Chambers, 226 Pa. 573, 75 Atl. 956. The secretary and general manager of a corporation, who induced a purchaser to buy land as belonging to the corporation and who executed a deed to the purchaser on behalf of the corporation, was held estopped to set up, in himself, an after-acquired title to the land. Mountain Home L. Co. v. Swartwout, 30 Idaho 559, 166 Pac. 271.

[38] Robinson v. Douthit, 64 Tex. 101; Morris v. Short, (Tex. Civ. App.) 151 S. W. 633.

[39] Haslam v. Jordan, 106 Me. 49, 70 Atl. 1066.

[40] Jackson v. Hoffman, 9 Cow. (N. Y.) 271; Sinclair v. Jackson, 8 Cow. (N. Y.) 587, *semble.*

[41] Kelly v. Jenness, 50 Me. 455; Gregory v. Peoples, 80 Va. 355. See, also, Cleveland v. Smith (Tex. Civ. App.) 113 S. W. 547; Newton v. Easterwood (Tex. Civ. App.) 154 S. W. 646.

So, where several coparceners exchanged deeds in partition, and one of them afterwards died, it was held that the survivors were not estopped to claim an interest as heirs in the share conveyed to the decedent.[43] So, also, where a corporation, by its president, conveyed its property with warranty, and the president afterwards acquired title to the property under a foreclosure sale by a third party.[44]

§ 210. **MUTUAL ESTOPPELS.** If, for any reason, the covenantee is estopped to pursue his remedy against the covenantor, in other words, if there are mutual estoppels, the after-acquired title will not pass. The estoppel is thereby, in the language of the ancient common-law authorities, "set at large."[45] The simplest illustration of this principle is furnished by an exchange of lands in which the parties stipulate that in case either is evicted he may re-enter upon the land of the other. In such a case, the evicted party is not estopped by his warranty, to recover his original land from the other.[46]

§ 211. **ESTOPPEL OF MORTGAGOR.** A mortgage containing covenants of warranty is as effectual to pass an after-acquired title as a conveyance in fee.[47] And a mortgage without warranty has been held sufficient for that purpose;[48] but there is a conflict of authority upon this point.[49] A covenant of warranty contained in a purchase-money mortgage will not estop the mortgagor to set up a subsequently acquired title against the mortgagee,[50] nor to recover on the covenants in the original conveyance by the mortgagee,[51] the deed and purchase-money mortgage being regarded as parts of one and the same transaction. "Equity does not require that a grantee should mortgage back a greater estate than that which his grantor professed to vest in him; nor can it be implied that a grantee, in mortgaging back the land for the purchase money, intended to grant an estate which the deed assumed to grant, but which it did not vest in him.[52]

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[42] Jackson v. Mills, 13 Johns. (N. Y.) 463. The same rule applies to the converse of this state of facts, as where a person without title conveys, and afterwards acquires the title as trustee. Burchard v. Hubbard, 11 Ohio, 316.

[43] Carson v. Carson, 122 N. C. 645, 30 S. E. Rep. 4.

[44] Vermeule v. Hover, 113 Me. 74, 93 Atl. 37.

[45] Com. Dig. Estoppel E.; Co. Litt. 352b; Rawle Covt. § 252; Kimball v. Schoff, 40 N. H. 190; Carpenter v. Thompson, 3 N. H. 204, 14 Am. Dec. 348; Ill. Land Co. v. Bonner, 91 Ill. 114, 119, a case in which tenants in common made partition by conveying each to the other with covenants of warranty. Brown v. Staples, 28 Me. 503, 58 Am. Dec. 504, where the covenantees had by an instrument of as high a nature as the covenant, undertaken to remove an incumbrance on the premises, the existence of which was complained of as a breach of covenant.

[46] Grimes v. Redmon, 14 B. Mon. (Ky.) 234 (2d ed.) 189; Pugh v. Mayo, 60 Tex. 191.

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[47] Jones on Mortgages, §§ 561, 682, 825. Judge HARE's note to Duchess of Kingston's Case, 2 Sm. Lead. Cas. (8th Am. ed.) 838; Edwards v. Davenport, 4 McCr. (U. S.) 36; Rice v. Kelso, 57 Iowa, 115, 10 N. W. Rep. 235; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Chamberlain v. Meeder, 16 N. H. 381; Cross v. Robinson, 21 Conn. 387; Plowman v. Shidler, 36 Ind. 484; Boone v. Armstrong, 87 Ind. 169; Randall v. Lower, 98 Ind. 256; People's Sav. Bank v. Lewis (Wash.), 79 Pac. 932; Logue v. Atkinson (Tex. Civ. App.), 80 S. W. Rep. 137; West Mich. Park Asso. v. Ry. Co., 172 Mich. 179, 137 N. W. 799; Broadway v. Sidway, 84 Ark. 527, 107 S. W. 163; Steverson v. Agee Co., 9 Ala. App. 389, 63 So. 794; Hill v. O'Brien, 104 Ga. 137, 30 S. E. 996; Gallagher v. Stern, 250 Pa. 292, 95 Atl. 518. The estoppel operates not only against the mortgagor, but against one who, with knowledge of the facts, takes from the mortgagor a warranty deed, free from incumbrances on the property. Northrup v. Ackerman, 84 N. J. Eq. 117, 92 Atl. 909. Where a mortgage conveyed an "undivided one-eighth interest" in land, and the mortgagor subsequently acquired, under a will, another one-eighth interest in the land, the additional one-eighth interest did not enure to the benefit of the mortgagee. Newell v. Banking Co. (Ky.) 118 S. W. 267.

[48] Stewart v. Anderson, 10 Ala. 504; American Sav. Bank v. Helgesen, 64 Wash. 54, 116 Pac. 837, Ann. Cas. 1913 A. 390.

[49] Donovan v. Twist, 83 N. Y. Supp. 76, 85 App. Div. 130; Jackson v. Littell, 56 N. Y. 108.

[50] Bigelow Estoppel (4th ed.), 403; Rawle Covt. § 267; Co. Litt. 390; Haynes v. Stevens, 11 N. H. 32; Randall v. Lower, 98 Ind. 256; Ingalls v. Cook, 21 Iowa 560; Brown v. Staples, 28 Me. 497, 58 Am. Dec. 504; Hardy v. Nelson, 27 Me. 528; Smith v. Cannell, 32 Me. 125; Geyer v. Girard, 22 Mo. 160; Connor v. Eddy, 25 Mo. 72; Kellogg v. Wood, 4 Paige (N. Y.), 77; Lot v. Thomas, Penn. (N. J.) 300, 2 Am. Dec. 354; Sumner v. Barnard, 12 Met. (Mass.) 461; Hancock v. Carlton, 6 Gray (Mass.), 61; Pike v. Goodnow, 12 Allen (Mass.) 474. A contrary decision appears to have been made in Hitchcock v. Fortier, 65 Ill. 239. Here the land was conveyed without warranty, and immediately reconveyed in mortgage, with warranty, to secure the purchase money. This was undoubtedly a case of great hardship. The original grantor had no title, yet as mortgagee he reaped the full benefit of a title afterwards acquired by the mortgagor. Such a decision could not have been rendered if the original grantor had conveyed with warranty. It may be doubted whether the fact that the grantor took a mortgage on the premises to secure the purchase money did not show an intent to convey an estate of a particular description, and not merely such interest as the grantor might have. This case has been severely criticised. Rawle Covt. (5th ed.) p. 425; Bigelow Estoppel (4th ed.), 404. One who gives a purchase-money

If the owner of land execute a second mortgage on it with covenants of warranty and against incumbrances, and afterwards pay off the first mortgage, the payment enures to the benefit of the second mortgagee, and the grantor is estopped from claiming to be subrogated to the benefit of the first mortgage.[53]

A mortgage on government lands given by the entryman is valid, and the title subsequently perfected by issue of the patent enures to the benefit of the mortgagee.[54]

§ 212. **EFFECT OF VOID CONVEYANCE AS AN ESTOPPEL.** The rule that an after-acquired title passes to the grantee by virtue of the grantor's covenant of warranty has been held not to apply where the conveyance is prohibited by law, *e. g.*, a conveyance of premises in the possession of an adverse claimant.[54a] In those States, however, in which a champertous deed is held to be valid as between the parties though void as to strangers, it is apprehended that the after-acquired title would pass to the grantee.[55]

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mortgage that includes other lands not granted him by the mortgagee, will not be estopped as against the mortgagee to set up an after-acquired title to those lands. Brown v. Phillips, 40 Mich. 264.

[51] Resser v. Carney (Minn.), 54 N. W. Rep. 89.

[52] Randall v. Lower, 98 Ind. 256.

[53] Butler v. Seward, 10 Allen (Mass.), 466; Comstock v. Smith, 13 Pick. (Mass.) 119, 23 Am. Dec. 670; Trull v. Eastman, 3 Met. (Mass.) 124, 37 Am. Dec. 126; Hooper v. Henry, 31 Minn. 264, 17 N. W. Rep. 476.

[54] Adam v. McClintock, 21 N. D. 483, 131 N. W. 394.

[54a] Kennedy v. McCartney, 4 Port. (Ala.) 141, 158, the court saying that the covenantor is not estopped where he is inhibited from selling by the letter, spirit or policy of a legislative act. Kercheval v. Triplett, 1 A. K. Marsh. (Ky.) 493; Altemus v. Nichols, 24 Ky. Law R. 2401, 74 S. W. Rep. 221.

[55] Farnum v. Peterson, 111 Mass. 148, the court saying: "When it is said that the deed of one who is disseised is void, it is intended only that it is inoperative to convey legal title and seisin, or a right of entry upon which the grantee may maintain an action in his own name against one who has actual

Upon the same principle it has been held that no estoppel arises out of a fraudulent conveyance with covenant of warranty; the subsequently-acquired title cannot be thus made to enure to the benefit of the fraudulent grantee, and the grantor be permitted to accomplish by indirection what the law forbids to be directly done.[56] But where the rights of creditors are not concerned, the fact that a deed is fraudulent, and the fraud known to both parties, will not prevent an after-acquired title from enuring to the grantee. In such a case the law will not assist the grantor to avoid a consequence of his own fraud.[57]

It has been held that a conveyance of the homestead by the husband, with warranty, where void under the laws of the State because not executed by the wife also, does not estop the grantor from setting up title in himself after the death of the wife.[58]

If a deed, by reason of imperfect execution, be insufficient to pass the estate, and the grantor having no title, afterwards acquire title, it will not enure to the benefit of the grantee.[59] If this were not so, land might be made to pass, otherwise than by deed, will or descent. It would be absurd to hold that an instrument, which the law declares to be wholly invalid, should, nevertheless, by reason of the covenants of the grantor, operate effectually as a

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seisin. It is not void as a contract between the parties to it. The grantee may avail himself of it against the grantor by way of estoppel, or by suit upon the covenants; or he may recover the land by an action in the name of the grantor. Although he has no right of entry, yet if by lawful means he comes into possession, he may then avail himself of the title of his disseised grantor, and, by uniting that to his own present possession, defeat recovery by the intermediate disseisor. Wade v. Lindsay, 6 Met. (Mass.) 407, 413; Cleveland v. Flagg, 4 Cush. (Mass.) 76. And his title will also be made good against any one attempting to set up a deed from his grantor subsequent to his own. White v. Patten, 24 Pick. (Mass.) 324."

[56] Stokes v. Jones, 18 Ala. 734; S. C., 21 Ala. 738, the court saying, in the latter case, that the grantor cannot avoid the claims of creditors or *bona fide* purchasers, by conveying with warranty to defraud them, and afterwards acquiring the title. Gilliland v. Fenn, 90 Ala. 230, 8 So. 15, 9 L. R. A. 413; Donehoo v. King, (W. Va.) 98 S. E. 520; Troxell v. Stevens, 57 Neb. 329, 77 N. W. 781.

[57] Barton v. Morris, 15 Ohio, 408; Smith v. Ingram, 132 N. C. 959, 44 S. E. Rep. 643, 61 L. R. A. 878.

[58] Bolen v. Lilly, 85 Miss. 344, 37 So. Rep. 811.

[59] Wallace v. Miner, 6 Ohio, 367, 371.

grant and transfer of the estate.[60] Accordingly a deed insufficient for want of attestation as required by law, was held not to estop the grantor, even though it contained a general warranty.[61] Nor is a married woman estopped by a deed which, by statute, she was incompetent to execute.[62] A distinction appears to have been made between deeds, void for want of due execution, and such as are insufficient for want of proper words of conveyance, as respects their operation by way of estoppel. Thus it has been held that an instrument, void as a deed for want of words of grant, but containing a general warranty, was sufficient to estop the grantor from setting up an after-acquired title to the land;[63] and that a deed inoperative to convey a fee by way of grant, for want of words of inheritance, will, if it contain a general warranty, have that effect by way of estoppel.[64]

A conveyance of a part of the public lands by one who has made an entry thereon, but whose title has not been perfected by fulfillment of all the requirements of the land laws, is void as between the grantor and the United States, but has been held valid as between the grantor and grantee; so that upon the issuing of a patent after final proof by the entryman, the title so acquired enures immediately to the benefit of the grantee.[65]

The validity of the deed and its effect by way of estoppel, are to be determined by the law of the place where the land is located, and not by the law of the place where the deed was made.[66]

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[60] Connor v. McMurray, 2 Allen (Mass.), 204.

[61] Patterson v. Pease, 5 Ohio, 191.

[62] Kemery v. Taylor, 176 Ind. 660, 96 N. E. 950.

[63] Brown v. Manter, 1 Fost. (N. H.) 528, 53 Am. Dec. 223.

[64] Terrett v. Taylor, 9 Cranch (U. S.), 53; Somes v. Skinner, 3 Pick. (Mass.) 60.

[65] Anderson v. Wilder, 83 Miss. 606, 35 So. Rep. 875; Gough v. Cutter, 57 Wash. 276, 106 Pac. 774; Organ v. Bunnell, (Mo.) 184 S. W. 102; Case v. Stipes, (Mo.) 217 S. W. 306; Ketchum Coal Co. v. Coal Co., 50 Utah 395, 168 Pac. 86; Ketchum v. Coal Co., 257 Fed. 274, 168 C. C. A. 358. Where the grantee of an entryman assumed his obligation to the State for the purchase-money and made default therein, and the land was resold by the State and re-purchased by the entryman, the latter was not estopped from setting up the title so acquired against his grantee. Houston Oil Co. v. Lumber Co., (Tex. Civ. App.) 181 S. W. 715.

[66] Smith v. Ingram, 132 N. C. 959, 44 S. E. Rep. 643, 61 L. R. A. 878.

§ 213. EFFECT OF ESTOPPEL AS AN ACTUAL TRANSFER OF THE AFTER-ACQUIRED ESTATE. It seems to be established in America that the effect of an estoppel arising from the covenants or recitals by the grantor in his deed, is to actually transfer the after-acquired estate to the grantee, so as to obviate the necessity of a second conveyance of the premises,[67] or of resort to the courts to compel the transfer.[68] The learned commentators upon this somewhat abstruse branch of the law of real property have devoted much space to the consideration of the question whether the effect of the estoppel is to actually transfer the estate, or merely to rebut any claim, which the grantor might make, to the estate by virtue of the after-acquired title. Inasmuch as the grantee would, in either case, be in the actual possession and enjoyment of the estate, the question would seem to have little or no practical value, but for the bearing which it has upon two other questions, namely: (1) Whether one who purchases the after-acquired title from the grantor, without notice of the rights of the prior purchaser, who bought when the grantor had no title, will be preferred to such purchaser. (2) Whether the covenantee can be compelled to accept the after-acquired title in lieu of damages for the breach of the covenant; in other words, whether, after the contract has been executed by a conveyance with covenants of warranty, the grantor will be permitted to perfect the title by getting in the rights of an adverse claimant, so that the same may enure to the benefit of his grantee, and prevent an action at law for the breach of his covenant.

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[67] This, while deprecated, is admitted by Mr. Rawle to be the rule in most of the States. Covts. for Title (5th ed.), § 248. The actual transfer of the after-acquired estate to the grantor by force of the estoppel is recognized in the following cases, though it was unnecessary in few, if any of them, to decide anything more than that the grantor could not set up the after-acquired title as against the grantee: Hoyt v. Dimon, 5 Day (Conn.), 479; Dudley v. Cadwell, 119 Conn. 226; Rigg v. Cook, 4 Gil. (Ill.) 336, 46 Am. Dec. 462; Bank v. Mersereau, 6 Barb. Ch. (N. Y.) 528; Middlebury College v. Cheney, 1 Vt. 349; Moore v. Rake, 2 Dutch. (N. J.) 574; Vreeland v. Blauvelt, 23 N. J. Eq. 483; Bell v. Adams, 81 N. C. 118; Olds v. Richmond Cedar Works, 173 N. C. 161, 91 S. E. 846; Gallagher v. Stern, 250 Pa. 292, 95 Atl. 518; Douglas v. Scott, 5 Ohio, 199; Bailey v. Hoppin, 12 R. I. 560; Barr v. Gratz, 4 Wh. (U. S.) 222; Harmer v. Morris, 1 McL. (U. S.) 44. In Kinsman v. Loomis, 11 Ohio, 479, it was said that the grantee might not only avail himself of the estoppel defensively, but that it would sustain ejectment by him, citing Hill Abr. 401. In Brown v. Manter, 1 Fost. (N. H.) 528, 53 Am. Dec. 223, it was held that the operation of an estoppel was to prevent circuity of action and not to transfer the estate. In Burtners v. Keran, 24 Grat. (Va.) 42, it was held that a deed of bargain and sale with warranty, while it estopped the grantor from setting up title to the after-acquired estate, did not operate as an actual transfer of that estate. Such an effect could be given only to a fine, feoffment, common recovery, or other conveyance of like dignity, at common law. Inasmuch as a deed of bargain and sale has, in America, completely superseded these ancient common-law modes of conveyance, and accomplishes all of their purposes, it is difficult to perceive why it should not be given the same effect by way of estoppel. Mr. Rawle cites a large number of American cases to the proposition that the effect of a conveyance with covenants of warranty is to *actually transfer* to the covenantee any title which the covenantor may afterwards acquire. Examination of these cases will show, as observed by Mr. Bigelow (Estoppel [4th ed.], 420), that in few, if any of them, was it necessary to decide that the estate was actually transferred by the estoppel, there being no question raised as to the rights of a purchaser of the after-acquired title, nor as to the right of the covenantee to compel the covenantor to accept such title in lieu of damages for a breach of covenant. Those cases may be seen on pp. 367, 380, Rawle Covt. (5th ed.). Most of them are mere reiterations of the well-established rule that the grantor cannot set up the after-acquired title against his grantee.

[68] Donohue v. Vosper, 189 Mich. 78, 155 N. W. 407.

With respect to the first question, the doctrine of an *actual transfer* of the after-acquired title has been considered to furnish some ground for those cases which hold that a purchaser of that title, without notice, takes subject to the rights of the original purchaser, the covenantee; and as to the second question, that the effect of that doctrine is to deprive the covenantee of his election to recover damages for a breach of the covenant, or to take the after-acquired title. It remains now briefly to consider both of these questions.

§ 214. **RIGHTS OF PURCHASER OF AFTER-ACQUIRED TITLE.** It seems to be a generally accepted rule throughout the United States that a purchaser in searching the records for any prior conveyance which the vendor may have made, need not extend his search back beyond the time at which the instrument evidencing the vendor's title[69] was admitted to record. If the rule were otherwise the labors of the purchaser would be multiplied indefinitely, for not only would he be compelled to cover in his search a period of time in which the grantor might have conveyed the premises when he was without title, but a similar search would be necessary at each successive step backward in the chain of title. In a few of the States, however, it has been held that not only is the grantor estopped from denying that he had title at the time of his conveyance as against his grantee, but that the estoppel extends to a purchaser of the after-acquired title from the grantor, even though he had no notice of the prior conveyance, and prevents him from setting up such title against the original grantee; and this upon the ground that the effect of the estoppel is to *actually transfer* to the grantee the after-acquired title and to override any subsequent alienation of the premises by the grantor.[70] But this extension of the doctrine of estoppel has been denied by the courts of other States, and vigorously combated by able and discriminating text-writers.[71] They argue that the original purchaser having bought without examining the title, or with knowledge that the title was bad if he made such examination, is in no position to demand favors. It is true that the question is, where there was a warranty of the title in each case, but little more than which of the grantees shall be forced to an action on the covenant, but to this it is replied that the first purchaser has no right by his negligence to deprive the second purchaser of the estate and to force him to an action on the covenant, which, from the insolvency of the covenantor or from many other causes, may prove an unavailing remedy. Where one of two innocent persons must suffer a loss, it should be imposed upon him whose negligence made the loss possible. Besides, to extend the estoppel to a purchaser of the after-acquired estate, would virtually repeal the registry laws in nearly every State of the Union, or rather give them an effect which they were not intended to have, that is, to charge a pur-

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[69] 2 Pom. Eq. Jur. (13th ed.) § 761, and cases there cited. Rawle Covt. (5th ed.) § 259, where the author says that a purchaser who searches the registry for previous deeds made by his grantor, is not obliged to go beyond what is called "the line of title," and that it would be affectation to cite authority for such familiar knowledge.

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[70] 3 Washb. Real Prop. (4th ed.) p. 118; Trevivan v. Lawrence, 1 Salk. 276; S. C., 6 Mod. 258; Ld. Raym. 1051; Somes v. Skinner, 3 Pick. (Mass.) 52; White v. Patten, 24 Pick. (Mass.) 324; Russ v. Alpaugh, 118 Mass. 369, 376, 19 Am. Rep. 464; Knight v. Thayer, 125 Mass. 27, where it was said by the court: "We are aware that this rule, especially as applied to subsequent grantees, while followed in some States, has been criticised in others. * * * But it has been too long established and acted on in Massachusetts to be changed, except by legislation." Jarvis v. Aiken, 25 Vt. 635; Tefft v. Munson, 57 N. Y. 97. Compare Bernardy v. Mortgage Co. (S. Dak.), 98 N. W. Rep. 167. In McCusker v. McEvoy, 9 R. I. 528, 11 Am. Rep. 295, it was said that the rule should be altered by statute in order to give full effect to the registry laws, and prevent them from operating as a snare rather than a protection to purchasers. In Phelps v. Kellogg, 15 Ill. 131, a purchaser of the after-acquired title was charged with notice of a prior deed by his grantor which was recorded before the latter acquired title. Mr. Rawle comments upon the foregoing decisions as follows: "These cases are wholly indefensible, and are opposed not only to the registry acts at law, but also to elementary principles of equity. Nor can such cases be sustained upon the ground that the doctrine has become a rule of property, for there is no rule of property involved in protecting a negligent purchaser who buys what his vendor has not got to sell." Covts. (5th ed.) p. 424.

[71] Judge HARE's note, Doe v. Oliver, 2 Sm. L. Cas. 700; Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163, overruling in effect Brown v. McCormick,

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6 Watts (Pa.) 60, 21 Am. Dec. 450; Dodd v. Williams, 3 Mo. App. 278; Burke v. Beveridge, 15 Minn. 181; May v. Arnold, 18 Ga. 181; Faircloth v. Jordan, 18 Ga. 352. A purchaser is not required to search for incumbrances upon the premises executed by his grantor prior to the time when he obtained title. Farmers' Loan & Tr. Co. v. Maltby, 8 Paige (N. Y.), 361; Doswell v. Buchanan, 3 Leigh (Va.), 365, 23 Am. Dec. 280, where the same rule was applied, though the grantor had the equitable title. See Judge **HARE'S** note, Doe v. Oliver, 2 Smith's L. C. 700, where it is said: "The strongest argument against permitting the covenants or recitals in a deed to extend beyond the person of the grantor to an estate which he does not hold at the time, is that it necessarily tends to give a vendee who has been careless enough to buy what the vendor has not got to sell a preference over subsequent purchasers who have expended their money in good faith and without being guilty of negligence. Such a result seems to be at variance with the recording acts of the country, which are generally held not to require an examination of the record prior to the period at which the title conveyed vested in the vendor. To allow a title to pass by a conveyance executed and recorded before it is acquired may, therefore, be a surprise on subsequent purchasers against which it is not in their power to guard; and is contrary to the equity which is the chief aim of the doctrine of estoppel, as moulded by the liberality of modern times. It is, therefore, more consistent with reason, as well as with principle, to treat deeds made by a grantor without title as creating an equity which, though binding as between the original parties, cannot be enforced against purchasers without notice. The unmanageable character of estoppels, founded solely on common law and technical grounds, is a reason for not invoking their assistance in any case where it is not absolutely needed, and for confining the operation of deeds on an after-acquired interest in lands, to the creation of an equity which will bind subsequent grantees with notice without endangering the title of a *bona fide* purchaser."

chaser with notice of a conveyance executed between parties who were strangers to the title.

In many of the States there are statutes which provide in substance that an after-acquired title shall pass to the grantee.[72] It does not appear, however, from their terms or from judicial construction, that they amount to anything more than affirmation of the existing rule as it respects the covenantor, or that it was thereby intended to enlarge the rights of the original grantee, as against a purchaser of the after-acquired title without notice.[73] It frequently happens that the equitable owner of lands, *e. g.*, one who has paid the purchase money in full but has not received a conveyance, sells and conveys, or mortgages his interest in the premises, and afterwards receives a conveyance of the legal title, whether in such a case, a subsequent grantee without notice of the rights of the purchaser of the equitable title, would be estopped to set up the after-acquired legal title seems to have been nowhere clearly decided.[74] It has been intimated in Georgia that in such a case, the first grantee had a right to establish an equitable title as against the second grantee.[75] It is difficult to distinguish such a case from one in which the grantor had no title, legal or equitable, at the time of the first conveyance, and it would seem that in either case the second purchaser being without notice from the registry of the rights of the first purchaser, would not be estopped to set up the after-acquired legal title. Of course if the second grantee has actual notice of the rights of the first purchaser,[76] as where he sees him in the possession of the estate,[77] he cannot hold the subsequently-acquired title as against such purchaser, for he can no longer claim to be a purchaser of that title without notice.

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[72] Arizona Comp. L. 1877, p. 384, § 33; Ark. Mansf. Dig. 1884, § 642; Cal. Hitts Code, 1876, § 6106; Colo. Gen. Stats. 1883, § 201; Dak. Lev. Rev. Code, 1883, vol. 2, p. 883, subd. 4; Ga. Rev. Code, 1882, § 2699; Ill. Rev. St. p. 279, § 7; Iowa Rev. Code, 1884, § 1931; Kans. Comp. Laws, 1879, p. 211, § 5; Miss. Code 1880, § 1195; Mo. Rev. St. 1879, § 3940; Mont. Rev. St. 1879, p. 443, § 209; Neb. Comp. St. 1885, p. 482, § 51; Nev. Comp. L. 1873, p. 84, § 261; Wash. Ty. Code, 1881, App. 25.

[73] Mr. Rawle is of the opinion that the effect of these statutes is to override any equities that might otherwise avail the second purchaser. Covts. for Title (5th ed.), p. 370n. The Kansas statute (Comp. L. 1879, p. 211, § 5) is, perhaps, as unfavorable to the second purchaser as any. It provides that "where a grantor, by the terms of the deed, undertakes to convey to the grantee an indefeasible estate in fee simple absolute, and shall not at the time of such conveyance have the legal title to the estate sought to be conveyed, but shall afterwards acquire it, the legal estate subsequently acquired by him shall immediately pass to the grantee, and such conveyance shall be as effective as though such legal estate had been in the grantor at the time of the conveyance." It is to be observed that this statute does not in terms provide that the original conveyance shall be effective against a purchaser of the after-acquired title without notice, and it may well be doubted whether the statute was so intended.

[74] Unless in Doswell v. Buchanan, 3 Leigh (Va.), 365, 23 Am. Dec. 280, where H., having only an equitable estate in lands, conveyed the same in trust to secure a debt which deed was duly recorded, and after acquiring the legal title, conveyed to D. with warranty. It was held that the recording

If the purchaser of the after-acquired title be not a privy to the conveyance under which the estoppel is claimed to arise, he will of course hold the estate as against the grantee. Thus, where an heir, before the death of his ancestor, conveyed all of his interest in the ancestor's estate, a purchaser at a sale made after descent of the property, under a judgment against the heir entered before the conveyance, being neither a party nor privy to that conveyance, was held not to be estopped thereby, and to be entitled to the land. In other words, an estoppel cannot affect a purchaser under a judgment against the grantor, entered prior to the conveyance creating the estoppel.[78]

Creditors of the grantor are not purchasers, and, of course, cannot subject the after-acquired estate to the payment of their debts

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of the deed conveying the *equitable* estate was not constructive notice of that deed to D., on the ground that the statute requiring deeds to be recorded, makes them void as to subsequent purchasers without notice if not recorded, but gives them no additional validity (as notice) if recorded. The principle of this decision was afterwards affirmed in Virginia by a statute which provides: "A purchaser shall not be affected by the record of a deed or contract made by a person under whom his title is not derived, nor by the record of a deed or contract made by any person before the date of a deed or contract made to or with such person, which is duly admitted to record, and from whom the title of such person is derived." Va. Code, 1887, § 2473.

[75] Bevins v. Vanzant, 15 Ga. 521.

[76] Gochenour v. Mowry, 33 Ill. 331; Great Falls Ice Co. v. Worster, 15 N. H. 412; Wark v. Willard, 13 N. H. 389.

[77] Doe v. Dowdall, 3 Houst. (Del.) 369.

[78] Jackson v. Bradford, 4 Wend. (N. Y.) 619.

as against the grantee.[79] A different rule may prevail in those States in which lien creditors are given priority over an unrecorded deed, assuming that the deed to the grantee, recorded at a time when his grantor had no title, is to be treated, to all intents and purposes of the registry acts, as an unrecorded deed.[80]

§ 215. **COMPULSORY ACCEPTANCE OF AFTER-ACQUIRED TITLE IN LIEU OF DAMAGES.** So long as a contract for the sale of lands remains executory, there is no doubt as to the right of the vendor, in most cases in which time is not of the essence of the contract, to perfect the title to the estate by purchasing the rights of an adverse claimant, and to compel the vendee to accept the title when so perfected.[81] But if the contract has been executed by a conveyance with a covenant of warranty, or a covenant of seisin, the grantor cannot, after a right to recover substantial damages for a breach of those covenants has accrued to the grantee, as where he has been evicted from the premises, buy in the rights of the adverse claimant and require the grantee to take the title so acquired in lieu of his damages.[82] Of course, as will be readily perceived, the covenantee could have no object in rejecting the after-acquired title and demanding his damages, unless the property had depreciated in value, in which case the damages, being measured by the consideration money, might be greater in amount than the value of the after-acquired title.[83] As respects the covenant of warranty, which is only broken by an eviction from the premises, there would seem to be no doubt that the acquisition of title from the real owner by the covenantor before an eviction had occurred would necessarily deprive the covenantee of any right to reject that title, because in such a case there would not be, and could never be, a right to damages against the covenantor. The covenant of seisin, however, is broken as soon as made if the covenantor has no title, and a right of action immediately accrues thereupon to the covenantee.[84] In that action, unless the covenantee had been evicted, he could recover no more than nominal damages; consequently, it would seem immaterial to him whether he were left to his action or forced to take the after-acquired title. There can be no right to recover the consideration money as damages so long as the covenantee remains in the undisturbed possession of the estate. It has been laid down by a learned writer upon this branch of the law of estoppel that the effect of a conveyance with a covenant of warranty or of seisin is not to actually transfer to the covenantee the after-acquired estate, so as to deprive him of the election to take that estate, or recover damages for the breach of covenant, but merely to *rebut* any claim of the covenantor to the estate, leaving to the covenantee the option of proceeding in equity to compel a conveyance to him of the after-acquired estate, or of recovering damages on the covenant. And, in order to give this position effect, the same writer declares that, upon a breach of the covenant of seisin resulting from a total failure of the title, the covenantee would have the option to retain the land, or to offer to reconvey it and recover its consideration.[85] The objection to this view of the doctrine of the

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[79] Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476; Watkins v. Warsell, 15 Ark, 73; Brown v. Blake, 35 Okl. 498, 130 Pac. 155; Lamprey v. Pike, 28 Fed. 30; Trudeau v. Fischer, 96 Neb. 275, 147 N. W. 698.

[80] As in Virginia, Guerrant v. Anderson, 4 Rand. (Va.) 208.

[81] Ante, § 202.

[82] Washb. Real Prop. 673; Rawle Covt. (2d ed. 244); Bigelow on Estoppel, p. 400; Burton v. Reeds, 20 Ind. 92; Bethell v. Bethell, 92 Ind. 318, 328; Jones v. Gallagher, 54 Okl. 611, 154 Pac. 552; So. Plantation Co. v. Kennedy, 104 Miss. 131, 61 So. 166; Nichols v. Alexander, 28 Wis. 118; McInnis v. Lyman, 62 Wis. 191, 22 N. W. Rep. 405. In both of these cases the eviction was constructive, the covenantees never having gotten possession of the property conveyed. *Cf.* Noonan v. Illsey, 21 Wis. 139, 84 Am. Dec. 742; Blanchard v. Ellis, 1 Gray (Mass.), 199; 61 Am. Dec. 417, where the court said: "Supposing it to be well settled that if a new title come to the grantor before the eviction of his grantee, it would enure to the grantee, and not deciding, because the case does not require it, whether the grantee even after eviction might elect to take such new title and the grantor be estopped to deny it, we place the decision of this case upon this precise ground, that where a deed of land has been made with covenants of warranty, and the grantee has been wholly evicted from the premises by a title paramount, the grantor cannot after such entire eviction of the grantee purchase the title paramount and compel the grantee to take the same against his will, either in satisfaction of the covenant * * * or in mitigation of damages for the breach of it." In Winfrey

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v. Drake, 4 Lea (Tenn.), 293, it seems to have been conceded that the grantor might perfect the title in a suit for rescission on the ground of mistake.

[83] Ante, § 164.

[84] Ante, § 116.

[85] Rawle Covt. §§ 182, 258. Mr. Rawle cites Tucker v. Clarke, 2 Sandf. Ch.

after-acquired estate is that it would, in every case of breach of the covenant of seisin in which the covenantee had suffered no actual damage, give to him the right to rescind an executed contract of sale and have back his purchase money, though the outstanding title had not been, and might never be, asserted against him. It is true that, in actions to recover the unpaid purchase money, there are in a number of cases dicta or intimations that the purchaser may set up by way of recoupment the breach of the plaintiff's covenant of seisin, as a defense to the action, upon condition that he reconvey the premises to the grantor,[86] but the writer is not aware of any case in which this has been permitted after the outstanding title had been acquired by the covenantor. There would

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(N. Y.) 96, in support of his views on this point. In that case, however, the covenantee had been constructively evicted from the premises, having never gotten possession, and it is very clear that in a case of constructive as well as an actual eviction the covenantee cannot be compelled to take the after-acquired title. McInnis v. Lyman, 62 Wis. 191. If it is intended thereby to decide that a covenantee in the undisputed possession of the premises may practically rescind the contract by delivering up the possession and recovering back the purchase money paid, regardless of the after-acquired title, the decision is *obiter dictum*. The case was a suit in equity to enjoin an action by the covenantee for breach of the covenant of seisin, and to compel the defendant to accept in lieu of damages a title subsequently acquired by the covenantor. The court said: "The executed contract was that the complainants were seised of these lots, and if they were not they should repay the consideration money. This is sought to be reconsidered and turned into a contract by which, if it should ever turn out that they were not seised, they might either repay the consideration or procure a good title to be conveyed. It would have been a little more plausible if there had been a semblance of mutuality about it, so that the defendant might have coerced them to procure a good title on discovering the defect. But there is no pretense that the defendant had any such equity. The complainants' ground amounts to this: If the lots had been worth two or three times the price which the defendant paid for them, then they could set up the outstanding title, deprive the defendant of his speculation, and throw him upon the covenants in his deed, which would restore to him the consideration paid. If, on the other hand, the lots should depreciate very much, the complainants would procure the outstanding title for him, and retain the price which he paid. There is no equity or fairness in this, and the court cannot grant the relief prayed by the bill without first making such a contract for the parties; a contract which they never did make, and, I presume, never would have made if any failure of title had been supposed probable when the conveyance was executed."

[86] Post, § 264.

seem to be no equity in allowing the covenantee to rescind his *executed* contract, when he is in the possession and enjoyment of everything that he could demand under that contract. Accordingly, it has been decided that, upon a breach of the covenant of seisin, from which the covenantee has suffered no actual damage, there can be a recovery of no more than nominal damages if the covenantor has gotten in the outstanding title.[87]

But the defendant cannot show title acquired by himself after action brought. The rights of the parties must be determined according to their existence at the time when the action was commenced.[88] If the covenantee recover a judgment for damages for a breach of the covenants of warranty or of seisin, he cannot afterwards claim the benefit of a title acquired by the covenantee after the covenant was made.[89] If the vendor was guilty of fraud in respect to the title, the grantee cannot be required to take an after-acquired title, and this upon the same principle that a vendor guilty of fraud will not, even where the contract is executory, be permitted to perfect the title.[90] The acceptance of a conveyance is not, as a general rule, a merger of the right to rescind the contract on the ground of fraud.[91]

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[87] 3 Sedg. Dam. (8th ed.) § 978; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Reese v. Smith, 12 Mo. 344; Cotton v. Ward, 3 T. B. Mon. (Ky.) 312; Burke v. Beveridge, 15 Minn. 208; Blackmore v. Shelby, 8 Humph. (Tenn.) 439; Burton v. Reeds, 20 Ind. 92; Farmers' Bank v. Glenn, 68 N. C. 39; Hughes v. McNider, 90 N. C. 248. In this case the vendor was allowed, after conveying the property, to perfect the title by paying off incumbrances. Cornell v. Jackson, 3 Cush. (Mass.) 506; McCarthy v. Leggett, 3 Hill (N. Y.), 134; King v. Gilson, 32 Ill. 349, 83 Am. Dec. 269; Morrison v. Underwood, 20 N. H. 369; Fletcher v. Wilson, 1 Sm. & M. Ch. (Miss.) 376; Hartley v. Costa, 40 Kans. 552, 20 Pac. Rep. 208, *semble*. Building Co. v. Fray, 96 Va. 559, 32 S. E. Rep. 58; Middlebury College v. Cheney, 1 Vt. 336. In Cross v. Martin, 46 Vt. 14, it was said that the after-acquired title enured to the grantee in discharge of the grantor's covenants, but the question whether the grantor must take such title in lieu of damages was not before the court. Knowles v. Kennedy, 82 Pa. St. 445; McLennan v. Prentice, 85 Wis. 427; Marsh v. Sheriff, (Md.) 14 Atl. Rep. 664; Kimball v. West, 15 Wall. (U. S.) 377. *Note*, that in Cochran v. Pascault, 54 Md. 1, it was held that under a covenant for *further assurance* the *grantor* had the right to get in an outstanding title and tender a new deed to the grantee removing the objection to the title, and that the grantee would be compelled to accept such deed.

[88] Morris v. Phelps, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323; Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 439, 19 Am. Dec. 139. But see Noonan v. Ilsley, 21 Wis. 147, where the point was questioned, and King v. Gilson, 32 Ill. 348, 83 Am. Dec. 269.

[89] Bank v. Mersereau, 7 Barb. Ch. (N. Y.) 528, 572; Porter v. Hill, 9 Mass. 34, 6 Am. Dec. 22; Stinson v. Sumner, 9 Mass. 143.

§ 216. **WHAT COVENANTS WILL PASS THE AFTER-ACQUIRED TITLE.** A covenant of warranty will, in every case in which the grantor undertakes to convey an indefeasible estate, and not merely such interest as he may have, estop him from afterwards holding an after-acquired estate in the premises, as against his grantee. The reason is to avoid circuity of action;[92] the passing of the after-acquired estate to the grantee satisfies the grantor's covenant and takes away the covenantee's right of action, unless he has been evicted from the premises.[93] A covenant of seisin will also estop the grantor from setting up the after-acquired title;[94] except in certain of the New England States, in which it is held that this covenant is a mere admission that the covenantor is seised *de facto,* and that there is no estoppel because there is no right of action if the grantor was actually, though wrongfully seised.[95] The covenants for good right to convey and for quiet enjoyment will transmit the after-acquired title.[96] The covenant of further assurance is also as effectual for that purpose as the covenant of warranty, since the covenantor thereby engages to convey the after-acquired title, and may be in equity compelled so to do.[97] The covenants of seisin, against incumbrances, and for quiet enjoyment implied from the words "grant, bargain and sell," have been held to act as an estoppel;[98] so, also, a covenant of warranty implied from those words.[99] But in Missouri, the covenants of seisin, against incumbrances, and for further assurance implied by statute from like words, have been held insufficient to estop the grantor, upon the ground that they amount to nothing more than a quit claim.[1] It seems that the warranty implied from a partition will not pass an after-acquired estate.[2] In England covenants for title are not sufficient to create an estoppel against the grantor. There must be a precise averment in the deed that he is seised of the estate purported to be conveyed.[3]

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[90] McWhirter v. Swaffer, 6 Baxt. (Tenn.) 42; Woods v. North, 6 Humph. (Tenn.) 310, 44 Am. Dec. 312; Blackmore v. Shelby, 8 Humph. (Tenn.) 439. The reasons for this rule are clearly stated as follows in Alvarez v. Brannan, 7 Cal. 509, 68 Am. Del. 274: "Where there is no fraud, and the vendor binds himself to convey a certain title and afterwards discovers a defect which he can cure, and thus convey to the purchaser all the latter bargained for, it is obviously just that the vendor should be allowed to do so. But when a party misrepresents material facts, which he knows to be untrue, the law will not permit him to derive any benefit from the transaction. The injured party has a right to elect to rescind the contract and recover the purchase money, or he may proceed upon the covenants in his deed. In case he elect to rescind, he must place the vendor in the same position he occupied at the date of the transaction. If the rule were otherwise, it would offer a reward for injustice. A party knowing he had no title could sell, and, if the property declined in price, he could purchase the outstanding title for less than he received and tender it to the purchaser; and, if the property advanced, all he would be required to do would be to refund the purchase money with legal interest. All the wrongs would be on his side, and yet he would enjoy all the advantage of the market. The risk of loss would be entirely thrown upon the innocent, while all the chance of gain would be on the side of the guilty party. If such be the legitimate result of the rule, there must be something radically wrong in the rule itself. A rule of law that rewards the guilty and punishes the innocent would defeat the noble ends aimed at by the government. But, as the rule of law is different, the innocent party had his election either to take the title, if it can be had of the vendor, or to recover the purchase money with the interest."

[91] Post, §§ 270, 276.

[92] Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Ruggles v. Barton, 13 Gray (Mass.), 506; Dickinson v. Talbot, 14 B. Mon. (Ky.) 65, and cases cited, p. 493, note 2; Breen v. Morehead, (Tex. Civ. App.) 126 S. W. 650. A deed executed by an attorney in fact with warranty passes an after-acquired title, though the power of attorney did not authorize the execution of a warranty deed. Lindsay v. Freedman, 83 Tex. 263, 18 S. W. 727; Guffey Petroleum Co. v. Hooks, 47 Tex. Civ. App. 560, 106 S. W. 690.

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[93] Rawle Covts. for Title (5th ed.), § 250.

[94] Pratt v. Pratt, 96 Ill. 184; Irvine v. Irvine, 9 Wall. (U. S.) 618.

[95] Allen v. Sayward, 5 Greenl. (Me.) 227; Doane v. Willcutt, 5 Gray (Mass.), 328; 66 Am. Dec. 369.

[96] Foss v. Strachn, 42 N. H. 40; Weightman v. Reynolds, 24 Miss. 675, 680.

[97] 2 Sugd. Vend. (8th Am. ed.) 294, 3 Washb. Real Prop. 667 (4th ed. 479); Fitch v. Fitch, 8 Pick. (Mass.) 482; Bennett v. Waller, 23 Ill. 183 (97); Pierce v. Milwaukee R. Co., 24 Wis. 551, 553, 1 Am. Rep. 203; Hope v. Stone, 10 Minn. 141 (114).

[98] DeWolf v. Haydn, 24 Ill. 525; King v. Gibson, 32 Ill. 352, 83 Am. Dec. 269; Pratt v. Pratt, 96 Ill. 184, 197; Porter v. Henderson, (Ala.) 82 So. 668.

[99] Blakeslee v. Insurance Co., 57 Ala. 205.

[1] Bogy v. Shoab, 13 Mo. 365; Chauvin v. Wagner, 18 Mo. 53; Gibson v. Chouteau, 39 Mo. 566; Butcher v. Rogers, 60 Mo. 138.

[2] Rawle Covts. (5th ed.) pp. 381, 450; Walker v. Hall, 15 Ohio, 355, 86 Am. Dec. 482.

A consent decree having the effect of a conveyance but expressly providing that the title is not warranted, was held not to estop the grantor from setting up an after-acquired title to the property.[4]

If the grantor undertakes to convey an estate of a particular description, he will be estopped from setting up against his grantee an after-acquired title, though his conveyance contained no covenants for title.[5]

§ 217. **ESTOPPEL NOT DEPENDENT ON AVOIDANCE OF CIRCUITY OF ACTION.** The following instances in which the doctrine of estoppel has been applied when there was no right of action on the grantor's covenants clearly show that the doctrine of estoppel and transfer of the after-acquired estate does not depend altogether on avoidance of circuity of action. Those instances are the estoppel of married women, of the sovereign power, of bankrupts, and of covenantors against whom no action can be maintained on the covenant by reason of the Statute of Limitations,[6] to which may be added those cases in which the grantor, undertaking to convey an estate of a particular quality or description, is held to be estopped from setting up an after-acquired title, even though the conveyance contained no covenants for title. The grantor is as much bound by the recitals in his deed as by formal covenants.[7] In some of the States it is provided that a fee-simple conveyance shall operate to pass a subsequently acquired estate of the grantor.[8]

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[3] Heath v. Creelock, L. R., 10 Ch. 30; Gen. Finance Co. v. Liberator, etc., Society, L. R., 10 Ch. Div. 15.

[4] Barron v. Cooperage Co., 185 Mo. App. 625, 171 S. W. 683.

[5] Post, § 217.

[6] Cole v. Raymond, 9 Gray (Mass.), 217, the court saying that while the covenant is a personal contract to be enforced by personal action, in which the usual incidents to a personal action will be applied, the covenant is not thereby affected in its broader application and effect as a covenant real. Care must be taken to distinguish this decision from those which hold that the title of a disseisor, which has been perfected by the statute limiting the time within which lands may be recovered, will not enure to the benefit of the disseisee-covenantee. Ante, § 208.

[7] Post, § 218. Denn v. Cornell, 3 Johns. Cas. (N. Y.) 174; Carver v. Jackson, 4 Pet. (U. S.) 87; Flanary v. Kane, 102 Va. 547, 46 S. E. Rep. 681; Summerfield v. White, 54 W. Va. 311, 46 S. E. Rep. 154; Breen v. Morehead, (Tex. Civ. App.) 126 S. W. 650.

Upon the question whether a married woman is estopped by her covenants or conveyance from setting up against her grantee an after-acquired title to the estate there is a conflict of authority. The rule which seems to prevail in most of the States is that she is not estopped;[9] principally for the reason that she cannot bind herself by her covenants, and that, consequently, there is no room for application of the doctrine of estoppel in order to prevent a circuity of action.[10] There are decisions, however, that it is immaterial whether the deed was with or without warranty, there being no estoppel in either case.[11] The mere fact that she joined in a conveyance for the purpose of relinquishing her dower will not estop her from setting up the after-acquired title.[12] Nor will a statute authorizing her to convey have that effect.[13]

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[8] Ante, § 214. Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Bernardy v. Mortgage Co., (S. Dak.) 98 N. W. Rep. 167.

[9] Bishop Married Women, § 603; Hempstead v. Easton, 33 Mo. 142; Hobbs v. King, 2 Met. (Ky.) 142; Prior v. Loeb, 119 Ala. 450, 24 So. Rep. 714; Gonzales v. Hukil, 49 Ala. 260, 20 Am. Rep. 282; Wadleigh v. Glines, 6 N. H. 17, 23 Am. Dec. 705; Goodenough v. Fellows, 53 Vt. 102; French v. McMillion, 79 W. Va. 639, 91 S. E. 538, L. R. A. 1917 D. 228. In Lowell v. Daniels, 2 Gray (Mass.) 161, 61 Am. Rep. 448, it was held that a married woman could not be estopped by her acts *in pais*, even though fraudulent, from setting up an after-acquired title to the land. A party who is incapable of conveying by deed cannot be barred by an estoppel *in pais*. But where a married woman, while she had only an equitable estate in certain lands, executed a deed of trust upon it jointly with her husband, and, after the deed of trust had been foreclosed, obtained a deed from her vendor conveying the legal title, it was held that she could not set up such title against the purchaser under the deed of trust. She would not be estopped to set up against him an after-acquired title *paramount to the right conveyed by her in trust*, but the legal title received by her from her vendor was in equity subordinate to the right so conveyed, and could not avail her as an after-acquired title. Barker v. Circle, 60 Mo. 258.

[10] Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378, a leading case; Carpenter v. Schermerhorn, 2 Barb. Ch. (N. Y.) 314; Martin v. Dwelly, 6 Wend. (N. Y.) 14, 21 Am. Dec. 245; Grout v. Townsend, 2 Hill (N. Y.), 554; Edwards v. Davenport, 4 McCr. (U. S.) 34; Teal v. Woodworth, 3 Paige (N. Y.), 470. In Thompson v. Merrill, 58 Iowa, 419, it was held that a statute providing that a married woman should not be liable on her covenants in a conveyance of the husband's lands relieved her as well of liability on her covenants by way of estoppel as for damages. When, by statute, the husband is not bound by covenants for title in the wife's deed in which he joined, he is not estopped by such deed from claiming an interest in the land subsequently acquired by him. Irish v. Steeves, 134 Iowa 286, 134 N. W. 634.

In several of the States it has been held that a married woman cannot set up a subsequently-acquired title against her grantee, even though she is not answerable in damages for a breach of her covenants.[14] Such decisions necessarily proceed upon the principle that a grantor shall not, *in equity*, be permitted to repudiate his own deed. Upon the same principle it has been held that a married woman is as effectually estopped by a deed without covenants as if the deed contained them.[15] She is estopped from setting up her own title existing at the time of the conveyance; otherwise, the statutes permitting her to convey would be rendered nugatory.[16] In those States in which a married woman is permitted to bind her separate estate by her contracts to the same extent and in the same manner that a married man might, her property is bound by her covenant of warranty, and by such covenant she is estopped from setting up an after-acquired title to the property.[17] If the deed does not show on its face her ownership of the land conveyed, the fact may be shown by parol.[18]

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[11] Den v. Demarest, 1 Zab. (N. J.) 541. See, also, the remarks of McCrary, J., in Edwards v. Davenport, 4 McCr. (U. S.) 34; Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; Raymond v. Holden, 2 Cush. (Mass.) 264, 270; Griffin v. Sheffield, 38 Miss. 359, 393, 77 Am. Dec. 646; Strawn v. Strawn, 50 Ill. 33; State v Kemmerer, 15 S. Dak. 504, 90 N. W. Rep. 150.

[12] O'Neill v. Vanderberg, 25 Iowa, 107. Whether she would be estopped if the conveyance were of her own land,
431. In Schaffner v. Grutzmachen, 6 Iowa, 137, it was suggested that to avoid any question as to estoppel the wife should not join in the body of the deed, but should appear only in the "*in testimonium*" clause.

[13] Dominick v. Michael, 4 Sandf. (N. Y. S. C.) 423.

[14] Fowler v. Shearer, 7 Mass. 14; Colcord v. Swan, 7 Mass. 291; Nash v. Spofford, 10 Met. (Mass.) 192, 43 Am. Dec. 425; Doane v. Willcutt, 5 Gray (Mass.), 328, 332, 66 Am. Dec. 364; Knight v. Thayer, 125 Mass. 25; Massie v. Sebastian, 4 Bibb (Ky.), 436. But see Hobbs v. King, supra. Hill v. West, 8 Ohio, 222, 21 Am. Dec. 442; Farley v. Eller, 29 Ind. 322; Beal v. Beal, 79 Ind. 280, *obiter*. Wife, tenant by entireties, conveying with warranty, is estopped to set up title to husband's interest under devise to her by him. Demerse v. Mitchell, 187 Mich. 683, 154 N. W. 22, 164 N. W. 97.

[15] Graham v. Meek, 1 Oreg. 328; Keady v. Martin, 69 Oreg. 299, 137 Pac. 856, Ann. Cas. 1916 A. 796.

[16] King v. Rea, 56 Ind. 1; Wadleigh v. Glines, 61 N. H. 17, 23 Am. Dec. 705; Summerfield v. White, 54 W. Va. 311, 46 S. E. Rep. 154.

A release of a contingent right of dower by a married woman cannot operate as a conveyance of an existing or after-acquired estate in the premises by estoppel or otherwise. Such a deed, being insufficient to pass an existing estate, cannot have that operation by way of estoppel.[19]

While covenants for title cannot be required from the State or sovereign power, and while, if made, there can be no action for the breach of them, yet, according to the weight of authority in the United States, such covenants, if contained in a grant by the State, will estop her from claiming the land afterwards as against the grantee and his assigns. Therefore, where the State granted lands to an alien with warranty, it was held that upon the death of the grantee the State was estopped to set up the alienage of the grantee or of his heirs, as ground of escheat.[20] The same effect has been given to recitals by the government in public grants, and other solemn instruments.[21] In several cases, however, it has been held that the doctrine of estoppel has no application to acts of the sovereign power.[22] A bankrupt is estopped to set up an after-acquired title as against his covenants,[23] or as against his deed without covenants,[24] notwithstanding his discharge. If the deed contain covenants it is apprehended that the same rule applies, whether there had been, or had not been, a breach of the covenants at the time of the discharge, since the estoppel does not depend upon the personal liability of the covenantor for damages.[25]

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[17] Cooper v. Burns, 133 Fed. Rep. 398. In Missouri, in consequence of a statute limiting the power of a wife to bind herself by covenants for title, a wife joining in her husband's deed of trust with warranty, is not thereby estopped from setting up title to the property thereafter acquired by her. Conrey v. Pratt, 248 Mo. 576, 154 S. W. 749.

[18] Cooper v. Burns, 133 Fed. Rep. 398.

[19] Burston v. Jackson, 9 Oreg. 275.

[20] Commth. v. Andre, 3 Pick (Mass.) 224. The State is estopped by the deed of its officer conveying its lands in the performance of his official duty. State v. Cent. Poca. Coal Co., (W. Va.) 98 S. E. 214. Compare Com. v. Bierly, 37 Super. Ct. Rep. (Pa.) 496.

[21] People v. Society, 2 Paine (U. S.), 557; Menard v. Massey, 8 How. (U. S.) 293, 313; Magee v. Hallett, 22 Ala. 718; Nieto v. Carpenter, 7 Cal. 527; Commth. v. Pejepscut, 10 Mass. 155.

[22] Taylor v. Shufford, 4 Hawks (N. C.), 116, 15 Am. Dec. 512; Candler v. Lunsford, 4 Dev. & Bat. (N. C.) 407; Wallace v. Maxwell, 10 Ired. (N. C.) 112, 51 Am. Dec. 380. There were no covenants in any of these cases. In St. Louis Refrigerator Co. v. Langley, 66 Ark. 48, 51 S. W. Rep. 68, it was held that an act providing that an after-acquired title should pass, under the prior conveyance, immediately to the grantee, did not apply to conveyances by the State, the State not being expressly mentioned in the act.

[23] Chamberlain v. Meeder, 16 N. H. 381; Gregory v. Peoples, 80 Va. 355. In Bush v. Cooper, 26 Miss. 599, 59 Am. Dec. 270, 18 How. (U. S.) 82, it

§ 218. **MERE QUIT CLAIM DOES NOT OPERATE AN ESTOPPEL.** As a general rule a mere quit claim of all the grantor's interest in the premises, without covenants for title, will not estop him from setting up an after-acquired title as against the grantee.[26] And if

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appeared that the covenants in the bankrupt's deed were not broken until after the discharge in bankruptcy, and there being no right of action on the covenant at the time of the discharge, and no claim for liability on the covenant provable in bankruptcy, it was held that the bankrupt was estopped to set up the after-acquired title.

[24] Stewart v. Anderson, 10 Ala. 504; Dorsey v. Gassaway, 2 Harr. & J. (Md.) 402; 3 Am. Dec. 557, where, however, the question arose in a controversy as to the title of personal property.

[25] Gregory v. Peoples, 80 Va. 356, where it was said by LEWIS, P.: "It was claimed that by his discharge in bankruptcy H. was released from the obligation of his covenant to warrant the title to the land conveyed by him, and that, consequently, the subsequent conveyance of the legal title to him did not enure to the benefit of his grantee. This contention would be well founded if the case of the appellant rested solely on the personal liability of H. growing out of his covenant. But it does not. Such a covenant is not only one running with the land, for the breach of which the covenantor is liable in an action for damages, but is something more. By its operation a paramount title, subsequently acquired by him, enures to the benefit of the covenantee, and in equity he is estopped from asserting that any outstanding title existed inconsistent with what he undertook to convey. It has, therefore, been held that a discharge in bankruptcy, while effectual to release the covenantor from liability in an action for a breach of the covenant, does not at all affect the estoppel. This is on the ground that, as the release is by force of the statute, and not by the act of the covenantee, or those claiming under him, no greater effect will be given to it than is warranted by the term of the statute; and for the further reason that existing personal liability is not necessary to work an estoppel, and, consequently, there is no necessary connection between the personal liability of the debtor on his covenant and the estoppel which arises therefrom." The case does not show whether the breach of warranty took place before or after the discharge in bankruptcy, and it may be that the foregoing observations are, to some extent, *obiter dicta.*

[26] Co. Litt. § 446, p. 265, a. b.; Bigelow Estoppel, ch. 11, § 4; Rawle Covt. 247, 2 Washb. Real Prop. 665; McCracken v. Wright, 14 Johns. (N. Y.) 194; Jackson v. Hubble, 1 Cow. (N. Y.) 613; Jackson v. Winslow, 9 Cow. (N. Y.) 18; Jackson v. Peek, 4 Wend. (N. Y.) 302; Pelletreau v. Jackson, 11 Wend. (N. Y.) 119, distinguishing Jackson v. Bull, 1 Johns. Cas. (N. Y.) 81, and

the grantor warrant the title specially, the subsequently-acquired estate will not pass to the grantee if it came to the grantor through

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Jackson v. Murray, 12 Johns. (N. Y.) 201, in which it did not appear that the deeds were without warranty. Edwards v. Varick, 5 Den. (N. Y.) 664, 702; Sparrow v. Kingman, 1 Comst. (N. Y.) 242, 247; Jackson v. Littell, 56 N. Y. 108; Cramer v. Benton, 64 Barb. (N. Y.) 524; Boswell v. Buchanan, 3 Leigh (Va.) 365, 23 Am. Dec. 280; Wynn v. Harman, 5 Grat. (Va.) 157; Comstock v. Smith, 13 Pick. (Mass.) 116, 23 Am. Dec. 670; Hagensick v. Castor, 53 Neb. 495, 73 N. W. Rep. 932, Troxell v. Stevens, 57 Neb. 329, 77 N. W. Rep. 781. The assignment of a mortgage by deed without covenants of warranty, does not estop the granter to set up an after-acquired title to the mortgaged premises. Merritt v. Harris, 102 Mass. 326; Weed Machine Co. v. Emerson, 115 Mass. 554; McBride v. Greenwood, 11 Ga. 379; Morrison v. Whitesides, 116 Ga. 459, 42 S. E. Rep. 729; Taylor v. Wainman, 116 Ga. 495; 43 S. E. Rep. 58; Kent v. Watson, 22 W. Va. 568; Simpson v. Greeley, 8 Kans. 586; Bruce v. Luke, 9 Kans. 201, 12 Am. Rep. 491; Scoffins v. Grandstaff, 12 Kans. 470; Young v. Clippinger, 14 Kans. 148, where the grantor not only quit-claimed his present interest but any that he might have in the future, and undertook to defend the property against all claims if any should afterward be asserted against it. Ott v. Sprague, 27 Kans. 624; Harden v. Collins, 8 Nev. 49; Demarest v. Hooper, 2 Zab. (N. J. L.) 620; Howe v. Harrington, 18 N. J. Eq. 496; Smith v. De Russy, 29 N. J. Eq. 407; Dart v. Dart, 7 Conn. 250; Tillotson v. Kennedy, 5 Ala. 413, 39 Am. Dec. 336; Morrison v. Wilson, 30 Cal. 344; Cadiz v. Majors, 33 Cal. 288; Quivey v. Baker, 37 Cal. 465; Gibson v. Chouteau, 39 Mo. 536; Bogy v. Shoab, 13 Mo. 365; Butcher v. Rogers, 60 Mo. 138; Kimmel v. Benna, 70 Mo. 52, 68; Kinsman v. Loomis, 11 Ohio, 475; Frink v. Darst, 14 Ill. 304, 58 Am. Dec. 55, overruling Frisby v. Ballance, 2 Gil. (Ill.) 141, both cases being ejectment founded on the same quit-claim deed. In Bennett v. Waller, 23 Ill. 97 (1st ed. 182), it was held that the rule stated in the text did not apply if the quit claim contained a covenant for further assurance. It is now declared by statute in that State that a quit claim shall not pass an after-acquired title. R. S. 1883, ch. 30, § 10, p. 280; Avery v. Aikins, 74 Ind. 283; Locke v. White, 89 Ind. 492; Sweetser v. Lowell, 33 Me. 452. In Coal Creek Mining Co. v. Ross, 12 Lea (Tenn.), 5, it was said that if the special warranty was of the title to the land, and not merely of an existing or limited interest therein, the grantor would be estopped. In Mississippi it is provided by statute that a deed of quit claim and release shall estop the grantor and his heirs from asserting a subsequently-acquired title. Code, 1880, § 1195. Before this statute the rule was as stated in the text. Mitchell v. Woodson, 37 Miss. 578. The reasons for the rule were thus explained in Western Min. & Mfg. Co. v. Peytona Coal Co., 8 W. Va. 449: "If then, at the time the grantor executes the covenant of special warranty, the title to the land is in a third person, not because of any act or default of the covenantor, and such person afterwards asserts and enforces the title against the covenantee, the covenant is not thereby broken, and the covenantor is not in any way responsible. The covenantee pays nothing for the actual a defect of title not embraced by his covenant.[27] Thus, the grantor may buy in a title paramount to that under which he held, and the title so acquired will not enure to his grantee, but he cannot acquire the very title which he warranted, and hold it against his grantee.[28] The reason why no estoppel arises under a mere quit claim, pure and simple, is partly because there is no right of action against the grantor, if the estate be lost to one having a paramount title, and consequently no occasion for the application of the doctrine of estoppel to prevent circuity of action.[29] There is no injustice in preventing the passage of the after-acquired estate to the grantee, where the grantor merely

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title, but pays only for the claim of the covenantor together with the covenant. No duty rests on the covenantor to procure the title for the benefit of the covenantee, or at all to protect him against, or indemnify him for, the assertion and enforcement of the title, and his consequent eviction. The title in the third person may, without the agency of the covenantor, descend or otherwise come to him. Or it may be important to the interest of himself or others, that he should purchase the land, and accordingly he may purchase it. Such a purchase cannot damage the covenantee. And there is no reason whatever at all sufficient, why the covenantor should not purchase the land from the owner, and assert his title thereto, or dispose of the land as any other person may do." Another reason is that a quit claim is regarded as a mere release, and "by a release no right passeth but the right which the releasor hath." Co. Litt. p. 265. Jackson v. Winslow, 9 Cow. (N. Y.) 18. *Recent cases:* East v. Davis, (Mo.) 204 S. W. 402; Emery v. Barfield, (Tex. Civ. App.) 138 S. W. 386; Breen v. Morehead, (Tex. Civ. App.) 126 S. W. 650; Bunch v. Johnson, (Ark.) 211 S. W. 551; Wells v. Glos, 277 Ill. 516, 115 N. E. 658; Corbin v. Railway Co., 285 Ill. 439, 120 N. E. 800; Vary v. Smith, 162 Ala. 457, 50 So. 187; Hohn v. Bidwell, 27 S. D. 249, 130 N. W. 837; Manson v. Peaks, 103 Me. 430, 69 Atl. 690, 125 Am. St. Rep. 311; Hill v. Coburn, 105 Me. 437, 75 Atl. 67. A husband's quitclaim deed, not specifically pointing out the estate conveyed, will not estop him from setting up a title to the property subsequently acquired by him as heir to the wife. Buckel v. Auer, (Ind. App.) 120 N. E. 437.

[27] Comstock v. Smith, 13 Pick. (Mass.) 116, 23 Am. Dec. 670; Trull v. Eastman, 3 Met. (Mass.) 121, 37 Am. Dec. 126; Loomis v. Pingree, 43 Me. 314; Bell v. Twilight, 6 Fost. (N. H.) 401, 45 Am. Dec. 357; Tillotson v. Kennedy, 5 Ala. 407, 39 Am. Dec. 330.

[28] So held in Gibbs v. Thayer, 6 Cush. (Mass.) 30, where the grantor executed a fraudulent conveyance, with special warranty, and afterwards went into insolvency, and purchased back his own title at the assignee's sale. Such a case, the court said, is clearly distinguishable from one in which the grantor purchases in the title of a stranger, as in Comstock v. Smith, supra.

[29] Doane v. Willcutt, 5 Gray (Mass.), 334, 66 Am. Dec. 369.

releases whatever present claim or interest he may have, for, presumably, the consideration of the conveyance was commensurate only with that interest.[30] If it should appear that the consideration paid by the grantee was the full value of the estate, that fact might be important in determining whether the intent of the grantor was to convey, not merely such present interest as he may have in the premises, but an estate of a particular description, which would, notwithstanding the absence of covenants for title, estop him from claiming the after-acquired estate.[31] A deed with special or limited covenants for title, will be regarded in the same light as a quit claim, or deed without covenants, so far as its effect, by way of estoppel, is concerned.[32]

If the grantor covenant against certain designated claims only, and afterwards acquire the title from a source independent of those having such claims, the estate so acquired will not pass to the grantee.[33]

A release or quit claim passes only such interest as the grantor then has, and does not embrace a bare possibility of a future interest.[34] If a contingent remainderman convey the estate by deed with *general* warranty, the estate which vests upon the happening of the contingency will, of course, enure to the benefit of the grantee.[35] But a conveyance of a contingent interest without covenants of title will not operate an estoppel.[36] So, also, if an heir convey his estate in expectancy by quit claim, he will not, after the death of his ancestor, be estopped to hold the estate descended to him as against his deed.[37] If the heir conveys not merely his interest in expectancy, but the land itself with covenants of general warranty, he will be estopped.[38]

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[30] Western Min. & Mfg. Co. v. Peytona Coal Co., 8 W. Va. 449.

[31] Post, this section.

[32] Harrison v. Boring, 44 Tex. 255. In Keith Lumber Co. v. Oil Co., 257 Fed. 1, holding the grantor estopped, stress was laid upon the fact that the words of the conveyance were "grant, bargain, and sell," instead of "quitclaim."

[33] Lamb v. Wakefield, 1 Sawy. (U. S.) 251. Here the covenant was against all persons except the government of the United States and those deriving title from that government. The covenantor afterwards acquired title from a donee of the government, and it was held that such title did not enure to the covenantee. See, also, Lamb v. Kann, 1 Sawy. (U. S.) 338; Quivey v. Baker, 37 Cal. 471; Fields v. Squires, Deady (U. S.), 380; Blake v. Tucker, 12 Vt. 44.

[34] Varick v. Edwards, 1 Hoff. Ch. (N. Y.) 382; Ernst v. Ernst, 178 Mich. 100, 144 N. W. 513, 51 L. R. A. (N. S.) 317.

[35] 4 Kent Com. 201; Read v. Fogg, 60 Me. 479; Hayes v. Tabor, 41 N. H. 521; Fulton v. Teager, 183 Ky. 381, 209 S. W. 535; English v. McCreary, 157 Ala. 487, 48 So. 113; Cherry v. Cherry, (N. C.) 101 S. E. 504.

Even though a deed contains general covenants for title, if it appear that the grantor does not intend to convey an indefeasible estate, but merely such present right, title or interest as he may have in the premises, that is, no greater estate than he was really possessed of, the after-acquired title will not pass.[39] Of course, the grantor cannot acquire by estoppel a greater estate than the instrument creating the estoppel purports to convey. A warranty cannot enlarge the estate; it attaches only to the estate granted or purported to be granted. If it be a life estate the covenantor warrants nothing more. He cannot be estopped by the deed, or the covenants contained in it, from alleging that the fee did not pass, when the deed shows precisely what estate did pass, and that it was less than the fee.[40]

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[36] Jackson v. Bradford, 4 Wend. (N. Y.) 619.

[37] 3 Washb. Real Prop. 94, 95; Jackson v. Winslow, 9 Cow. (N. Y.) 13. Hart v. Gregg, 32 Ohio St. 502; Spacey v. Close, 184 Ky. 523, 212 S. W. 127; Blackwell v. Harelson, 99 S. C. 264; 84 S. E. 233. Contra, Bohon v. Bohon, 78 Ky, 408. If a warranty deed purport to convey only such interest as the grantor may have in the future as an heir or grantee, it is void as the conveyance of a mere expectancy or naked possibility of an interest, and will not estop the grantor from setting up a title subsequently acquired as such heir or grantee. Dailey v. Springfield, 144 Ga. 395, 87 S. E. 479. Ann. Cas. 1917 D. 943. In Stoepler v. Silberberg, 220 Mo. 258; 119 S. W. 418, it was held that a conveyance with warranty of the grantor's "right, title, and interest" in a lot, not being a conveyance of the lot itself, did not estop him from setting up title to the lot thereafter acquired by him as heir to his mother. In McClure v. Raben, (Ind.) 25 N. E. Rep. 179, it was held that a conveyance of an expectancy by an heir apparent without warranty, the ancestor being still alive but not informed of the transaction, would not estop the heir from holding the interest after the death of the ancestor, though the purchase was in good faith, and full value was paid for the expectant estate. But if the deed be with warranty, the heir will be estopped. Habig v. Dodge, (Ind.) 25 N. E. Rep. 182. Johnson v. Branch, 9 S. Dak. 116; 68 N. W. Rep. 173.

[38] Ackermann v. Smiley, 37 Tex. 211. Holmes v. Carr, 163 N. C. 122; 79 S. E. 413; Baker v. Austin, 174 N. C. 433; 93 S. E. 949; Molina v. Ramirez, 15 Ariz. 249; 138 Pac. 17. An heir conveying by quitclaim is estopped to set up title to the property on the death of the ancestor, if an intention to convey an estate of a particular description appears. Pring v. Swarm, 176 Iowa 153, 157 N. W. 734. A prospective heir may lawfully sell and convey his interest in the estate. Blackwell v. Harelson, 99 S. C. 264; 84 S. E. 232, disapproving McCall v. Hampton, 98 Ky. 166; 32 S. W. 406; 33 L. R. A. 266; 56 Am. St. Rep. 335. If one attempts to convey, with warranty, land which he does not own, his subsequent acquisition of title to the property as heir enures to the benefit of his grantee. Zarate v. Villareal (Tex. Civ. App.) 155 S. W. 328. One conveying his interest as executory devisee, is estopped to claim such interest on the happening of the event on which the interest was to vest. Smith v. Carroll, 286 Ill. 137; 121 N. E. 254.

The foregoing rules show the necessity of great care and prudence in taking conveyances of expectant or contingent interests in real property. At the first glance any one who had not given the subject attention, would, very likely, conclude that a conveyance of all the grantor's "right, title and interest," with general covenants for title, would be an ample assurance of the title to the property upon the happening of the event vesting the title in the grantor. Apparently the only safe course is to take an ordinary, unqualified conveyance of the property in fee simple, with general covenants for title, or to require the vendor, conveying without covenants, to insert recitals showing that he intends to part with all prospective as well as present interests in the estate.

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[39] Hannick v. Patrick, 119 U. S. 156; Brown v. Jackson, 3 Wh. (U. S.) 452. Sanford v. Sanford, 135 Mass. 314; Hoxie v. Finney, 16 Gray (Mass.), 332; Sweet v. Brown, 12 Met. (Mass.) 175; 45 Am. Dec. 243; Wight v. Shaw, 5 Cush. (Mass.) 56; Allen v. Holton, 20 Pick. (Mass.) 458; Coe v. Persons Unknown, 43 Me. 436; Shoemaker v. Johnson, 35 Ind. 33; Locke v. White, 89 Ind. 492; Adams v. Ross, 1 Vr. (N. J. L.) 509; 82 Am. Dec. 237; White v. Brocaw, 14 Ohio St. 339; Wynn v. Harman, 5 Grat. (Va.) 162; Bell v. Twilight, 6 Fost. (N. H.) 411; 45 Am. Dec. 367; Gee v. Moore, 14 Cal. 474; Kimball v. Semple, 25 Cal. 441, 452; Hope v. Stone, 10 Minn. 141, 149; Gibson v. Chouteau, 39 Mo. 536, 567; 100 Am. Dec. 366; Valle v. Clemens, 18 Mo. 486; Bogy v. Shoab, 13 Mo. 365; Holbrook v. Debo, 99 Ill. 372. The rule stated in the text has been extended so far as to defeat the passing of a vested interest to the covenantee which, at the time of the conveyance, was contingent. Thus, in Blanchard v. Brooks, 12 Pick. (Mass.) 47, a person being the devisee of a contingent, and also of a vested remainder, executed a deed with general warranty purporting to convey all his "undivided share or portion, right, title and interest of, in and to" the lands etc. The court said the grant was of all the grantor's "right, title and interest," and not of the land itself, or of any particular estate in the land. "The grant in legal effect operated only to pass the vested interest, and not the contingent interest, and the warranty being co-extensive with the grant, did not extend to the contingent interest, and of course, did not operate upon it by way of estopped." A like decision upon a similar state of facts was made in Hall v. Chaffee, 14 N. H. 215, 225

[40] 2 Co. Litt. 385, b. Adams v. Ross, 1 Vr. (N. J.) 505; 82 Am. Dec. 237.

But while a mere quit claim of the grantor's present interest will not estop him from claiming the after-acquired interest, it does not follow that there will be no estoppel wherever there are no covenants for title. If the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to acquire, an estate of a particular description or quality, as distinguished from a quit claim or release, the after-acquired title will pass to the grantee, though the deed contains no formal covenants for title.[41] It has been held that the fact that an instrument is a quit-claim deed in form will not preclude the grantee from showing that something more than the grantor's interest, such as it might be, was intended to be conveyed.[42]

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[41] Ante, § 217. Bigelow Estoppel (3d ed.), 333; Rawle Covt. (5th ed.) § 247. Van Rensselaer v. Kearney, 11 How. (U. S.) 298; French v. Spencer, 21 How. (U. S.) 228, 240; Clark v. Baker, 14 Cal. 612, 629; Taggart v. Risley, 4 Oreg. 235; Habig v. Dodge, (Ind.) 25 N. E. Rep. 182; Hagensick v. Castor, 53 Neb. 495; 73 N. W. Rep. 932; Lindsey v. Freeman, 83 Tex. 259; 18 S. W. Rep. 727; Scates v. Fohn, (Tex. Civ. App.) 59 S. W. Rep. 837; Garrett v. McLain, 18 Tex. Civ. App. 245; 44 S. W. Rep. 47; Anderson v. Casey Co., (Tex. Civ. App.) 120 S. W. 918; Van Rensselaer v. Kearney, supra, is a leading case upon this point. It distinguishes between a quite claim or release, and a deed without covenant for title, yet which shows on its face that the grantor intended to convey an estate of a particular description or quality and not merely whatever interest or estate the grantor might happen to have. The court, by NELSON, J., after discussing certain analogous authorities, continued: "The principle deducible from these authorities seems to be that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises and which estate the deed purports to convey; or, what is the same thing, if the seizure or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privies. The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality and recommends itself to the common sense and justice of every one. And although it debars the truth in the particular case, and, therefore, is not

The principle involved in these cases is, that the grantor having by his conveyance represented himself to be the true owner of the particular estate therein dscribed, should be estopped to allege the contrary, if he should afterwards acquire title to the estate, upon the same ground that a party to an instrument is estopped by the recitals which it contains. If the grantor in the quit claim allege himself to be the owner of the premises, both he and those claiming under him will be estopped to deny that fact and to hold the after-acquired title.[43] In Maine it has been held that the covenant of "non-claim" will not operate an estoppel, for the reason that

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unfrequently characterized as odious and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation, upon the faith of which persons had dealt and pledged their credit or expended their money." In Nixon v. Carco, 28 Miss. 414, 426, the following instrument was held sufficient to estop the heirs of the grantor from setting up the after-acquired title:

"PASS CHRISTIAN, *October* 7, 1815.

"I, the undersigned, declare that I, John Baptiste Carco, have sold to Messrs. Francis Bouquie and Anthony Martin my plantation and two cabins situate thereon, together with the enclosure and all the rails. (Here follows a description of the property and recital of the consideration.)

"(Signed) JEROME BAPTISTE CARCO."

In Thomas v. Stickle, 32 Iowa, 72, it was held that a quit claim of all the grantor's interest would include a tax certificate held by the grantor at the time of the conveyance, but not disclosed by him, by means of which he afterwards obtains a tax deed of the land; and that the title so acquired enured to the benefit of the grantee.

The recital "being part of the land purchased by me of the town of Foxcroft" is not a covenant for title operating a transfer of an after-acquired estate in the land. Manson v. Peaks, 103 Me. 430, 69 Atl. 690, 125 Am. St. Rep. 311.

[42] Harrison v. Boring, 44 Tex. 255. If the consideration of the quit claim did not appear upon its face, parol evidence would seem admissible to show that the grantor received the full value of the estate, and that, therefore, an estate of a particular description was intended to be conveyed; this upon the ground that parol evidence is, as a general rule, admissible to show the consideration of an instrument as between the parties.

[43] Jackson v. Waldron, 13 Wend. (N. Y.) 178.

such a covenant amounts to no more than a mere quit claim.[44] A contrary view has been taken in Massachusetts.[45]

An exception to the rule that a quit-claim deed will not pass an after-acquired title has been held to exist where one who, after purchasing lands from the State and paying for them, quit claimed his interest to a third person before a patent issued. In such a case the title when perfected by the patent passes to the grantee, on the ground that the inception of the title by the purchase and its consummation by patent are parts of the same title, the patent relating back to the inception; and upon the further ground that the grantor intended to convey and the grantee expected to receive, not merely such inchoate title as the grantor then had, but the perfected title accruing upon compliance with all the requirements of the laws regulating public grants.[46] Upon the same principle it would seem that a quit claim executed by one who had paid the purchase money in full for the premises, but had not received a conveyance, would operate to pass the legal title to his grantee when afterwards consummated by a conveyance from the original grantor.[47] Another exception to the rule that a quit claim does not create an estoppel, exists in those cases in which the quit claim expressly provides that neither the grantor, nor his assigns, will hereafter claim any right, title or interest in the premises conveyed. In such cases the grantor and his assigns are estopped to assert an after-acquired title to the estate.[48]

It seems that covenants for title executed by a fiduciary will not estop the beneficiary from claiming an after-acquired estate. Thus, if a ward acquires title after a sale and conveyance by his guardian, it has been held that such title will not enure to the benefit of the purchaser.[49] Nor will a title acquired by an execution debtor after sale by the plaintiff enure to the benefit of the purchaser at such sale.[50]

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[44] Pike v. Galvin, 29 Me. 183, overruling Fairbanks v. Williamson, 7 Gr. (Me.) 97; Ham v. Ham, 14 Me. 355; Partridge v. Patten, 33 Me. 483, 54 Am. Dec. 633; Loomis v. Pingree, 43 Me. 314; Harriman v. Gray, 49 Me. 538; Read v. Fogg, 60 Me. 479.

[45] Trull v. Eastman, 3 Met. (Mass.) 121, 37 Am. Dec. 126, distinguishing between a quit claim and a covenant of non-claim on the ground that a quit claim, being a mere conveyance of such right as the grantor then has, does not include future interests, while a covenant of non-claim, *i. e.*, that neither the grantor nor his heirs will thereafter claim the premises, expressly contemplates the after-acquired estate. Miller v. Ewing, 6 Cush. (Mass.) 34.

[46] Welsh v. Dutton, 79 Ill. 465; Irvine v. Irvine, 9 Wall. (U. S.) 618.

[47] Johnson v. Johnson, 173 Ky. 701, 191 S. W. 672.

[48] Garlick v. Railway Co., 67 Ohio St. 223, 65 N. E. Rep. 896.

§ 219. **ESTOPPEL OF GRANTEE.** By the common law of England a grantee who had accepted and taken possession of an estate was estopped to deny the title of his grantor or of any one claiming under him.[51] Thus, if a widow brought an action to recover dower against the grantee of her husband, the defendant was estopped to show that the husband had had no title to the land. This rule was followed in New York in several early decisions,[52] but they were afterwards overruled,[53] and it is settled now in that State, as well as in other States, that the grantee is not estopped to deny the title of his grantor, or of any one claiming under him.[54] If, however, the real title be already in the grantee, he will be estopped from suing on the covenants of his grantor by his acceptance of the grant.[55] But while the grantee is not estopped to deny the title of the grantor by way of defense to an action for the purchase money, he is estopped in another sense, namely, that he cannot acquire the adverse title and set it up adversely to the grantor, so as to prevent the latter from recovering the balance of the purchase money over and above that paid by the grantee to get in the title.[56] The rule that the purchaser is estopped to deny his vendor's title has been held not to apply where the vendor undertook to sell a part of the public domain to which he had no title. In such a case the purchaser, on ascertaining the vendor's want of title, may himself preempt the land and claim adversely thereunder to his vendor.[57] Neither does the rule apply where the vendee was induced to purchase by reason of the fraudulent representation of the vendor.[58] Nor where the purchaser has been actually or constructively evicted.[59] The spirit and intent of the rule is that the purchaser shall not repudiate the contract while he remains in possession and retains its benefits.[60] And if the purchaser rejects title and possession from the vendor, and takes possession under what he supposes is the better title, he may set up such title in defense of an action of ejectment by the vendor.[61]

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[49] Young v. Lorain, 11 Ill. 624, 52 Am. Dec. 463.

[50] Henderson v. Overton, 2 Yerg. (Tenn.) 393, 24 Am. Dec. 492; McArthur v. Oliver, 60 Mich. 605; Gentry v. Callahan, 98 N. C. 448; Westheimer v. Reed, 15 Neb. 662.

[51] Co. Litt. 352, a.

[52] Bowne v. Potter, 17 Wend. (N. Y.) 164; Sherwood v. Vendenburgh, 2 Hill (N. Y.), 307; Osterhout v. Shoemaker, 3 Hill (N. Y.), 518.

[53] Averill v. Wilson, 4 Barb. (N. Y.) 180; Sparrow v. Kingman, 12 Barb. (N. Y.) 208, 1 Comst. (N. Y.) 245; Finn v. Sleight, 8 Barb. (N. Y.) 406.

[54] Gaunt v. Wainman, 3 Bing. N. Cas. 69; Small v. Proctor, 15 Mass. 495; Porter v. Sullivan, 7 Gray (Mass.), 441; Craig v. Lewis, 110 Mass. 377; Fox v. Widgery, 4 Gr. (Me.) 218; Foster v. Dwinel, 49 Me. 44; McLeery v. McLeery, 65 Me. 173; Cutter v. Waddingham, 33 Mo. 282; Patterson v. Dwinel, 113 Ill. 570; Clee v. Seaman, 21 Mich. 287. The holder under a tax title that has been perfected by the statute of limitations is not estopped to set up that title against one from whom he subsequently took a conveyance of the premises, since such conveyance was without consideration and of no effect. Stewart v. Williams, (Tex. Civ. App.) 167 S. W. 761.

[55] Fitch v. Baldwin, 17 Johns. (N. Y.) 166; Beebe v. Swartwout, 3 Gil. (Ill.) 179; Furness v. Williams, 11 Ill. 229; Smiley v. Fries, 104 Ill. 416; Davenport v. Roberts, 171 Ill. App. 196.

§ 220. **RESUME OF PRINCIPLES.** Mr. Rawle, in summing up the results of the American decisions as to the transfer of the after-acquired estate, observes that the doctrine rests upon a principle which is or at times may be salutary, being intended to carry out the real intention of the parties that a certain particular estate was to be conveyed and received, and where that intention appears the law will not suffer the grantor to defeat it. Such an intention may be deduced either from averments, recitals, or the like, or from the presence of covenants for title; and it is immaterial what particular covenants there may be, so that they show the intention. But the intention is not *necessarily* deduced from the covenants, and may appear by other parts of the deed. In many cases, to prevent circuity of action, it may be held that the estate actually passes; but this should not be suffered to work injustice by depriving the first grantee of his legal right of action, *i. e.,* his option to sue for breach of covenant. And the doctrine may often apply when there is no right of action, but should never be applied against a purchaser without notice.[62] These conclusions appear to be sound in principle and to be warranted by the decisions, except in so far as they would permit the covenantee, upon a breach of the covenant of seisin unaccompanied by disturbance of the possession, to practically rescind the executed contract and recover the purchase money as damages, though he had not suffered and could never, by reason of the after-acquired title, suffer actual damage from the breach of the covenant. In such a case an attempt has been made to show that upon reason and authority the covenantee must take the after-acquired title, not in lieu of damages, for there can be no substantial damages when the covenantee has suffered no actual injury, but in satisfaction of the grantor's covenant, and as denial of the demand for rescission when the grantee is in the enjoyment and possession of everything that the covenant was intended to secure to him.[63]

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[56] Ante, § 168. Ellis v. Crossley, 119 Fed. 779. As to estoppel of the purchaser where the contract is still executory, see ante, § 202, and post, § 279. Brown v. Thompson, 81 S. C. 380, 62 S. E. 440; Eames v. Armstrong, 146 N. C. 1, 59 S. E. 165, 125 Am. St. Rep. 436.

[57] Spier v. Laman, 27 Tex. 205; Wheeler v. Styles, 28 Tex. 240. For qualifications of this doctrine see ante, §§ 168, 202, post, § 279; Butterfield v. Copper Co., 12 Ariz. 55, 95 Pac. 182.

[58] Patterson v. Fisher, 8 Blackf. (Ind.) 237; Phenix v. Bijelich, 30 Nev. 257, 95 Pac. 351.

[59] Thus, in Beall v. Davenport, 48 Ga. 165, 15 Am. Rep. 656, it was held that the purchaser, in ejectment by the vendor, might show that the land had been sold to a third person under execution against the vendor, and that he (the purchaser) had attorned to such third person as tenant. This, it is apprehended, would amount to a constructive eviction. Strong v. Waddell, 56 Ala. 471; Bigelow Estoppel (5th ed.), p. 545.

[60] Finch v. Noble, 49 Wash. 578, 96 Pac. 3, 126 Am. St. Rep. 880.

[61] Nerhooth v. Althouse, 8 Watts (Pa.), 427, 34 Am. Dec. 480.

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[62] Covenants for Title (5th ed.), § 264.

[63] Ante, § 215.

CHAPTER XXII.

REFORMATION OF THE CONVEYANCE.

WHEN GRANTED AND WHEN DENIED.

General principles. § 221.
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IN FAVOR OF AND AGAINST WHOM RELIEF MAY BE HAD.

In general. § 229.
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§ 221. **WHEN GRANTED AND WHEN DENIED. General principles.** The reformation or correction of written contracts or conveyances which, for some reason, fail to express the true intention of the parties, is one of the most familiar grounds of equitable jurisdiction.[1] We shall see, hereafter, that in certain cases of mistake when the contract has been executed by the delivery and acceptance of a conveyance, the grantee is entitled to a rescission or abrogation of the contract, and to have back from the grantor whatever may have been paid or delivered to him in furtherance of the agreement.[2] But in such cases the remedy of the grantee in equity is not limited to a rescission of the contract. As a general rule he may elect to affirm the contract, and insist that a new conveyance shall be executed, either by the defendant, or by an officer of the court acting on behalf of the defendant by decree of the court, which shall operate as a reformation or correction of the original deed, and effectuate the true intent of the original parties.[3] This, after all, is no more than specific performance of the contract; the court goes back of the conveyance and ascertaining the real terms and subject-matter of the executory agreement between the vendor and the vendee, directs that a new deed be executed in conformity therewith.[4] The reformation is not to make a new agreement between the parties, but to establish and perpetuate the old one.[5]

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[1] 1 Story Eq. Jur. p. 108, *et seq.;* 2 Pomeroy's Eq. Jur. § 845; 2 Beach Mod. Eq. Jur. p. 609. An instructive summary of the conditions under which equity will reform a written contract, will be found in Humphreys v. Hurtt, 20 Hun (N. Y.), 398.

[2] Post, ch. 35, Fraud and Mistake.

The deed may, of course, be reformed by the original parties thereto or by their privies if *sui juris* and in no way incompetent to execute a new conveyance.[6] And it has been laid down as a general rule that a bill will not lie to reform a deed unless a new deed, correcting the error or mistake complained of, has been prepared and tendered by the grantee to the grantor or other person who should execute the same and execution thereof has been refused, and that the bill should aver such tender and refusal.[7] But these cases have been disapproved and the better rule declared to be that the court shall retain the bill until the correction is made, taxing the costs against the complainant, if the bill was filed unnecessarily and without previous request *in pais* to correct the error.[8] No tender of an amended or corrected deed is necessary where the party from whom reformation is sought has refused to execute a new deed or denies the plaintiff's equity, or is incompetent to execute the deed, nor, generally, wherever a tender of a corrected deed would be vain and useless.[9] Neither does the rule apply in a suit to foreclose a mortgage in which the reformation of the mortgage was merely incidental to the main object of the suit, that is, to compel the payment of the purchase money by foreclosure.[10] If, upon request, a party or privy to the deed refuses to correct a mistake therein by the execution of a new deed or release or quit claim, costs should be awarded against him.[11] So, also, if he pertinaciously and contrary to good faith resists an application to equity for reformation of the deed.[12]

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[3] See, generally, the cases and authorities cited throughout this chapter.

[4] Dickinson v. Glenneg 27 Conn. 104; Adams v. Reed, (Utah) 40 Pac. Rep. 720, *dict.* Hoffman v. Kirby, 136 Cal. 26, 68 Pac. Rep. 321.

[5] Welshbillig v. Drenhart, 65 Ind. 94.

[6] Lavender v. Lee, 14 Ala. 688.

[7] Long v. Brown, 4 Ala. 622; Beck v. Simmons, 7 Ala. 71; Lamkin v. Reese, 7 Ala. 170; Black v. Stone, 33 Ala. 327; Heck v. Remka, 47 Md. 68; Jennings v. Brizendine, 44 Mo. 232.

[8] Robbins v. Battle House Co., 74 Ala. 499.

[9] Robbins v. Battle House Co., 74 Ala. 499.

[10] Axtel v. Chase, 83 Ind. 546.

The court, it seems, will not reform a deed unless the pleadings contain a prayer for such relief.[13] It has been held, however, that the general prayer for "other and further relief" is sufficient for this purpose.[14]

The reformation of a conveyance, so as to conform to the terms of a parol agreement for the sale of the premises conveyed, is not within the Statute of Frauds, and the reason is that a contrary rule would, in such a case, prevent any relief whatever.[15] Nor is it necessary to show such part performance of the parol contract as would take the case out of the Statute of Frauds.[16]

The court will not reform a deed in favor of one party, without enforcing equities arising out of the transaction in favor of the other party. Therefore, where the grantee sought to reform a deed, for error in the description of the premises, and it appeared that the grantor had verbally reserved the right to occupy the premises, and to be supported from the rents and profits thereof during the remainder of his life, the court, as a condition upon which the deed should be reformed, required the grantee to convey the premises to a trustee for the use and benefit of the grantor for life.[17] The fact that the premises were, at the time of the execution of the deed, in the adverse possession of a stranger, does not affect the grantee's right to reformation.[18] If, by mistake, a deed do not convey the whole of the premises purchased, the remedy of the purchaser is by suit for reformation of the deed, and not an action on the grantor's covenant of warranty.[19] In Indiana it has been held that where, by reason of a misdescription of lands in a deed, a grantee does not obtain the legal title, and before discovery of the mistake, the lands are sold under execution against the grantee, the purchaser in possession acquires no title, either at law or in equity, and cannot maintain a suit to reform the deed. The reason given for this decision was that the grantee under the defective deed had only an equitable title or interest, and that such an interest being incapable of sale under execution, the purchaser acquired no title of any kind.[20]

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[11] Hutson v. Furnas, 31 Iowa, 154.

[12] Dod v. Paul, 43 N. J. Eq. 302.

[13] Gamble v. Daugherty, 71 Mo. 599.

[14] Coe v. N. J. Mid. R. Co., 31 N. J. Eq. 105.

[15] Adams Eq. (5th Am. ed.) 345 (171); Pom. Eq. Jur. § 867; Noell v. Gill, 84 Ky. 241, 1 S. W. Rep. 428; Conaway v. Gore, 24 Kans. 389, the court, by BREWER, J., saying: "The argument is that the contract for the sale of the land was in parol; that there is no allegation or proof of the delivery of possession, the making of improvements, or any other matters which take a parol contract out of the Statute of Frauds; that the deed which was executed was a conveyance of other land, and, therefore, neither a conveyance nor a contract for the land in question. The argument is elaborated by counsel, and many authorities are cited. But these authorities run along the line of the doctrine of specific performance, while the case at bar comes under the head of reformation of contracts. The difference between the two is marked and substantial. One aims to enforce a parol contract as though it were in writing, the other seeks simply to conform the written to the real contract. One would avoid the necessity of any writing, the other would simply correct the writing. The principles which control the one are essentially different from those which control the other. * * * It (reformation) is not the substitution of acts *in pais* for the written contract, but it is the making of the writing the expression of the real contract."

[16] Morrison v. Collier, 79 Ind. 417.

Mistakes which occur in the registration of deeds are to be corrected, not by changing the record, but by compelling the execution of a quit claim or release on the part of him who might take advantage of the mistake.[21]

§ 222. **Mistakes of fact.** The greater number of suits for the reformation of deeds are founded upon some mistake of fact, either in respect to the contents or to the consideration of the instrument to be reformed. A mistake of fact in an executed contract occurs: (1) Where the conveyance contains or omits some matter or thing which it was intended by the parties should not be so contained therein or omitted therefrom;[22] as where the scrivener omits from the deed some provision upon which the parties have agreed,[23] or employs language insufficient to effectuate the intent of the parties,[24] and they have executed the deed in ignorance of the omission. (2) Where the contents of the deed are as they were intended by the parties, but those contents themselves are founded in ignorance and mistake of fact; as where the parties, upon misinformation, insert a wrong description of the premises to be conveyed; or where a part of the premises was already the property of the grantee, both parties being ignorant of his title thereto. In all such cases the equity of the grantee to have the deed reformed so that it may speak the true intention of the parties is clear and undeniable.[25] In this respect convey-

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[17] Coleman v. Coleman, Phil. Eq. (N. C.) 43.

[18] Thompson v. Marshall, 36 Ala. 504, 76 Am. Dec. 328.

[19] Connor v. Wells, 91 Ind. 197.

[20] Hiatt v. Callaway, 7 B. Mon. (Ky.) 178.

[21] Broadway v. Buxton, 43 Conn. 282.

[22] Parham v. Parham, 6 Humph. (Tenn.) 287; Perkins v. Dickinson, 3 Grat. (Va.) 335. In Kirk v. Zell, 1 McArth. (D. C.) 116, a mistake of the draftsman in conveying the whole estate to the grantee instead of one moiety, and the other moiety to another, was corrected. So, where the draftsman

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inserted the name of the wrong person as grantee. Bohanan v. Bohanan, 3 Ill. App. 502. This class of cases will include those in which there are mere clerical errors in the description of the premises, such as the insertion of one number instead of another, as where a deed read "seven degrees and thirty-nine minutes" instead of "seventy degrees and thirty-nine minutes." Claypoole v. Houston, 12 Kans. 324.

[23] Athey v. McHenry, 6 B. Mon. (Ky.) 50; Bouldin v. Wood, 96 Md. 332, 53 Atl. Rep. 911; Hebler v. Brown, 41 N. Y. Supp. 441.

[24] Adams Eq. (5th Am. ed.) 343 (169).

[25] Adams Eq. (5th Am. ed.) 339 (168); Moore v. Munn, 69 Ill. 591; Briegel v. Muller, 82 Ill. 257; Fullen v. Savings Bank, 14 R. I. 363; Fields v. Clayton, 117 Ala. 538, 23 So. Rep. 530; Winnipisseogee Lake Cotton Mfg. Co. v. Perley, 46 N. H. 83. Here a deed founded upon the erroneous computations of a surveyor was reformed. In First Nat. Bank v. Gough, 61 Ind. 147, it was said that the neglect of the parties to insert a proper description of the premises in a mortgage was a mistake of law — a statement deserving much consideration. Whether the want of a sufficient description is a mistake of law or a mistake of fact can be determined only, it would seem, by the circumstances of each case and the nature of the mistake. If they are mutually mistaken in inserting wrong boundaries, that is clearly a mistake of fact. Tooley v. Chase, (Oreg.) 37 Pac. Rep. 908. If they advisedly insert an insufficient description believing it to be sufficient, that would be a mistake of fact. And it is apprehended that if the deed were prepared by a third person and the parties executed it without adverting to the erroneous or insufficient description, so that the deed does not effectuate their purposes, that would be a mistake of fact, and equity would reform the instrument. Instances in which equity has reformed a deed containing an erroneous description of the premises will be found in Dane v. Derber, 38 Wis. 216; Berry v. Webb, 77 Ala. 507; Bush v. Bush, 33 Kans. 556, 6 Pac. Rep. 794; Critchfield v. Kline, 39 Kans. 721, 18 Pac. Rep. 898; Skerrett v. Presbyterian Society, 41 Ohio St. 606; Christman v. Colbert, 33 Minn. 509, 24 N. W. Rep. 301; Kellogg v. Chapman, 30 Fed. Rep. 882; Sowler v. Day,

ances stand upon different grounds from wills, for while a latent ambiguity in a will is open to explanation by parol proof, nothing can be supplied to a will or expunged therefrom on the ground of mistake; for, as has been said, there can be no will without the statutory forms, and the disappointed intention of the testator has not these forms.[26] But a patent ambiguity in a deed may be corrected or removed by a suit to reform the deed;[27] and the authorities to the effect that mistakes or ambiguities in a will cannot be corrected or explained, have no application whatever to the reformation of deeds.[28]

The grantor cannot maintain a bill to reform his deed by inserting a reservation of certain rights in the premises, if it appears that such reservation was not omitted from the deed through fraud, accident or mistake, but merely in consequence of his reliance upon the agreement of the purchaser to carry out the original contract,[29] as where there was an easement in the granted premises unknown to the parties, and the grantor had covenanted against the incumbrances created by himself only.[30] If by mistake covenants of warranty to which a purchaser is entitled, be omitted from his deed, equity will cause them to be inserted. But the mere fact that the title turns out to be bad will not justify a court of equity in reforming a conveyance without warranty, so as to include a covenant of general warranty, when the purchaser was fully aware of the character of the instrument he accepted, and there was no mistake on the part of any one as to its contents. If the instrument perfectly represents the understanding of the parties, it will not be reformed merely because one of the parties might have exacted a different instrument, if he had known of facts making it desirable for him to do so.[31]

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58 Iowa, 252, 12 N. W. Rep. 297; Roberts v. Taliaferro, 7 Iowa, 110; Hileman v. Wright, 9 Ind. 126.

[26] Adams Eq. (5th Am. ed.) 345 (172).

[27] Campbell v. Johnson, 44 Mo. 247; Jennings v. Brizendine, 44 Mo. 332.

[28] Robbins v. Mayer, 76 Ind. 381.

[29] Andrew v. Spurr, 8 Allen (Mass.), 412. In this case the original contract, which was oral, reserved to the grantor the right to cut and remove certain timber from the premises. After the deed was executed the purchaser repudiated this reservation.

[30] Lewenberg v. Johnson, 224 Mass. 297, 112 N. E. 870.

[31] Whittemore v. Farrington, 76 N. Y. 452.

§ 223. **Mistake of law.** A mistake of law occurs where the contents of the deed are such as they were intended to be, but through misconstruction or ignorance of the law those contents do not embody the real intention of the parties, nor amount to such a conveyance as the grantee might have insisted upon in the first instance,[32] for example, where the purchaser ignorantly accepts a deed executed by an attorney in fact in his own name instead of that of the principal.[33] An erroneous opinion as to the legal effect and operation of a conveyance, developed by events subsequent to its execution, is a mistake of law, and, it has been held, furnishes no ground for reformation of the deed.[34] A number of cases may be found in which it is declared that a mistake of law is no ground upon which a deed may be reformed in equity.[35] They hold that no equity arises when the court is not asked to make the deed what the parties intended, but to make it that which they did not intend, but would have intended if they had been better advised. This, however, is a disputed question, and many cases, perhaps a preponderance of authority, adopt the contrary view.[36] Where it is admitted that an instrument executed in pursuance of a prior agreement by which both parties meant to abide, is inconsistent with the purpose for which it was designed, or that by reason of some mistake of both parties, it fails to express their intention, a court of equity will correct it, although the mistake be one of law.[37] These cases, it is believed, establish the better doctrine. Most of the decisions which declare that a deed may not be reformed where the mistake is one of law, are founded upon authorities which maintain that such a mistake is no ground upon which to *rescind* an executed contract. It may be doubted whether these authorities are in point. Rescission is the annulment or abrogation of the contract, involving the risk of inability to place the parties in *statu quo*, in itself a most serious consequence, while reformation of the conveyance does not touch the contract nor displace either party, but simply makes effectual that which their ignorance or mistake rendered abortive. If a purchaser buys a fee simple, a fact easily shown by the purchase price and other surrounding circumstances, and accepts a conveyance which the parties deem sufficient to convey the fee, but which is in fact insufficient for that purpose, an unconscionable wrong would be inflicted upon the purchaser by refusing to reform the deed and by permitting the vendor to reap the benefits of the mistake. The court merely enforces the original agreement between the parties when it reforms a deed, and it would seem inequitable to deprive either party of that right, merely because their own efforts to complete the contract had, from mistake or ignorance of law in the selection and preparation of the means, proven ineffectual.

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[32] Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142; Bradford v. Bradford, 54 N. H. 463.

[33] Personneau v. Blakely, 14 Ill. 15.

[34] Kelly v. Turner, 74 Ala. 513. This was a case in which a married woman sought to have a conveyance to herself reformed so as to show that the consideration thereof was her separate statutory estate, consisting of money inherited from her father, and thereby protect the property conveyed from the creditors of her husband. The application was refused.

[35] Allen v. Anderson, 44 Ind. 395; Baldwin v. Kerlin, 46 Ind. 426; Barnes v. Bartlett, 47 Ind. 98; Nicholson v. Caress, 59 Ind. 39; Easter v. Severin, 78 Ind. 540.

[36] Gale v. Morris, 29 N. J. Eq. 222; Warner v. Sisson, 29 N. J. Eq. 141; Dupre v. Thompson, 4 Barb. (N. Y.) 279; Alexander v. Newton, 2 Grat. (Va.) 266; Allen v. Elder, 76 Ga. 674; Wyche v. Greene, 16 Ga. 49; Brewton v. Smith, 28 Ga. 442; Brock v. O'Dell, (S. C.) 21 S. E. Rep. 976; Canedy v. Marcy, 13 Gray (Mass.), 373; Crum v. Loud, 23 Iowa, 219; Nowlin v. Pyne, 47 Iowa, 293; Baker v. Massey, 50 Iowa, 399; Reed v. Root, 59 Iowa, 359; Stone v. Hale, 17 Ala. 557, 52 Am. Dec. 185. In McDonnell v. Milholland, 48 Md. 540, it seems to have been admitted that upon satisfactory evidence of mistake in conveying premises to the grantees as joint tenants instead of tenants in common, the error would be relieved against. Such a mistake would appear to be necessarily a mistake of law, as it must be presumed that the parties were aware of the way in which the deed was drawn, but misconstrued its effect. In Whitehead v. Brown, 18 Ala. 682, a deed was

It is not always easy to determine whether the insufficiency of the conveyance complained of is due to a mistake of fact or to a mistake of law. If the parties agree upon the contents and instruct a draftsman to draw a conveyance in accordance with such agreement, that is, give specific directions as to the contents of the deed, and the draftsman should omit any matter upon

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reformed on the ground of a mistake of the parties in supposing that it was sufficient to create in the grantee such an estate as would be free from liability for the debts of her husband.

[37] Kornegay v. Everett, 99 N. C. 30, 5 S. E. Rep. 418; Benson v. Markol, (Minn.) 36 Alb. L. J. 44.

which they had agreed or insert any matter upon which they had not agreed, and they should execute the deed in ignorance of such omission on insertion, that, it is clear, would be a mistake of fact.[38] On the other hand, if the parties should debate as to whether certain matter should be inserted in or omitted from the deed, and should err in their conclusions, that would plainly be a mistake of law.[39] Lastly, if the parties should neither give directions as to the contents of the deed nor discuss its provisions before execution and acceptance, and the deed should be not such as the purchaser had a right to require — as if it should lack a seal, or proper words of conveyance, or should omit the name of the grantee — this, too, it seems, would be treated as a mistake of fact, that is, the omission of these requisites would be attributed to accident and oversight and not to an impression of the parties that the deed was sufficient without them.[40] There is, therefore, it would appear, a disposition to bring within the rule prohibiting the reformation of deeds in cases of mistake of law only cases in which the error is of an affirmative kind, that is, those in which the attention of the parties must necessarily have been drawn to the question of the sufficiency of the instrument or some of its provisions, and they have erred in their conclusions.[41]

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[38] Adams Eq. (5th Am. ed.) 342 (169). A mistake in the description of land intended to be conveyed is a mistake of fact and not of law. McCasland v. Life Ins. Co., 108 Ind. 130, 9 N. E. Rep. 119.

[39] Adams Eq. (5th Am. ed.) 344 (170). In other words, if it appear that the instrument contained the precise language the parties intended it should contain, the mistake, if any, is a mistake of law. Easter v. Severin, 78 Ind. 540.

[40] See Canedy v. Marcy, 13 Gray (Mass.), 373, where it was said that if a deed has been imperfectly drawn, and the parties have been misled by a misplaced confidence in the skill of the draftsman, it can hardly be said to be a mistake of law, but is rather a mistake of fact. To this class may be referred those cases which hold that a deed may be reformed by inserting the word "heirs" omitted from the granting clause. Springs v. Harven, 3 Jones Eq. (N. C.) 96; Rutledge v. Smith, 1 Busb. Eq. (N. C.) 283; Wright v. Delafield, 23 Barb. (N. Y.) 498; Wanner v. Sisson, 29 N. J. Eq. 141; Coe v. N. J. Midland R. Co., 31 N. J. Eq. 28. But see Nicholson v. Caress, 59 Ind. 39, where it was said that if the parties execute a deed in ignorance that it does not contain the word "heirs" that is a mistake of fact; but if they are not ignorant of the omission, and look upon the deed as sufficient to carry an estate of inheritance, that is a mistake of law. In such a case, if the pleadings do not aver the ignorance of the parties of the omission from the deed, the complainant will not be entitled to relief. If a deed be imperfectly executed, it will be reformed at the suit of the grantee. Sumner v. Rhodes, 14 Conn. 135; Smith v. Chapman, 4 Conn. 344. As where it lacks a seal: Michel v. Tinsley, 69 Mo. 442; Mastin v. Holley, 61 Mo. 196; Galbraith v. Dilday, 152 Ill. 207, 38 N. E. Rep. 572. Or omits the name of the grantee: Parlin v. Stone, 1 McCrary (C. C.), 443; Courtright v. Courtright, 63 Iowa, 356, 19 N. W. Rep. 255; Nowlin v. Pyne, 47 Iowa, 293; Stowell v. Haslett,

§ 224. **Mutuality of mistake. Fraud.** As a general rule, there can be no reformation of a deed on the ground of mistake unless the complainant shows that the mistake was mutual.[42] And one who seeks to rectify an instrument on the ground of mistake must be able to prove not only that there has been a mistake, but must be able to show exactly the form to which the deed ought to be brought in order that it can be set right according to what was really intended by the parties;[43] and must be able to establish in the most clear and satisfactory manner, that the alleged intention of the parties to which he desires to make the instrument conformable continued concurrently in the minds of all parties down

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5 Lans. (N. Y.) 380. So, also, where the signature of the grantor is lacking; Martin v. Nixon, 92 Mo. 26. Mere clerical errors, such as inconsistent dates, may always be corrected. Moore v. Wingate, 53 Mo. 398. If a conveyance be defectively executed by one acting under a power, as where it purports to be the act of the attorney and not of the principal, it will be reformed so as to operate as the deed of the principal. Willard Eq. Jur. 83; Gerdes v. Moody, 41 Cal. 335.

[41] An illustration of this class of cases may be found in the case of Oswald v. Sproehule, 16 Ill. App. 368. The difficulty here was that a clause, by which the purchaser was exempted from liability from certain immature taxes and assessments on the granted premises, was not broad enough to include a certain other assessment. This was held a mistake in the purchaser's construction of the deed, and one against which the court could not relieve.

[42] Adams Eq. (5th Am. ed.) 344 (171). Grubb's Appeal, 90 Pa. St. 228; Remillard v. Prescott, 8 Oreg. 37; McCoy v. Bayley, 8 Oreg. 196. Long delay of a party in taking advantage of the mistake is a strong circumstance to establish the mutuality of the mistake; as where the grantee delayed action for ten years to recover for a breach of the covenant against incumbrances, the defense being that it was mutually understood between the parties that the existence of a railroad right of way across the premises should be excluded from the operation of the covenant. Fierce v. Houghton, (Iowa) 98 N. W. Rep. 306.

[43] Kerr Fraud & Mistake (Am. ed.), 421; Guilmartin v. Urquehart, 82 Ala. 570, 1 So. Rep. 897; Silbar v. Ryder, 63 Wis. 106, 23 N. W. Rep. 106.

to the time of its execution.[44] Of course a court of equity has no jurisdiction to reform a deed simply on the ground that one of the parties thereto has erred in its construction; there being no averment of proof of fraud, accident or mistake.[45] "The proposition which lies at the foundation of all suits to reform is, that the court cannot make such a contract as it thinks the parties ought to have made, or would have made if better informed, but merely makes it what the parties intended it should be. Every reformation of a contract by the court necessarily presupposes that there has been a meeting of the minds of the parties — an agreement actually entered into — but for some cause they have failed fully or accurately to express it in the writing." [46] A mistake of one party only may be ground for rescinding or refusing specific performance of the contract, but cannot justify an alteration of the terms of the agreement, which, in such a case, would necessarily result from a reformation of the conveyance.[47] The mistake must not only have been mutual, but the pleadings must allege it to have been so. Therefore, if neither the bill nor the accompanying affidavits contain such an allegation, the complainant will not be entitled to relief.[48]

The rule that a mistake must be mutual to entitle the grantee to relief does not mean that the mistake must be mutual in all cases between the grantor and the grantee; it suffices if the mistake is mutual between the grantee and other persons having interests under the deed, the grantor being a mere nominal party.[49]

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[44] Language of the court in Ranney v. Smith, 32 N. J. Eq. 28, citing Kerr F. & M. (Am. ed.) 421.

[45] Grubb's Appeal, 90 Pa. St. 228.

[46] St. Anthony's Falls W. P. Co. v. Merriman, 35 Minn. 42, 27 N. W. Rep. 199. Here the deed conveyed a water power of "fifty cubic feet per second," and the plaintiff contended that both parties being mistaken in the belief that the amount specified was sufficient to operate the machinery of a certain mill, he was entitled to have the deed reformed so as to convey a water power adequate for that purpose. This contention was denied upon the grounds stated in the text.

[47] Adams Eq. (5th Am. ed.) 344 (171).

[48] Schoonover v. Dougherty, 65 Ind. 463; Ramsey v. Smith, 32 N. J. Eq. 28.

[49] Murray v. Sells, 53 Ga. 257. In this case Sells sold his homestead and purchased a property from Rondeau, who had only an equitable title, the legal title being in Orme. Sells agreed with Rondeau that he (Rondeau)

Nor does the rule apply where the party against whom relief is sought fraudulently permitted the other party to act in ignorance of the mistake.[50] If it appear that the mistake was known to one of the parties, who, with knowledge of the ignorance of the other, nevertheless kept silent when he should have spoken, the party having knowledge will be estopped to defeat a reformation by alleging that he knew that the instrument was different from the agreement and that the mistake was not mutual.[51] Nor in such case will the rights of the complainant be affected by the fact that the fraud of the other party might have been discovered by the exercise of ordinary care.[52] Therefore, where the grantor inserts in his deed a provision by which the purchaser is made to assume the payment of an incumbrance on the premises, and then induces the purchaser to accept the deed without disclosing to him the existence of such provision, equity will reform the deed.[53] But mere ignorance of the contents of a deed from failure to read it, there being no pretense of mutual mistake, is no ground upon which to reform the deed, unless it appear that fraud was practiced upon the complainant by one occupying a relation of confidence toward him.[54]

§ 225. **Mistakes resulting from negligence.** It has been held that a court of equity will not reform a description in a deed, if the misdescription was the result, not of mistake of the parties,

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should procure a conveyance of the property to Sells' wife and child, but Rondeau, through ignorance, inadvertence or mistake, procured a conveyance from Orme to Sells' wife alone omitting the child. Here there was no mistake on the part of the grantor, Orme, for the deed was executed by him in strict pursuance of the directions he had received; but there being a mistake as between Rondeau and the other parties in interest, the deed was reformed so as to express their true intent.

[50] Dane v. Derber, 28 Wis. 216; James v. Cutler, 54 Wis. 172, 10 N. W. Rep. 147; De Jarnatt v. Cooper, 59 Cal. 703; Withouse v. Schaack, 57 How. Pr. (N. Y.) 310; Winans v. Huyck, 71 Iowa, 459, 32 N. W. Rep. 422; Bergen v. Ebey, 88 Ill. 269. Here, after instructions had been given the draftsman by the parties, the grantor went to him and gave him other instructions.

[51] Roszell v. Roszell, 109 Ind. 354, 10 N. E. Rep. 114.

[52] Hutchins v. Pettingill, 58 N. H. 3; Monroe v. Skelton, 36 Ind. 302.

[53] Savings Inst. v. Burdick, 20 Hun (N. Y.), 104. See, also, Wells v. Yates, 44 N. Y. 525; Botsford v. McLean, 45 Barb. (N. Y.) 478; Rider v. Powell, 28 N. Y. 310.

[54] Michael v. Michael, 4 Ired. Eq. (N. C.) 349.

but of their carelessness and negligence in not procuring a correct description before executing the deed, the policy of the law being to administer relief to the vigilant, and to put all the parties upon the exercise of a reasonable degree of diligence.[55] But the same court has held that this rule does not apply in its fullest sense to the correction of mistakes merely in the description of the premises.[56] It is plain that a rigid enforcement of such a rule would result in a denial of relief in a great many cases of mistake, for most mistakes in deeds are traceable to the negligence of the parties, certainly those that are visible upon the face of the instrument, such as the omission of the name of the grantee and the like. A court might well hesitate to *rescind* an executed contract where the mistake complained of was the consequence of the complainant's negligence, but there seems to be no very strong reason why reformation of a deed should be denied under those circumstances, since that is doing only what the parties themselves intended to do. Therefore, it has been held that a person who accepts a deed, ignorant that it contains a provision which obliges him to assume the payment of a mortgage on the premises, is not guilty of such negligence as will preclude him from relief.[57]

§ 226. **Nature and degree of evidence required.** In many instances mistakes in conveyances will be admitted by the parties, or will appear upon the face of the instrument itself. No difficulty arises in such cases.[58] But if the defendant deny the existence of any mistake, and the alleged mistake does not appear upon the face of the conveyance itself or of the documents connected therewith, much difficulty may arise in the proof, in view of the presumption of law that the conveyance is the last expression of the intention of the parties, and of the rule which forbids the introduction of parol testimony of any contemporaneous agreement or understanding inconsistent with the conveyance. Parol testimony, however, is always admissible to show a mistake;[59] the difficulty lies in distinguishing between mistake proper and such matters as are the result of mistake or afterthought on one side only. If the mistake appear on the face of the deed it may, of course, be corrected without the aid of extrinsic evidence.[60] Thus, in one case, the court went so far as to insert a granting clause in an instrument alleged to have been intended as a deed, but which, except for the presence of words of warranty, would have been clearly no more than an executory contract for the sale of lands.[61] But if evidence *aliunde* is relied upon to show a mistake it must be in the highest degree clear, positive and satisfactory.[62] The burden devolves upon the complainant to show, beyond a reasonable doubt, the existence of a mistake.[63]

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[55] 1 Story Eq. Jur. § 146; First Nat. Bank v. Gough, 61 Ind. 147; Toops v. Snyder, 70 Ind. 534. Unless confidence is reposed, a party, before signing a deed, is put upon inquiry, and must exercise proper and reasonable diligence; Withouse v. Schaack, 57 How. Pr. (N. Y.) 310. Where the parties failed to insert the number of the square in which the premises were situated, not from accident or mistake, but from mere want of recollection, it was held that the deed would not be reformed, though the grantee might compel specific performance. Leonard v. Mills, 24 Kans. 231. But inasmuch as the result would be the same in either case, it is not easy to perceive why the deed should not have been reformed to prevent circuity of action.

[56] Elliott v. Sackett, 108 U. S. 132; Morrison v. Collier, 79 Ind. 417.

[57] Schaatz v. Keener, 87 Ind. 258; Silbar v. Ryder, 63 Wis. 106, 23 N. W. Rep. 106.

[58] If the truth of the bill be admitted by demurrer, and the allegations showing a mistake be clear and positive, the complainant will be entitled to a decree. Moore v. Munn, 69 Ill. 591.

The mere fact that a deed made in pursuance of an executory contract for the sale of lands, conveys a lesser or a greater estate than that provided for in the contract, does not, of course, necessarily establish a case for reformation of the deed, for in such a case the deed is looked upon as the last expression of the intent of the parties, and the presumption is that the change was made by mutual agreement. There must be clear and positive evidence to show that the change was the result of fraud and mistake, to justify a reformation of the deed.[64]

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[59] Bush v. Hicks, 2 Thomp. & C. (N. Y.) 356; Farley v. Bryant, 32 Me. 474; Wagenblast v. Washburn, 12 Cal. 208; Heard v. Nancoles, (Iowa) 175 N. W. 13. In a suit to reform a deed, evidence of declarations of the grantor contemporaneous with the execution of the deed, is admissible to show what he intended to convey. Cake v. Peet, 49 Conn. 501.

[60] Wagenblast v. Washburn, 12 Cal. 208; Creighton v. Pringle, 3 S. C. 77. Here the deed was reformed by substituting the word "hereinbefore" for "hereafter," the context showing that the former word was intended.

[61] Michael v. Tinsley, 69 Mo. 442.

[62] Story Eq. Jur. § 152; Adams Eq. (5th Am. ed.) 345 (171). Sawyer v. Hovey, 3 Allen (Mass.), 331, 81 Am. Dec. 659; Nicoll v. Mason, 49 Ill. 358; Hamlon v. Sullivant, 11 Ill. App. 423; Wells v. Ogden, 30 Wis. 637; Bates v. Bates, 56 Mich. 405, 23 N. W. Rep. 63; Jarrett v. Jarrett, 27 W. Va. 743; Strayn v. Stone, 47 Iowa, 333. The evidence of mistake must be such as will overcome the strong presumption in favor of written instruments. Remillard v. Prescott, 8 Oreg. 37.

[63] Miller v. Rhuman, 62 Ga. 332; Willis v. Sanders, 51 N. Y. Super. Ct. 384; McTucker v. Taggart, 29 Iowa, 478; St. Anthony's Falls Water Power Co. v. Merriman, 35 Minn. 42, 27 N. W. Rep. 199.

§ 227. **Laches in application for relief.** The general rule is that a party seeking relief in equity on the ground of mistake must act promptly.[65] The reason is that delay in such cases increases the difficulty of placing the parties *in statu quo*, or may affect the rights of third parties. There has been a disposition in some cases to extend this rule to suits for the reformation of deeds,[66] but the better opinion seems to be that mere lapse of time is no bar to such a suit where possession has all the while been held according to the real intention of the parties, and the condition of the defendant has not been made worse by the delay, and the rights of no third party have intervened.[67] Nor in any event will laches be imputed to the complainant until after discovery of the mistake.[68] Nor where it appears that the complainant has made repeated efforts to have the mistake corrected without a law suit.[69] A mistake occurred in a deed in 1816. The grantee took possession and remained in possession until 1848, when one who had succeeded to the rights of the grantor in some way obtained possession. The grantee filed a bill in 1851 to correct the mistake, and it was held that he was not precluded from relief by the delay.[70] The case tends to establish the principle that laches is not imputable to the grantee until after some adverse claim to the premises has been made.

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[64] Whitney v. Smith, 33 Minn. 124, 22 N. W. Rep. 181; Dunham v. New Britain, 55 Conn. 378.

[65] Willard Eq. Jur. 69; Story Eq. Jur. § 1520.

[66] Sable v. Maloney, 48 Wis. 331, 4 N. W. Rep. 479. Here fifteen years had elapsed after discovery of the mistake before an application for reformation was made. Farley v. Bryant, 32 Me. 474, where it was said that lapse of time tended to show either that there was no mistake, or that the mistake, if any, had been waived.

[67] Canedy v. Marcy, 13 Gray (Mass.), 373; Mills v. Lockwood, 42 Ill. 111; First Nat. Bank v. Wentworth, 28 Kans. 183; Kirk v. Zell, 1 McArthur (D. C.), 116. In Farley v. Bryant, 32 Me. 474, it was said that lapse of time would be immaterial to the right of reformation, if the premises were unimproved lands.

[68] Stone v. Hale, 17 Ala. 557, 52 Am. Dec. 185.

[69] Thompson v. Marshall, 36 Ala. 504, 76 Am. Dec. 328.

§ 228. **Defective execution of statutory power.** It seems that equity will not, as a general rule, aid a defective execution of a power, that is, will not supply any matter for the want of which the legislature declares a deed void, since the effect would be to make nugatory the legislative enactment.[71] But this rule has no application where an officer, selling and conveying under a statute, complies with all the provisions of the statute, and merely misdescribes the land in the conveyance which he executes in pursuance of the sale. In such a case equity has jurisdiction to decree the execution of a new deed correcting the mistake.[72]

§ 229. **IN FAVOR OF AND AGAINST WHOM RELIEF MAY BE HAD. IN GENERAL.** The right to reformation of a deed on the ground of mistake is not confined to the immediate parties to the instrument, but extends to all persons who stand in the place of such parties and who are injured by the mistake.[73] To maintain the action the complainant must be either a party or a privy to the deed.[74] Suits for the reformation of conveyances on the ground of mistake have been frequently brought by remote assignees of the original grantee.[75] But where a judicial sale intervened between the original grantee and the remote grantee it was held that the deed in which there was an erroneous description could not be reformed, since the effect would be to give to the plaintiff land which the court had not directed to be sold.[76] Nor can a grantee, immediate or remote, compel a reformation of the deed so long as he is in default in the payment of any part of the purchase money.[77] He who asks equity must do equity. Reformation of the conveyance is a species of specific performance, and specific performance by the grantor could not be compelled so long as any part of the purchase money remained unpaid.

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[70] Farmers & Mech. Bank v. Detroit, 12 Mich. 445.

[71] 1 Story Eq. Jur. § 117. See infra, this chapter, § 233, "Married Women."

[72] Houx v. Bates County, 61 Mo. 391.

[73] See, generally, cases cited below. Pomeroy Eq. Juris. §§ 845, 870, 1376; Mills v. Lockwood, 42 Ill. 112.

[74] Story Eq. Jur. § 165. Willis v. Sanders, 51 N. Y. Sup. Ct. 380, where it was also held that the mere fact that a person is a grantee of one to whom a deed was made does not necessarily so connect him with the contract as to entitle him to maintain a suit to reform the deed.

The complainant should not neglect to aver and prove that he holds under the deed which he seeks to reform. In Ballentine v. Clark, 38 Mich. 395, the court said: "The testimony entirely fails to trace title into complainant; and, as this is essential to his recovery, he must fail on this record. None of the deeds in the chain of title appear. It seems to have been taken for granted that the only proof required was the identification of the premises described in the bill. But unless complainant shows that he holds under the deed sought to be reformed he makes no showing of equities."

§ 230. **Reformation in favor of grantor.** Reformation of deeds on the ground of mistake will of course be decreed in favor of the grantor as well as the grantee if the mistake be clearly established, as where the deed includes lands not purchased by the grantee and not intended to be conveyed.[78] But if the existence of the mistake is denied, the position of the grantor becomes different in view of the maxim *verba chartarum fortius accipiuntur contra proferentem;* the words of a deed shall be taken most strongly against him who employs them. It has also been held that the grantor will not be entitled to relief if a wrong description inserted in his deed was the result of his own gross negligence.[79] Nor will the court reform a deed, absolute on its face, by inserting a condition therein, at the suit of the grantor.[80] Nor can a mistake as to the quantity of land conveyed be corrected, on his behalf, if, after discovery of the mistake, he receives payment of the purchase money for the whole land and surrenders possession to the grantee.[81] Nor where he insists upon the payment of the purchase money while seeking relief on the ground of the mistake.[82] And it has been intimated that a grantor conveying all of his interest is not entitled to relief on the ground that such interest was greater than both parties supposed it to be.[83]

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[75] Instances may be found in Taber v. Shattuck, 55 Mich. 370, 21 N. W. Rep. 371; Bradshaw v. Atkins, 110 Ill. 323; Crippen v. Baumes, 15 Hun (N. Y.), 136; Gerdes v. Moody, 41 Cal. 335; Blackburn v. Randolph, 33 Ark. 119. In May v. Adams, 58 Vt. 74, 3 Atl. Rep. 187, the suit was between grantees of the original grantor and grantee respectively.

[76] Rogers v. Abbott, 37 Ind. 138. No authorities were cited to this proposition, and the grounds upon which it rests are by no means clear. Land had been erroneously described by Conley in his deed to Abbott as the S. E. instead of the N. E. quarter. This error was perpetrated through several mesne conveyances, including a sheriff's deed, until the land came to the plaintiff, possession of the N. E. quarter passing with all the deeds. Meanwhile Abbott, discovering the error, procured Conley to execute a deed of the N. E. quarter to his (Abbott's) son, who thereupon claimed the land in plaintiff's possession. Plaintiff then brought an action to reform the original deed from Conley, and the court held as stated in the text, intimating, however, that the plaintiff was not without a remedy of some kind. See, also, Rice v. Poynton, 15 Kans. 263, and Keepfer v. Force, 86 Ind. 81, Where a mistake in the description of mortgaged lands is carried into the decree of foreclosure it may be corrected by reforming and reforeclosing the mortgage. McCasland v. Life Ins. Co., 108 Ind. 130. In Thomas v. Dockins, 75 Ga. 347, a mistake in a sheriff's deed was corrected in favor of a subsequent grantee as against the execution defendant. And in Parker v. Starr, 21 Neb. 680; 33 N. W. Rep. 424, a deed under a judicial sale was reformed at the instance of a remote grantee. In Martin v. Dollar, 32 Ala. 422, it was held that a sheriff's deed will not be reformed for error in the description of the premises, if the sale itself is a nullity, as having been made under a void judgment. A mistake in the description of mortgaged premises may be reformed, even after foreclosure of the mortgage. Congers v. Mericles, 75 Ind. 443. Davenport v. Scovil, 6 Ohio St. 459. A court of equity has power to correct errors in a sheriff's deed. Bradshaw v. Atkins, 110 Ill. 323; Gilbreath v. Dilday, 152 Ill. 207; 38 N. E. Rep. 572.

[77] McFadden v. Rogers, 70 Mo. 421; Conaway v. Gore, 21 Kans. 725.

Against whom reformation will be decreed. A deed will be reformed in a case of mistake, not only as against the original grantee, but as against all who claim under, or are in privity with him, such as heirs, devisees, voluntary grantees, judgment creditors and purchasers with notice of the mistake.[84] The person or persons whose duty it is to reform the deed, or who will be affected by the reformation, should always be made parties defendant to the suit.[85] But it does not follow that it is necessary in all cases to make the grantor a defendant; it frequently happens that he stands indifferent, for example, where the deed is made in pursuance of directions given by one who had the equitable title only, and who sold his bargain to the person who became the grantee. In such a case it is not necessary to make the grantor a party, for his interests are in no way affected, and the court may appoint a commissioner to execute the reformed deed.[86] A remote grantee who holds under a deed without warranty, need not make his immediate grantor a party to his suit for reformation.[87] If, however, the plaintiff holds under mesne conveyances with warranty, it has been held that he must make the grantees parties.[88] Where the grantor conveys to two purchasers, but makes a mistake as to the interest which each is to receive, he is not a necessary party to a bill to correct the mistake.[89]

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[78] Bush v. Hicks, 60 N. Y. 298; Fuchs v. Treat, 41 Wis. 404; Damm v. Moors, 48 Mich. 510; Wilcox v. Lucas, 121 Mass. 21; Hutson v. Fumas, 31 Iowa, 154; Burr v. Hutchinson, 61 Me. 514; Pugh v. Brittain, 2 Dev. Eq. (N. C.) 34; Cooke v. Husband, 11 Md. 492. Where lands not sold under a decree are by mistake reported as sold, and a deed of the same is made by the court, such deed will be reformed, as against the grantor or his heirs. Stiles v. Winder, 35 Ohio St. 555.

[79] Lewis v. Lewis, 5 Oreg. 169.

[80] Clark v. Drake, 3 Pinney (Wis.), 228; Law v. Hyde, 39 Wis. 345; Mills v. Seminary, 47 Wis. 354; 2 N. W. Rep. 550. Here the grantor desired to reform the deed by inserting in it a provision that the deed should be void if the premises should cease to be used as a site for a seminary.

[81] Wittbecker v. Watters, 69 Tex. 470; 6 S. W. Rep. 788.

[82] Dorr v. Steichen, 18 Minn. 26.

[83] Fly v. Brooks, 64 Ind. 50. But see Baker v. Massey, 50 Iowa, 399, where it was held that if the deed embrace an interest of which the grantor was ignorant, he will be entitled to reformation.

§ 231. **Purchasers and creditors.** If the vendor should sell lot A, but by mistake should convey to the purchaser lot B, and afterwards a third person should purchase lot A from the vendor and take a conveyance thereof without notice of the mistake, the deed to the first purchaser could not be reformed as against the second purchaser.[90] Neither could such a deed be reformed as against judgment creditors of the vendor, in those States in which judgment creditors are protected by the registry acts.[91] But as against a subsequent purchaser, and, it is apprehended, a creditor of the grantor, with notice of the mistake, such deed might always be reformed in equity, upon the same principle that one purchasing with notice of an equitable estate in the premises in favor of a third person, may, himself, be compelled to perform the contract of the vendor.[92] Possession of the premises in respect to

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[84] Adams Eq. (5th Am. ed.) 340 (169), n. Grayson v. Weddle, 80 Mo. 39.

[85] Goodman v. Randall, 44 Conn. 321; Bullock v. Whipp, 15 R. I. 195; 2 Atl. Rep. 309, *obiter*.

[86] Baker v. Pyatt, 108 Ind. 61; 9 N. E. Rep. 112, a case in which a father, desiring to convey his whole estate to his sons, executed a deed to each, but one of the deeds failed to take effect because of a mistake in the description. The grantee in this deed was held entitled to maintain an action to reform his deed against one of the other sons who was in possession of the land intended to be conveyed to the plaintiff. See, also, Roszell v. Roszell, 105 Ind. 77; 4 N. E. Rep. 423.

[87] Farmers & Mech. Bank v. Detroit, 12 Mich. 445.

[88] Davis v. Rogers, 33 Me. 222.

[89] Briegel v. Moehler, 82 Ill. 257.

[90] Story Eq. Jur. § 165; Adams Eq. (5th Am. ed.) 340 (169), n. Berry v. Lowell, 72 Ala. 14; Ruppert v. Haske, 5 Mackey (D. C.), 262; Boardman v. Taylor, 66 Ga. 638; Kilpatrick v. Stozier, 67 Ga. 247; First Nat. Bank v. Gough, 61 Ind. 147; Hewitt v. Powers, 84 Ind. 295; Farley v. Bryant, 32

Me. 474; Whitman v. Westman, 30 Me. 285; Dart v. Barbour, 32 Mich. 267; Wilson v. King, 27 N. J. Eq. 374; Willis v. Saunders, 51 N. Y. Super. Ct. 384; Lally v. Holland, 1 Swan (Tenn.), 396. Whether an execution creditor who buys in the realty of the debtor at a sale under the execution is a purchaser for value without notice, and entitled to object to the reformation of a prior deed, which, when reformed, will embrace the purchased premises, *quære?* Bailey v. Timberlake, 74 Ala. 221. In Carver v. Lasalette, 57 Wis. 232; 15 N. W. Rep. 162, a deed was reformed as against a purchaser under an execution against the grantor.

[91] Freeman on Judgments, §§ 357, 359. Goodbar v. Dunn, 61 Miss. 618; Martin v. Nixon, 92 Mo. 26; 4 S. W. Rep. 503; Galway v. Melchow, 7 Neb. 286; Bush v. Bush, 33 Kans. 556; Ruppert v. Haske, 5 Mackey (D. C.), 262. In Alabama a judgment is not a lien on equitable estate, and, therefore, a judgment creditor of one who mortgages an equity of redemption cannot object to the reformation of the mortgage. Bailey v. Timberlake, 74 Ala. 221. In Mississippi, under a statute declaring unrecorded deeds void as to subsequent creditors as well as purchasers, it has been held that a court of equity will not correct a mistake in the description of land in a deed against one who, having actual notice of the mistake at the time of the purchase, bought the land at execution sale under a judgment rendered in favor of a party who had no notice of the mistake at the time he recovered judgment. Nugent v. Priebatsch, 61 Miss. 402, disapproving Simmons v. North, 3 Sm. & M. (Miss.) 67. A judgment creditor whose debt was made before the execution of a deed to certain premises, but whose judgment was obtained afterwards, does not stand on the footing of a *bona fide* purchaser without notice, within the rule protecting such purchasers against the reformation of deeds on the ground of mistake. Lowe v. Allen, 68 Ga. 225.

[92] Adams v. Stevens, 49 Me. 362; Freeman's Bank v. Vose, 23 Me. 98; Gale v. Morris, 29 N. J. Eq. 222; Preston v. Williams, 81 Ill. 176; De Jarnatt v. Cooper, 59 Cal. 703; Holabird v. Burr, 17 Conn. 556; Haynes v. Seachrist, 13 Iowa, 445. In Fenwick v. Buff, 1 McArth. (D. C.) 107, an erroneous description in a deed was corrected, not only as against the grantor, but as against one holding under a prior deed, who had failed to record such deed before the record of the deed containing the erroneous description. Such a person does not stand on the footing of a subsequent purchaser without notice. It has been held that a court of equity will not, as against a subsequent purchaser, set up or reform a deed absolutely void for want of due

which the mistake was made will, of course, be deemed sufficient to put the purchaser on inquiry and charge him with constructive notice of the mistake. As respects notice from the deed itself, it is equally clear that the record of a deed which, by mistake, contains a totally erroneous description of the land intended to be conveyed, would not be sufficient to put a subsequent purchaser on inquiry.[93] But if the mistake be of a kind that appears upon the face of the deed, or if the deed contain enough to show what land was really intended to be conveyed, no reason is perceived why such a deed would not be sufficient to charge the purchaser with notice by putting him on inquiry.[94] A bill to reform a deed as against a subsequent purchaser will be demurrable unless it avers that the defendant purchased with notice of the mistake.[95] And such a purchaser will not be protected unless he paid a valuable consideration; a deed will be reformed against one who took a mortgage on the premises to secure a past due and antecedent debt, without regard to the question of notice.[96]

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execution by the grantor, even though such purchaser took with notice of the void conveyance. Goodman v. Randall, 44 Conn. 321. This was a case of much hardship. Hubbard executed to Allen a paper purporting to be a mortgage, but invalid as such because not signed by the grantor. At the same time Hubbard conveyed the premises to Parker, subject to this mortgage, the deed reciting that Parker assumed the payment of the mortgage. The court refused to reform the mortgage and enforce it against Parker and his assignees, who had also accepted conveyances containing an assumption of the mortgage. It was intimated, however, that Allen had his remedy on the promise to pay contained in the several conveyances. It is believed that this decision is open to much doubt. In Bullock v. Whipp, 15 R. I. 195; 2 Atl. Rep. 309, a mortgage void for want of a seal was reformed as against a subsequent attaching creditor of the mortgagor. See, also, Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 322; 13 N. W. Rep. 145.

[93] Pena v. Armstrong, 95 Ind. 191, the court saying: "If this mortgage contained no description of these premises it could not be reformed and foreclosed against an innocent purchaser; but it does contain a description, and this description, though defective, was sufficient to put the purchaser on inquiry, and thus to charge him with notice of the extent of the premises intended to be embraced in the mortgage," citing Wade Notice, § 319. McAleer v. McMullen, 2 Pa. St. 32; Parker v. Teas, 72 Ind. 235. See, also, Cass County v. Oldham, 75 Mo. 50.

[94] Dayton v. Citizens' Nat. Bank, 11 Ill. App. 501.

[95] Davis v. Rogers, 33 Me. 522.

[96] First Nat. Bank v. Wentworth, 28 Kans. 183.

§ 232. **Volunteers.** A court of equity will not decree specific performance of a voluntary contract to convey lands. For the same reason, it will not interfere to correct a mistake in a voluntary conveyance of lands. Where such a deed fails to take effect, the title remains in the grantor, and he may make what disposition of the premises he chooses.[97] Therefore, the court has refused to insert in a voluntary deed the word "heirs," necessary to create an estate of inheritance, and omitted by mistake of the draftsman.[98] But this rule does not apply where the controversy is between those claiming under the deed, the grantor standing indifferent.[99] Nor where the grantee has taken possession, made valuable improvements and executed a mortgage on the premises, and the application for correction of the deed is made by the mortgagee.[1] Deeds made in consideration of "services rendered and love and affection"[2] and "in consideration of one dollar and natural love and affection"[3] have been held not voluntary within the rule denying the reformation of voluntary conveyances. A voluntary deed may, of course, be reformed at the suit of the grantor in a case of mistake.[4]

§ 233. **Married women.** A court of equity will not reform the deed of a married woman when the mistake complained of consists in the omission of some statutory requisite,[5] for that were in effect to decree specific performance against a married woman, and to make valid that which the statute declares shall be invalid. This is one of the principal applications of the rule that equity will not aid the defective execution of a statutory power.[6] But a mistake in a mere matter of description in a married woman's deed may always be reformed,[7] and confessed clerical errors therein will be corrected.[8] And mistakes of every kind in her deed will be corrected in those States in which statutes exist, placing the contracts of married women upon the same footing as contracts of *femmes sole.*[9] In California, under a statute allowing the amendment of defective certificates of acknowledgment, the court permitted a defective certificate of acknowledgment by a married woman to be reformed.[10]

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[97] 2 Story Eq. Jur. § 793; Adams Eq. (5th Am. ed.) 342 (169), note. Preston v. Williams, 81 Ill. 176; Else v. Kennedy, 67 Iowa, 376; 25 N. W. Rep. 290; Dickinson v. Glenney, 27 Conn. 104; Froman v. Froman, 13 Ind. 317; Eaton v. Eaton, 15 Wis. 259; Smith v. Wood, 12 Wis. 382; Dupre v. Thompson, 4 Barb. (N. Y.) 279.

[98] Powell v. Morrissey, 98 N. C. 426; 4 S. E. Rep. 185.

[99] Adair v. McDonald, 42 Ga. 506.

[1] Cummings v. Freer, 26 Mich. 128.

[2] Baker v. Pyatt, 108 Ind. 61; 9 N. E. Rep. 112.

[3] Mason v. Moulder, 58 Ind. 1. But see Powell v. Morrissey, 98 N. C. 426; 4 S. E. Rep. 185.

[4] Mitchell v. Mitchell, 40 Ga. 11; Crockett v. Crockett, 73 Ga. 647.

[5] Martin v. Dwelly, 6 Wend. (N. Y.) 9; 21 Am. Dec. 245; Dickinson v. Glenney, 27 Conn. 104; Holland v. Moon, 39 Ark. 120; Grapengether v. Ferjervary, 9 Iowa, 163; 74 Am. Dec. 336; Hamar v. Medskar, 60 Ind. 413.

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[6] Williams v. Cudd, 26 So. Car. 213; 2 S. E. Rep. 14.

[7] Gardner v. Moore, 75 Ala. 394; 51 Am. Rep. 454; Carper v. Munger, 62 Ind. 481; Wilson v. Stewart, 63 Ind. 294; Styles v. Robbins, 76 Ind. 547; Jones v. Sweet, 77 Ind. 187; Hewitt v. Powers, 84 Ind. 295.

[8] Savings & Loan Assn. v. Meeks, 66 Cal. 371; 5 Pac. Rep. 624.

[9] Bradshaw v. Atkins, 110 Ill. 323; Christman v. Colbert, 33 Minn. 509; 24 N. W. Rep. 301.

[10] Hutchinson v. Ainsworth, 63 Cal. 286. Without the aid of a statute, defects in a certificate of acknowledgment, whether of a married woman or any other person, cannot be supplied. Ante, § 41.

BOOK II.

OF REMEDIES IN DISAFFIRMANCE OR RESCISSION OF THE CONTRACT OF SALE.

CHAPTER XXIII.

OF RESCISSION BY ACT OF THE PARTIES.

GENERAL PRINCIPLES. § 234.
RESCISSION BY ONE PARTY ONLY. § 235.
STATUTE OF FRAUDS. § 236.

§ 234. **GENERAL PRINCIPLES.** We have already seen that upon the discovery of a defect in the title to real estate the steps to be taken by the purchaser depend upon the stage that the transaction has reached, upon the express agreements, if any, which the parties have entered into respecting the property, upon those which the law implies from their acts and conduct, and from the transaction itself, and upon the nature of the defect in respect of which relief is claimed. In some instances the purchaser, because of the defect, may rescind and abandon the contract, or affirm it and demand to be compensated in damages for the breach; in some he may seek his remedy in a court of law, or in a court of equity, at his election, while in others no such right of election exists, and he must proceed in the one court or the other, according to the nature of his case. But whatever course he may take amounts of necessity either to a rescission or an affirmance of the contract; and, as these diametrically opposite attitudes of the purchaser in respect to the contract constitute the most natural and convenient subdivision under which the rights of purchasers of defective titles to real estate may be considered, they have been adopted as main features in the analysis and classification of this work. The foregoing pages having been devoted to the examination of remedies in affirmance of the contract, and their incidents, we pass now to the consideration of those in which the purchaser elects to disaffirm, abandon or rescind the contract.

Rescission is the abrogation or annulment of a contract.[1] The most common legal use of the term is to designate the jurisdiction which equity assumes in the cancellation of contracts; but rescission may, of course, be accomplished by act of the parties without resort to judicial proceedings. The parties may, at any time before conveyance, rescind the contract by consent,[2] which consent may be express or implied from the acquiescence of the one party in the acts of the other.[3] But, in order to bind the one party by his presumed acquiescence in the acts of the other, it must clearly appear that he had notice of the intent of the other to rescind,[4] or knowledge of such acts on the part of the latter as constituted in themselves a rescission.[5] The proper course to be pursued by the party intending to rescind is to notify the other party of that intent.[6] This form of relief is one to which the parties, acting in good faith, not infrequently resort, the purchaser agreeing to give up the premises and the vendor returning the purchase money. If, upon a rescission of the contract by consent, the vendor fail to return the purchase money, the vendee may recover it back; the law implies an agreement on the part of the vendor to repay.[7] And where the contract is rescinded by the acts of both parties, the purchaser may recover back what he has paid, though the contract provides that upon default in the payment of the purchase money the purchaser shall forfeit such payments as he may have made.[8] He is not in default in failing to pay on the day named if he then points out a reasonable objection to the title.[9]

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[1] The several ways in which the rescission of an executory contract may occur have been thus summarized by Mr. Fry in his treatise on Specific Performance, § 998: "(1) A simple agreement between the parties to rescind the contract. (2) An agreement between the parties to new terms, which put an end to the terms of the old contract. (3) An agreement between the original parties and a third person by which the third person takes the place of one of the original contractors. (4) An exercise of a power to rescind reserved by the contract to one or both of the contractors. (5) An exercise of the right to rescind which results to the injured party from fraud or mistake in relation to the contract. (6) An exercise of the right to rescind which results to one party from the other party's absolute refusal to perform the contract or unreasonable delay in its performance. (7) An exercise of the right to rescind which results to one party from the other party's having made performance impossible."

Surrender of possession by the purchaser and acceptance thereof by the vendor do not necessarily amount to a rescission of the contract by the parties, so as to preclude the vendor from asserting rights under the contract against the purchaser. Pioneer Min. Co. v. Price, 189 Mo. App. 30; 176 S. W. 474.

[2] Fry Specific Perf. § 998; 2 Warvelle Vend. 834, 947; Boyce v. McCullough, 3 Watts & S. (Pa.) 429; Lauer v. Lee, 42 Pa. St. 165.

[3] Carter v. Fox, 11 Cal. App. 67; 103 Pac. 910; Tague v. McColm, 145 Iowa, 179; 123 N. W. 960. Demand of possession by the vendor and surrender of possession by the vendee, when the latter refuses to pay the purchase-money because of want of title in the vendor, amount to a mutual rescission of the contract. Prentice v. Erskine, 164 Cal. 446; 129 Pac. 585.

[4] A parol agreement discharging the vendee from his contract as to part of the land on account of defective title is a good defense to an action for the purchase money, *pro tanto.* Hussey v. Roquemore, 27 Ala. 281; Carney v. Newberry, 24 Ill. 203; Alexander v. Utley, 7 Ired. Eq. (N. C.) 242.

[5] 2 Warvelle Vend. 883.

The contract of sale frequently provides that the purchaser shall pay the purchase money within a certain time, and receive a clear title, and in default of payment in full at that time, shall forfeit so much of the purchase money as may have been paid. Where such a provision exists, the forfeiture cannot occur so long as the vendor has not a good title.[10]

If the purchaser be entitled to rescind because of the inability of the vendor to give a marketable title, the court cannot inquire into his motive for rescission. It is, therefore, immaterial that the value of the property had greatly declined at the time fixed for performance of the contract.[11]

§ 235. **RESCISSION BY THE ACT OF ONE PARTY ONLY.** Any act by which either party clearly manifests that he has abandoned the contract, is as to him a rescission; as where the purchaser seeks, by judicial proceedings, to recover back the purchase money which he has paid,[12] or where the vendor, in default of payment of the purchase money, resells the premises to a stranger,[13] or where he declares the contract rescinded on account of his inability to furnish a good title, or a good merchantable abstract.[14] Of course one party to a contract cannot, of his own motion, deprive the other of his right to enforce the contract by declaring that he will proceed no further in the matter. But if the act of one party be such as must of necessity prevent the other party from fulfilling the contract, as where the vendor disables himself from performance on his part by conveying away the premises, the other party may treat the contract as rescinded.[15]

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[6] 1 Sugd. Vend. (14th Am. ed.) 370 (243). Reynolds v. Nelson, 6 Madd. 18; Alexander v. Utley, 7 Ired. Eq. (N. C.) 242; McDowell v. McKesson, 6 Ired. Eq. (N. C.) 278. Where vendor and vendee are both endeavoring to clear up a defect in the title, neither has a right to rescind or consider his obligation to the other determined without reasonable notice. Lyons v. Pyatt, (N. J. Eq.) 26 Atl. Rep. 33.

[7] Beaman v. Simmons, 76 N. Y. 43.

[8] Shively v. Land Co., (Cal.) 33 Pac. Rep. 848, citing several California decisions.

[9] Brown v. Reichling, 86 Kans. 640; 121 Pac. 1127.

[10] Getty v. Peters, 82 Mich. 661; 46 N. W. Rep. 1036; Converse v. Blumrich, 14 Mich. 109; 90 Am. Dec. 230.

[11] Crim v. Umbsen, 155 Cal. 697; 103 Pac. 178; 132 Am. St. Rep. 127.

A contract can be rescinded *in pais* of course only by consent of all the contracting parties. But such consent need not be expressed in words; it may be implied from the acts and conduct of the other party. If one party announces his intention to rescind and the other does not object; or if one party fails to perform or disables himself from performing on his part, the other party may treat the contract as rescinded.[16] A subsequent conveyance of the premises by the vendor, after the purchaser has defaulted in the payment of the purchase money, is not necessarily a rescission of the contract. The vendor may assign his contract to a third person, and the conveyance to the assignee may be made for the purpose of enabling him to tender performance to the purchaser.[17] A rescission of the contract by act of the parties, must be concurred in by both parties, and must affect all parties previously bound.

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[12] 1 Sugd. Vend. (8th Am. ed.) 537 (358). Refusal to execute a conveyance is a rescission by the vendor. 2 Sugd. Vend. (8th Am. ed.) 212 (562).

[13] Ketchum v. Everson, 13 Johns. (N. Y.) 359; 7 Am. Dec. 384.

[14] Elder v. Chapman, 176 Ill. 143; 52 N. E. Rep. 10.

[15] Chitty Cont. (10th Am. ed.) 812; *et seq.*

[16] Parsons Cont. 677. Lewis v. White, 16 Ohio St. 444. In Trevino v. Cantu, 61 Tex. 88, it appeared that upon the execution of a deed with general warranty, the parties executed at the same time another instrument providing that if the title should fail, the purchaser, who had taken possession under the deed, should not recover more than $2,000 which was the price paid. It was held that the vendor could not by afterwards confessing that the title was defective compel the purchaser in a suit for rescission to accept the $2,000; that the purchaser had a right to retain possession and resist an adverse claim; and in case of eviction, recover according to the terms of his contract; and that he had a right to buy out the adverse claimant if he desired to do so, and to every other advantage resulting from possession, the court saying that to allow a rescission in opposition to the wishes of the vendee on a mere confession of the invalidity of the title would be to place the purchaser at the mercy of the seller, since in all instances in which the land had appreciated in value, the seller could confess invalidity of the title, recover the land and speculate upon the advance in the value of the property.

When it is said that one party cannot rescind the contract, without the consent of the other, it is not meant that he cannot himself abandon the contract if he conceives that he has a right so to do, but that he cannot by so doing deprive the other party of his right to enforce the contract. Thus, if the vendor attempt to rescind by conveying the premises to a stranger, he cannot thereby affect the right of the other party to affirm the contract by action for damages, and though the vendee may elect to rescind by abandoning the possession and refusing to pay the purchase money, the right of the vendor to affirm the contract by demanding specific performance in equity, or damages at law, remains unimpaired. If the purchaser elect to treat the contract as rescinded, his election must be evidenced by acts as well as words, that is to say, that he must give up whatever he has received under the contract, and cannot avoid its obligation by merely declaring that he will proceed no further in the business.[18]

§ 236. **STATUTE OF FRAUDS.** It has been decided that a rescission of a contract of sale of lands by mutual agreement, being a contract relating to real estate, is within the Statute of Frauds,[19] and must be in writing, but the weight of authority is that a rescission by parol is valid.[20] The rescission, however, must be accompanied by acts leaving no doubt of the intent. Such as cancelling the agreement or removing from the premises.[21] A learned writer observes in this connection: "It has been urged that the Statute of Frauds precludes parol evidence of rescission of contracts relating to land; for a contract to waive a purchase of land as much relates to land as the original contract. But it is replied that the rescinded contract is not the contract on which the action is brought, and that while the statute provides that no action shall be brought on any contract of the description there specified, except it be in writing, it does not provide that every such written contract shall support an action. In the result it is perfectly well ascertained that a contract in writing, and by law required to be in writing, may in equity be rescinded by parol, and waiver by mutual parol agreement, therefore, furnishes a sufficient defense to an action for specific performance."[22]

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[17] Davidson v. Keep, 61 Iowa, 218; 16 N. W. Rep. 101. Compare Dotson v. Bailey, 76 Ind. 434.

[18] Lewis v. McMillen, 41 Barb. (N. Y.) 420; Boyce v. McCulloch, 3 Watts & Serg. (Pa.) 429.

[19] Dial v. Crain, 10 Tex. 444.

[20] 2 Warvelle Vend. 834; Fry Specific Perf. § 1000. Boyce v. McCulloch, 3 Watts & Serg. (Pa.) 429; Goucher v. Martin, 9 Watts (Pa.), 106. In Gunby v. Sluter, 44 Md. 237, the question whether a parol agreement to rescind a contract for the sale of lands is within the Statute of Frauds, was raised but not decided. The court referred to Buckhouse v. Crossby, 2 Eq. Cas. Ab. 34, pl. 44; Goss v. Ld. Nugent, 5 B. & Ad. 58; Sugden V. & P. 167, 168;

Addison Cont. 97; 2 Taylor Ev. § 1905; Benjamin Sales, 159; Browne Stat. Frauds, §§ 429–436.

[21] Lauer v. Lee, 42 Pa. St. 165. See, also, Fry Spec. Perf. (3d Am. ed.) § 1004, and Id. note 1, p. 604.

[22] Fry Spec. Serf. (3d Am. ed.) § 1002; citing Gorman v. Salisbury, 1 Vern. 240; Inge v. Lippingwell, 2 Dick. 469; Davis v. Symonds, 1 Cox, 402; Robinson v. Page, 3 Russ. 114.

OF VIRTUAL RESCISSION OF THE CONTRACT BY PROCEEDINGS AT LAW.

Of Proceedings at Law Where the Contract is Executory.

CHAPTER XXIV.

OF THE RIGHT TO RECOVER BACK OR DETAIN THE PURCHASE MONEY ON FAILURE OF THE TITLE.

GENERAL PRINCIPLES. § 237.
RESTITUTION OF THE PURCHASE MONEY. § 238.
WHAT ACTION PURCHASER SHOULD BRING. § 239.
DETENTION OF THE PURCHASE MONEY. § 240.
EXCEPTIONS AND QUALIFICATIONS. § 241.
WHAT OBJECTIONS TO TITLE MAY BE MADE. § 242.
EXPENSES OF EXAMINING THE TITLE. § 243.
BURDEN OF PROOF. MISCELLANEOUS RULES. § 244
RIGHT TO RESCIND WHERE THE ESTATE IS INCUMBERED. § 245.
BUYING WITH KNOWLEDGE OF DEFECT OR INCUMBRANCE. § 246.
CHANCING BARGAINS. § 247.
EFFECT OF ACCEPTING TITLE BOND. § 248.
INQUIRY INTO CONSIDERATION OF SEALED INSTRUMENT. § 249.
RIGHT TO ENJOIN COLLECTION OF PURCHASE MONEY. § 250.
RIGHTS AGAINST TRANSFEREE OF PURCHASE-MONEY NOTE. § 251.
REFUSAL OF VENDOR TO CONVEY FOR WANT OF TITLE. § 252.
TENDER OF PURCHASE MONEY AND DEMAND OF DEED. § 253.
OFFER TO RESCIND. § 254.
PLEADINGS. § 255.

§ 237. **GENERAL PRINCIPLES.** Strictly speaking there is at law no such thing as a technical rescission of a contract for the sale of lands, for a court of law has no power to decree the surrender and cancellation of the contract, and the restitution of whatever either party has received in partial performance thereof. These are matters particularly within the province of a court of equity. But a virtual rescission of the contract is accomplished at law by allowing the purchaser, in case the title fails, to recover back so much of the purchase money as he may have paid,[1] or to detain that which remains unpaid, upon condition in either case that he restore the premises to the vendor, and place him substantially in the same condition in which he was before the contract was made.

The right to rescind an executory contract for the sale of land is perhaps more frequently exercised by proceedings of this kind, than in any other mode. Of this nature is the common action to recover back the deposit made at the time of the purchase, subject to the right of the purchaser to examine the title. It is to be borne in mind, however, that the right of the purchaser to recover back or to detain the purchase money where the title is found to be defective, is subject to the vendor's right to perfect the title in all cases in which time is not material.[2]

The right of the purchaser to detain or to recover back the purchase money depends mainly upon the following considerations, namely: Whether the contract has been executed by a conveyance to the purchaser; whether that conveyance contains covenants for title; and whether the purchaser or grantee is in the undisturbed possession and enjoyment of the premises. The right to relief in case of fraud by the vendor in respect to the title is usually enforced in equity, though an action at law may be maintained to recover damages for the deceit. There have been few more fruitful sources of litigation in the United States than disputes between vendors and purchasers of lands in respect to the sufficiency of title. The vast number of cases to be found in this field are to be attributed principally to the carelessness and indifference of purchasers in omitting an examination of the title before completing the contract; to their desire to escape from injudicious and unprofitable bargains; and to the fraud of the vendor in palming off a bad title upon a credulous, inexperienced or ignorant purchaser. The circumstances under which the purchaser may maintain an action to recover back his purchase money while the contract is executory have been thus classified in an American case:[3] (1) Where the rescission is voluntary, and with mutual consent of the parties, and without default on either side; (2) Where the vendor cannot or will not perform the contract on his part; (3) Where the vendor has been guilty of fraud in making the contract;[4] (4) Where by the terms of the contract, it is left in the purchaser's power to rescind it by any act on his part, and he does it;[5] (5) Where neither party is ready to complete the contract at the stipulated time, but each is in default.[6] Of these cases the last two appear to be included in the first three; of those three rescission by consent of both parties, and rescission in cases of fraud, are elsewhere considered in this work.[7] We have, therefore, to do now only with cases in which the vendor cannot, for want of title, perform the contract on his part. The state of American law respecting the right of the purchaser to detain or to recover back the purchase money on failure of the title, can best be presented, it is believed, in a series of general propositions. Some of these are necessarily qualifications or restrictions of the others; consequently the reader, before quitting the subject, should glance over the entire series. Those propositions may be thus stated:

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[1] Brown v. Witter, 10 Ohio, 144. No argument is needed to show that an executory contract for the sale of lands is practically rescinded by proceedings at law when the purchaser recovers back his purchase money. "A court of equity," says a learned writer, "entertains a suit for the express purpose of procuring a contract or a conveyance to be canceled, and renders a decree conferring in terms that exact relief. A court of law entertains an action for the recovery of the possession of chattels, or under some circumstances for the recovery of land, or for the recovery of damages, and although nothing is said concerning it, either in the pleadings or in the judgment, a contract or a conveyance, as the case may be, is virtually rescinded; the recovery is based upon the fact of such rescission, and could not have been granted unless the rescission had taken place. The remedy of cancellation is not expressly asked for, nor granted by the court of law, but all its effects are indirectly obtained in the legal action." 1 Pomeroy Eq. Jur. § 110.

[2] Post, ch. 32.

I. A purchaser of land may, so long as the contract remains unexecuted by a conveyance, as a general rule, recover back or detain the purchase money, if the title of the vendor be not such as the purchaser is, under the contract, entitled to require.[8]

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[3] Baston v. Clifford, 68 Ill. 67; 18 Am. Rep. 547; Bryson v. Crawford, 68 Ill. 362.

[4] Baston v. Clifford, 69 Ill. 67. Citing Smith v. Lamb, 26 Ill. 396; 79 Am. Dec. 381; Bannister v. Read, 1 Gilm. (Ill.) 99; Battle v. Rochester City Bank, 5 Barb. (N. Y.) 414. 1 Chit. Pl. 355.

[5] Baston v. Clifford, 69 Ill. 67. Citing Towns v. Barrett, 1 Term R. 133; Gillett v. Maynard, 5 Johns. (N. Y.) 85; 4 Am. Dec. 329; 1 Chit. Pl. 356.

[6] Baston v. Clifford, 68 Ill. 67. Citing 1 Chit. Pl. 355; Chit. on Contract (5th Am. ed.), 632.

[7] Ante, ch. 23; post, chs. 29 and 35.

II. A purchaser of lands in undisturbed possession cannot, as a general rule, while the contract is executory, recover back the purchase money on failure of the title, or resist the payment thereof, without restoring the premises to the vendor and placing him in *statu quo*.[9]

III. If the contract has been executed by a conveyance of the land to the purchaser without general covenants for title, he can, if the title fails, neither recover back the purchase money nor detain that which remains unpaid, either at law or in equity, unless the vendor was guilty of fraud, or the contract was founded in mistake of the parties as to some fact upon which the title depended.[10]

IV. If the contract has been executed by the delivery and acceptance of a conveyance containing a covenant of warranty, or for quiet enjoyment, or against incumbrances, and there has been such a breach of those covenants as would give the grantee a present right to recover substantial damages against the grantor, the former will, in an action against him for the purchase money, be allowed to set up such a breach as a defense by way of recoupment of the plaintiff's demand. If there has been no such breach the grantee cannot detain or recover back the purchase money.[11]

V. If the contract has been executed by a conveyance with a covenant of seisin or of good right to convey, and it clearly appears that the covenantor had no title, the covenantee, though he has not been disturbed in the possession, will, it seems, in some of the American States, be permitted to set up the breach of covenant of seisin as a defense to an action for the purchase money, upon condition that he convey the premises to the covenantor, and do all that may be necessary to put him in *statu quo*.[12]

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[8] This chapter.

[9] Post, ch. 25.

[10] Post, ch. 27.

[11] Ante, ch. 16.

[12] Post, ch. 26.

VI. After a contract for the sale of lands has been executed by a conveyance with covenants for title, the purchaser cannot, though he has been evicted by one claiming under a paramount title, or though he has discharged an incumbrance upon the estate, recover back the purchase money *eo nomine*, either by suit in equity, or by action against the vendor for money had and received to the plaintiff's use. His remedy is upon the covenants for title.[13]

VII. If the vendor fraudulently induced the purchaser to accept a bad title the latter may at law recover back or detain the purchase money as damages, whether the contract is executory, or has been executed; and if executed, whether the conveyance was with or without covenants for title; and if with covenants for title, whether those covenants have or have not been broken.[14]

PROPOSITION I.

A purchaser of lands may, so long as the contract remains unexecuted by a conveyance, as a general rule, recover back or detain the purchase money, if the title of the vendor be not such as the purchaser is, under the contract, entitled to require.

§ 238. **RIGHT TO RECOVER BACK THE PURCHASE MONEY.** As to the right to recover back the purchase money, the rule is thus stated by an eminent authority: "When a person sells an interest and it appears that the interest which he pretends to sell was not the true one, as, for example, if it was for a less number of years than he had contracted to sell, the purchaser may consider the contract at an end and bring an action for money had and received to recover any sum of money which he may have paid in part performance of the agreement for sale." The rule thus stated has been frequently recognized in America.[15] The purchaser may, of course, rescind the contract and recover back or detain the purchase money at law, in any case in which the vendor fraudulently misrepresented or concealed the state of his title.[16] If while the contract is executory the purchaser is forced to buy in an outstanding adverse claim to the property in order to protect his title, he may recover back from the vendor or his estate the amount expended for that purpose.[17]

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[13] Post, ch. 28.

[14] Post, ch. 29. In a case in which the purchaser deposited the cash payment with a stakeholder, to be forfeited on failure to comply with the contract, and the vendor made no effort to cure defects pointed out by the purchaser's counsel on examination of the title, the vendor could not claim a forfeiture of the deposit. Greenville Nat. Bank v. Parkinson, (Tex. Civ. App.) 52 S. W. Rep. 648.

[15] 1 Sugd. Vend. (14th ed.) 298. Wherever the purchaser has a right to rescind the contract, he may bring an action for money had and received to his use. Id. 249. Turner v. Nightingale, 2 Esp. 639; Hearn v. Tomlin,

Where the contract provided for the forfeiture of cash payments made by the purchaser in case of his failure to pay the deferred payments promptly, it was held competent for the purchaser to show an oral agreement that such payments were to be further postponed until the right of the vendor to receive and convey title to the land should be determined. Such agreement estops the vendor from claiming a forfeiture of the purchaser's deposit while the question of his title is unsettled.[18]

Peake Cas. 192; Thompson v. Miles, 1 Esp. 184; Hibbert v. Shee, 1 Camp. Cas. 113; Duffell v. Wilson, 1 Camp. Cas. 401; Greville v. Da Costa, Peake Add. Cas. 113; Guttschlick v. Bank, 5 Cranch (U. S. C. C.), 435; Seibel v. Purchase, 134 Fed. Rep. 484; Sanders v. Lansing, 70 Cal. 429; 11 Pac. Rep. 702; Burks v. Davies, 85 Cal. 110; 24 Pac. Rep. 613, where the purchaser had only an "option" to take the property at a certain price. Swihart v. Cline, 19 Ind. 264; Wickliff v. Clay, 1 Dana (Ky.), 585; Fields v. Baum, 35 Mo. App. 511; Pino v. Beckwith, 1 New Mex. 19; Force v. Dutcher, 18 N. J. Eq. 401; Judson v. Wass, 11 Johns. (N. Y.) 525; 6 Am. Dec. 392; Putnam v. Westcott, 19 Johns. (N. Y.) 73; Stevens v. Van Ness, 19 N. Y. Supp. 950; Wetmore v. Bruce, 118 N. Y. 319; 23 N. E. Rep. 303; Smith v. Browning, 225 N. Y. 358; 122 N. E. 217; Pipkin v. James, 1 Humph. (Tenn.) 325; 34 Am. Dec. 652; Buchanan v. Alwell, 8 Humph. (Tenn.) 516; Topp v. White, 12 Heisk. (Tenn.) 165; Mayes v. Blanton, 67 Tex. 246; House v. Kendall, 55 Tex. 40; Hall v. Huffhines, 47 Tex. Civ. App. 276; 105 S. W. 522; Parsons v. Smith, 46 W. Va. 728; 34 S. E. Rep. 922; Burke v. Schreiber, 183 Mass. 35; 66 N. E. Rep. 411; Maxwell v. Gregory, 53 Neb. 5; 73 N. W. Rep. 220; Talbot v. Land Co., 143 La. 263; 78 So. 533; Schlemmer v. Nelson, 123 Minn. 66; 142 N. W. 1041; Mays v. Blair, 120 Ark. 69; 179 S. W. 331; Indiana etc., Mfg. Co. v. Pharr, 82 Ark. 573; 102 S. W. 686; Rochells v. Brookman, 152 Ill. App. 253. In Kerr v. Read, (Cal. App.), 179 Pac. 399, it was held that the purchaser was entitled to recover his deposit where the vendor, without his consent, conveyed the property to a stranger. As to the right of a subscriber to the stock of a land company to recover back his subscription on failure of title to the lands forming part of the capital stock of the company, see Wright v. Swayne, 5 B. Mon. (Ky.) 441.

[16] Post, chs. 29 and 35. Inness v. Willis, 16 Jones & S. (N. Y.) 188.

[17] Ante, ch. 19. Ferguson v. Teel, 82 Va. 690.

[18] Missouri, K & T. R. Co. v. Pratt, (Kans.) 67 Pac. Rep. 464.

It has been held that the purchaser, in a case in which the vendor has been guilty of fraud, may, where the purchase money paid has been invested by the vendor in the funds or other property so that it may be traced, follow it and impress it with a trust.[19] The decision has been criticised by Sir Edward Sugden, who considers that such a rule, if established, would lead to much inconvenience.[20] The better opinion seems to be that the purchaser cannot follow the purchase money and obtain a lien upon it to the exclusion of creditors of the vendor, or others having equal equities with himself.

The purchaser may maintain an action to recover back the purchase money without having made a previous demand therefor, if the vendor is insisting upon a specific performance of the contract. The general rule is that no formal demand is necessary where the defendant disputes his liability to refund.[21]

The right of the purchaser to rescind and recover his deposit is not affected by the fact that he had notice of the defects in the title when the contract was made. He has a right to expect the removal of the defects by the vendor before the time fixed for performance.[22]

An action *at law* to recover the deposit cannot be defeated on the ground that no time was allowed the vendor in which to perfect the title. At law, time is of the essence of the contract.[23]

The purchaser, having elected to rescind and having recovered back the purchase money, cannot thereafter maintain an action against the vendor to recover damages for the loss of his bargain.[24]

§ 238-a. **FORFEITURE OF DEPOSIT.** It is frequently provided in contracts of sale that the purchaser shall forfeit his deposit if he fails to comply with his contract within a specified time. The vendor cannot insist upon this forfeiture if he be unable to perform the contract, on his part, for want of title. In such a case, there is a complete failure of the consideration, and the vendor has no more right to keep the purchaser's money than he would have to compel specific performance of the contract.[25]

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[19] Small v. Atwood, Yo. 407. In this case, however, the alleged fraudulent representations were as to the quality of the estate.

[20] 1 Sugd. Vend. (8th Am. ed.) 393 (256).

[21] Jenness v. Spraker, (Ind. App.) 27 N. E. Rep. 117; Toney v. Toney, 73 Ind. 34; Brown v. Harrison, 93 Ind. 142.

[22] Bell v. Stadler, 31 Idaho, 568; 174 Pac. 129.

[23] Groden v. Jacobson, 114 N. Y. Supp. 183; 129 App. Div. 508.

[24] Ante, § 1. White v. Harvey, 175 Iowa, 213; 157 N. W. 152.

But want of title in the vendor will not prevent a forfeiture of the deposit when the purchaser well knew that legal proceedings would be necessary to enable the vendor to perform his contract, as where the interest sold consisted of an option on the property of a widow and minor children, which could be made effective only by proceedings in the probate court to authorize the sale.[26]

§ 239. **WHAT ACTION THE PURCHASER SHOULD BRING.** In those States in which the common-law system of procedure is retained, if the purchaser elects to disaffirm or rescind the contract by proceeding at law while the contract is yet executory, the proper action is trespass on the case in *assumpsit*, counting for money had and received to the plaintiff's use and benefit.[27] In this action, he will recover merely what he has paid, with interest, including the deposit made at the time of the sale, which is considered a part of the purchase money, and cannot recover for expenses incurred in examining the title, nor for special damages caused by the vendor's inability to perform the contract, all of which must be sought in an action on the case for breach of contract or for deceit, as the case may be.[28] If, however, he took from the vendor a bond conditioned to make title, his remedy is by action of covenant on the bond.[29]

The remedy at law to recover back the purchase money on failure of the title, where the contract is executory, is concurrent with the remedy in equity for rescission. In the action at law, it cannot be objected that the plaintiff's remedy is in equity.[30]

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[25] Ante, § 88. Platte Land Co. v. Hubbard, 12 Colo. App. 465; 56 Pac. Rep. 64.

[26] McAlpine v. Reichenecker, 56 Kans. 100; 42 Pac. Rep. 339; Carter v. Fox, 11 Cal. App. 67; 103 Pac. 910. See, also, Vanity Fair Co. v. Hayes, 31 R. I. 77; 76 Atl. 771.

[27] 1 Sugd. Vend. (8th Am. ed.) 357 (236). In the States where the common law procedure does not obtain, he may sue for money had and received to his use. McDermott v. Chatfield, 18 Cal. App. 499; 123 Pac. 539.

[28] Sugd. Vend. (8th Am. ed.) 357 (236).

[29] Post, § 242. Rounds v. Baxter, 4 Me. 454; Green v. Green, 9 Cow. (N. Y.) 46; Charles v. Dana, 14 Me. 383.

[30] Wright v. Dickinson, 67 Mich. 580. This was an action to recover back

§ 240. **DETENTION OF THE PURCHASE MONEY.** The purchaser may, also, while the contract is executory, *resist* the payment of purchase money, if the title has failed.[31] This right

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purchase money paid on an executory contract for the sale of lands. It was objected by the defendant that, as the purchaser sought a rescission of the contract, his remedy was in equity. The court, however, said that there was no occasion to call for the interposition of a court of equity. There were no deeds to be surrendered up and canceled, and nothing which was required to be perpetuated by a decree. All there was to be ascertained could be ascertained by a jury, and that was, how much in equity and good conscience ought the vendors to repay of the purchase money they had received. All benefits which the purchaser had received would have to be deducted, and those could be ascertained and allowed for in a common-law proceeding. The value of the timber cut and removed, and all other benefits which the purchaser derived from the contracts, could be adjusted in the action.

[31] Smith v. Pettus, 1 Stew. & Port. (Ala.) 107; Whitehurst v. Boyd, 8 Ala. 375; Pearson v. Seay, 35 Ala. 612; Sorrells v. McHenry, 38 Ark. 127. Clark v. Croft, 51 Ga. 368; Hall v. McArthur, 82 Ga. 572; 9 S. E. Rep. 534. Gregory v. Scott, 4 Scam. (Ill.) 392; Cunningham v. Gwinn, 4 Bl. (Ind.) 341; Fish v. West, 18 Ky. Law R. 144; 35 S. W. Rep. 624; Dufief v. Boykin, 9 La. Ann. 295; Wamsley v. Hunter, 29 La. Ann. 628; Buchanan v. Lorman, 3 Gill (Md.), 51; Dorsey v. Hobbs, 10 Md. 412; Peques v. Mosby, 7 Sm. & M. (Miss.) 340; Mobley v. Keyes, 13 Sm. & M. (Miss.) 677; Barton v. Rector, 2 Mo. 524; Wellman v. Dismukes, 42 Mo. 101; Earl v. Campbell, 14 How. Pr. (N. Y.) 330. This, however, was a suit to compel the purchaser to accept a deed and pay the purchase money. Welch v. Watkins, 1 Hayw. (N. C.) 369; Stoddart v. Smith, 5 Binney (Pa.), 365; Poke v. Kelly, 13 S. & R. (Pa.) 260; Withers v. Baird, 7 Watts (Pa.), 227; 32 Am. Dec. 754; Colwell v. Hamilton, 10 Watts (Pa.), 413; Gans v. Renshaw, 2 Pa. St. 34; 44 Am. Dec. 152; Puckett v. McDonald, 58 Tenn. 395; West v. Shaw, 32 W. Va. 195; 9 S. E. Rep. 81. In Rhodes v. Wilson, 12 Colo. 65; 20 Pac. Rep. 746, it was held that in an action on a note for the purchase money of land, an answer setting up failure of title and inability of the vendor to convey, presented a legal, and not an equitable defense. It would seem that this observation of the court must be taken with the qualification that the plea must show a clear failure of title, and not merely a doubtful title, in order to have that effect. If the plea avers facts rendering the title merely doubtful, the authorities conclusively show that the defense is equitable and not legal. In an action to recover the purchase money of land, a plea that the deed tendered by the vendor was insufficient for lack of a proper description of the premises, but which fails to show wherein the description is defective or uncertain, is bad. Pettys v. Marsh. (Fla.) 3 So. Rep. 577. The cases in the English reports involving the right of the purchaser to set up the defense of failure of title in an action for the purchase money, are few compared with those in which the purchaser seeks to recover back the purchase money on the same ground, and these latter consist chiefly of actions to recover back the earnest money, or deposit made with the auctioneer. The causes

depends upon the same principles upon which he is allowed to recover back the purchase money in a like case, and is subject to the same exceptions. Accordingly it seems that wherever the purchaser might recover back the purchase money for defect of title, he may detain the same in an action against him by the vendor,[32] and this to prevent circuity of action, for there would be no reason in requiring the defendant to pay over that which he could immediately recover back from the plaintiff. An action for the purchase money of land is, in legal effect, a petition or bill for specific performance of the contract of purchase, and is governed by the same equitable principles.[33] The purchaser cannot be compelled to pay the purchase money if, by reason of the fraudulent representation of the vendor with respect to the title, he was induced to agree to accept a quit-claim conveyance of the land.[34] The fact that a note for the purchase money of land was executed to the vendor,[35] or to a third party at the request of the vendor, does not affect the right of the purchaser to detain the purchase money on failure of the title.[36] Neither is that right affected by the purpose for which he bought the premises, though such purposes may have been dishonest or improper.[37] Contracts for the sale of real estate frequently provide that the deposit or cash payment made by the purchaser shall be forfeited unless he makes prompt payment of the deferred installments of the purchase money. But under such a provision a forfeiture cannot be declared where the purchaser declines to pay the purchase money until the vendor removes an incumbrance from the premises, or cures a defect in the title.[38]

A provision in the agreement that the purchaser shall pay dam-

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of this disparity probably are that owing to the English practice of carefully examining the title few contracts proceeded further than the payment of the earnest money, if the title was bad, and that if the purchaser took possession and paid the purchase money, without examining the title, he would there be deemed to have waived his objections to the title.

[32] Hilliard on Vend. 71.

[33] Black v. Am. International Corp., 264 Pa. 260; 107 Atl. 737.

[34] Hayes v. Bonner, 14 Tex. 629.

[35] Piatt v. Trimby, 155 Ill. App. 29.

[36] Crawford v. Keebler, 5 Lea (Tenn.), 547.

[37] Hollenburgh v. Morrison, 9 Watts (Pa.), 408.

[38] Wallace v. McLaughlin, 57 Ill. 53.

ages in case of a breach of the contract by him, does not take away the right of the vendor to sue for the unpaid purchase money.[39]

As between vendor and purchaser there is no obligation upon the latter to record the contract of sale under which he holds. Therefore, where, for want of such record, the premises are subjected in the hands of the purchaser to the payment of claims against the vendor, the purchaser, having lost the estate, is none the less entitled to detain the unpaid purchase money.[40]

In such a suit, the court may provide for the application of the purchase money to the payment of liens upon the land.[41]

§ 241. **EXCEPTIONS AND QUALIFICATIONS.** The principal qualifications of the rule that the purchaser may recover back or detain the purchase money on failure of the title hereinbefore stated, are, that the right does not exist where the purchaser has waived his objections to the title,[41a] where the vendor has a right to perfect the title,[42] or to require the purchaser to take the title with compensation, or abatement of the purchase money, in case of trifling deficiencies and incumbrances,[43] and where the purchaser refuses or neglects to restore the possession to the vendor and to place him substantially in the same condition in which he was before the contract was made.[44] It has been held that an agreement to convey to the purchaser in fee simple does not entitle him to rescind the contract and recover back the purchase money on the ground that there are incumbrances on the property.[45] This is a narrow interpretation of such an agreement and is not supported, it is believed, by the weight of authority,[46] except in those cases in which the purchase money can be applied to the discharge of the incumbrance.

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[39] Boyd v. Hoffman, 241 Pac. 421; 88 Atl. 675.

[40] Daniel v. Baxter, 1 Lea (Tenn.), 630.

[41] Burnett v. Sulflow, 134 Minn. 407; 159 N. W. 951.

[41a] Ante, ch. 8.

[42] Post, § 325. The purchaser cannot recover his deposit where the vendor promptly removes the objections to the title pointed out by the purchaser. Price v. Loe, 56 Wash. 253; 105 Pac. 469.

[43] Post, § 308.

[44] Post, § 256, *et seq.*

[45] Fuller v. Hubbard, 6 Cow. (N. Y.) 13; 16 Am. Dec. 423.

[46] In Lewis v. White, 16 Ohio St. 441, it was held that under an agreement by which he was to receive a "perfect title," the purchaser might rescind the contract if the premises were incumbered.

In the English practice it has been held that a purchaser cannot, at the trial of an action to recover his deposit, insist upon an objection to the title which he did not raise at the time he refused to complete the contract; provided the objection be of such a nature that if then stated it could have been removed.[47] This decision has been cited approvingly in a recent American case, in which it was held that it was incumbent on a purchaser, assuming to examine the title, to make a complete examination, and that in an action to recover the deposit he would be limited to the defects pointed out when he rejected the title.[48] It has been held that a purchaser assenting to an assignment of the contract by the vendor cannot, on failure of the title, in the absence of fraud by the assignee, recover back payments of the purchase money made to him, though all parties at the time of the assignment were ignorant that the title was bad. The assignee is in no way responsible for the validity of the title, and the purchaser takes the risk incurred by making payments to one from whom they cannot be recovered back.[49]

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[47] Todd v. Hoggart, Moo. & M. 128. Chitty. Cont. (10th Am. ed.) 337.

[48] Easton v. Montgomery, 90 Cal. 313; 27 Pac. Rep. 280. There are *dicta* in this decision from which it might be inferred that a vendor negligently omitting an examination of the title, would thereby lose his right to rescind the contract and recover back the purchase money, if the title failed from causes that an examination would have disclosed. In Soper v. Arnold, L. R., 14 App. Cas. 429, it was held that a purchaser having accepted the title shown by the abstract and forfeited his deposit by failing to comply with the contract cannot, on a decision in favor of the second purchaser that the title was bad by reason of a defect appearing on the face of the same abstract, recover his deposit on the ground of mutual mistake and failure of consideration.

[49] Youmans v. Edgerton, 91 N. Y. 403, disapproving Smith v. McCluskey, 45 Barb. (N. Y.) 610. The court observed that the assignment did not, nor did it purport to, transfer any right in the land, or impose upon him any obligation. It was a mere authority to receive the moneys called for by its terms and apply them to his own use. With notice of this limitation, the party paying the money is chargeable. The purchaser's case is, therefore, not different from what it would have been if, as each payment became due, the vendor had given an order for value on the vendee to pay the same to the assignee, or an assignment in form of each separate installment. In

The right to resist the payment of the purchase money for defect of title is personal to the vendee. Therefore, if the vendee execute a note for the purchase money with sureties, the latter cannot, in an action on the note, set up the plaintiff's want of title as a defense.[50] This is a mere application of the principle that a surety cannot, as a general rule, avail himself of his principal's right of set-off, recoupment or counterclaim.[51]

§ 242. **WHAT OBJECTIONS TO THE TITLE MAY BE MADE IN ACTIONS FOR THE PURCHASE MONEY.** As a general rule the purchaser may show in the defense of an action for the purchase money, while the contract is executory, any matter of law or fact which invalidates or renders unmarketable the title of his vendor. These may be classified as defects which appear on the face of the instruments under which the vendor claims title, such as the absence of words of conveyance; defects which appear from the public records, such as prior conveyances by the vendor, mortgages, judgments, etc., and defects *in pais*, or those to be established by the testimony of witnesses, such as want of heirship, personal disability of a grantor in the chain of title, etc. A further classification of the principal sources or grounds of objection to the title may be seen in a preceding part of this work.[52] At one time it was held that the objection that the title was doubtful or unmarketable could not be availed of at law, all titles at law being regarded either as good or absolutely bad, and the doctrine of unmarketable titles being cognizable only in a court of equity. But now the objection that the title is not such as the purchaser could be required to take upon a bill for specific performance, may be made at law as freely as in equity.[53]

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neither case could the debtor, if he accepted the order or assented to the assignment, set up in defense of payment any equity between himself and the assignor, nor after payment recover back the money upon showing even such equity as would have been a defense as between himself and the assignor.

[50] 2 Parsons B. & N. 536, 537. Lewis v. McMillen, 41 Barb. (N. Y.) 431, citing Gillespie v. Torrance, 25 N. Y. 306; 82 Am. Dec. 355; Webb v. Spicer, 13 Q. B. 886; Salmon v. Webb, 16 Eng. L. & Eq. 37.

[51] There is, however, a conflict of authority on this point. Brandt on Suretyship, § 203; 24 Am. & Eng. Encyc. of Law, 798.

[52] Ante, § 77, *et seq.*

[53] Post, § 286. Sachs v. Owings, 121 Va. 162; 92 S. E. 997.

§ 243. **EXPENSES OF EXAMINING THE TITLE.** In those States in which the distinction between trespass on the case and trespass on the case in *assumpsit* is still observed, the purchaser cannot, on the count for money had and received to his use, recover expenses incurred by him in examining the title, or in fact any items of expense or damage growing out of the failure of the title, because the right to recover any such items depends upon contract, and the count for money had and received *disaffirms* the contract.[54] In a State in which a system of "Code procedure" has been adopted, the purchaser was allowed the expenses of examining the title in an action to recover back the purchase money.[55]

§ 243-a. **INTEREST ON DEPOSIT.** As a general rule, the purchaser is entitled to recover interest on his deposit from the time that he rejected the title and demanded the return of the deposit.[56] But, under the particular circumstances of the case, he has been allowed interest only from the commencement of his suit to recover the deposit.[57]

§ 244. **BURDEN OF PROOF LIES ON PURCHASER. MISCELLANEOUS RULES.** If the purchaser seeks to detain or to recover back the purchase money on the ground of want of title in the vendor, the burden will be on him to show defects in the title.[58] An agreement by the vendor to execute to the purchaser "a good and sufficient warranty deed" does not impose on the vendor the burden of showing a clear title in such an action.[59] But if the purchaser produces an original abstract of title showing a defect of title in the vendor a *prima facie* case is established against the latter, putting him to proof of a better title.[60]

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[54] Ante, § 93. 1 Sugd. Vend. (8th Am. ed.) 547 (362); Chitty Cont. (10th Am. ed.) 339; Canfield v. Gilbert, 4 Esp. 221; Gosbell v. Archer, 4 Nev. & Man. 485; Walker v. Constable, 1 Bos. & Pul. 306; Mangonaro v. Karl, 84 N. J. L. 408; 87 Atl. 94.

[55] Wetmore v. Bruce, 118 N. Y. 320; 23 N. E. Rep. 303; Elfenheim v. Von Hafen, 23 N. Y. Supp. 348; Lowe v. Molter, (R. I.) 71 Atl. 592; Rose v. Adler, 147 N. Y. Supp. 307; Maupai v. Jacobs, 124 N. Y. Supp. 220; 139 App. Div. 524, where *held*, also, that he was entitled to recover the expense of employing an attorney, in addition to a title company, to examine the title. If the title be found to be good but specific performance by the vendor impracticable, the purchaser will not be allowed the expenses of examining the title. Brody & Co. v. Hochstadter, 144 N. Y. Supp. 631; 160 App. Div. 310. He is not entitled to recover for expenditures on the property while uncertain about the title. Prentice v. Townsend, 127 N. Y. Supp. 1066; 143 App. Div. 151.

[56] Turner v. Reynolds, 81 Cal. 214; 22 Pac. 546; Hayt v. Bental, 164 Cal. 680; 130 Pac. 432; Anderson v. Ohnoutka, 84 Neb. 517; 121 N. W. 577; 39 Cyc. 2074; 48 Cent. Dig. Vend. & Purch. § 1017. The vendor has his counterclaim for the use and occupation if the purchaser was put in possession. Post, § 257.

[57] Donovan v. Hoenig, 157 Wis. 250; 146 N. W. 1125.

Miscellaneous rules. Of course, if the vendor disable himself from performing his contract by conveying the land to a third party, the purchaser may bring an action to recover back the purchase money paid instead of seeking damages for the violation of the contract.[61] But if the purchaser rejects a good and marketable title when tendered, and the vendor has waived none of his rights and left no part of the contract open, the purchaser cannot recover back his deposit on the ground that the vendor after the rejection of the title had conveyed the land to a third person.[62]

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[58] Post, § 281. Dwight v. Cutler, 3 Mich. 566; 64 Am. Dec. 105; Allen v. Atkinson, 21 Mich. 361; Sawyer v. Sledge, 55 Ga. 152; Cantrell v. Mobb, 43 Ga. 193; Bolton v. Branch, 22 Ark. 435; Reynolds v. White, 118 N. Y. Supp. 979; 134 App. Div. 248; S. C. 128 N. Y. Supp. 529; 143 App. Div. 595; Bardes v. Herman, 129 N. Y. Supp. 723; 144 App. Div. 772; Talifer Co. v. Falk, 173 N. Y. Supp. 251; 105 Misc. Rep. 6. Purchaser refusing to take the title, must point out and prove the defects. Baecht v. Hevesy, 101 N. Y. Supp. 413; 115 App. Div. 509.

[59] Baxter v. Aubrey, 41 Mich. 13, COOLEY, J., saying: "The contract obligated the vendor when the purchase price was paid to 'execute and deliver' to the vendee 'a good and sufficient warranty deed.' Baxter (the purchaser) claimed that this means a warranty deed conveying title to the land, and that it was not enough for the vendor to tender a deed sufficient in form, but she must go further and show that she had at the time a title which the deed would convey. We think, however, if the vendee accepts a contract in which the ownership of the vendor is assumed, and agrees to pay for the land without requiring the vendor to produce evidence of his title, the burden will be upon him to show defects. The presumption will be, in the absence of any showing, that he satisfied himself respecting the title when he made his bargain."

[60] Hartley v. James, 50 N. Y. 41; Kane v. Rippy, 22 Oreg. 296, 23 Pac. Rep. 180. In an action of covenant to recover the purchase money a plea of covenants performed, *absque hoc*, etc., does not put the plaintiff's title in issue and impose on him the burden of showing that his title is good. Hite v. Kier, 38 Pa. St. 72.

[61] Burley v. Shinn, 1 Neb. 433; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851.

[62] Beyer v. Braender, 57 N. Y. Super. Ct. 429.

If the purchaser demands such a deed as the contract entitles him to receive, and the vendor refuses to give it, but insists on the acceptance of a different and inferior title, the contract may be regarded as broken, and the purchaser may sue at once and recover back whatever purchase money he has paid.[63]

The purchaser cannot recover back the purchase money nor detain that which is unpaid on failure of the title, in any case in which the rule *caveat emptor* applies; *e. g.*, sales by administrators, sheriffs, officers of a court, and other judicial and quasi-judicial sales.[64] This rule of course does not apply where the question is only as to the validity or legality of the sale.[65]

The purchaser may not only recover back his deposit where there is a palpable failure of the title, but he is entitled to that privilege if the vendor fail to produce a marketable title, or one that is free from reasonable doubt. What is sufficient to render a title unmarketable will be elsewhere considered.[66] If the vendor's abstract shows a bad title, the purchaser can maintain an action to recover back his deposit without offering to complete the contract and demanding a conveyance.[67]

If the vendor be unable to perform his contract for want of title, the purchase money may be recovered back though the contract was void, as where it was within the Statute of Frauds. The defendant holds the money without consideration and is bound to return it.[68]

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[63] Shrove v. Webb, 1 Term, 732; Reddington v. Henry, 48 N. H. 279; Little v. Paddleford, 13 N. H. 167; Foote v. West, 1 Den. (N. Y.) 544; Camp v. Morse, 5 Den. (N. Y.) 161; Laurence v. Taylor, 5 Hill (N. Y.), 107. In Wilson v. Getty, 57 Pa. St. 266, the purchase money had been deposited in bank "to be paid over as soon as counsel for the parties pronounced the deed to be complete and perfect." Counsel having pronounced the deed tendered to be insufficient (the title not being good) it was held that the purchaser might immediately recover the deposit. This, however, was a suit in equity instead of an action at law, but the principle is the same in either case.

[64] Rorer on Jud. Sales, § 458. Ellis v. Anderton, 88 N. C. 472, distinguishing Shields v. Allen, 77 N. C. 375.

[65] See Shipp v. Wheless, 33 Miss. 646.

[66] Post, ch. 31.

[67] 1 Sugd. Vend. (8th Am. ed.) 368 (241).

[68] Gosbell v. Archer, 4 Nev. & Mann. 485; Adams v. Fairbain, 2 Stark. 277; Gillett v. Maynard, 5 Johns. (N. Y.) 85, 4 Am. Dec. 329. Here, however, the

The purchase money may, on failure of title, be recovered by the purchaser virtually in other forms of proceeding than the action for money had and received. Thus, in an action for breach of the contract or for breach of covenant, the damages are, as a general rule, measured by the consideration money and interest. And in equity upon a rescission of the contract, the court decrees a return of the purchase money to the purchaser.

In the action for money had and received to his use, disaffirming the contract on failure of the title, the purchaser cannot recover more than the money paid, though the estate has risen in value.[69] The rule is the same, however, in an action for damages unless the vendor was guilty of fraud.[70]

§ 245. **RIGHT TO RESCIND WHEN THE ESTATE IS INCUMBERED.** In many cases the purchaser may rescind the contract and recover back or detain the purchase money, if the estate is incumbered.[71] Where an incumbrance is discovered previously to the execution of the conveyance and payment of the purchase

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vendor merely refused to convey. Buck v. Waddle, 1 Ohio. 357; Thompson v. Gould, 20 Pick. (Mass.) 134, *semble.* Flinn v. Barber, 64 Ala. 193; Collins v. Thayer, 74 Ill. 138.

[69] 1 Sugd. Vend. 358; Dutch v. Warren, 2 Burr. 1010; Dale v. Sollett, 4 Burr. 2133.

[70] Ante, §§ 91, 101.

[71] See ch. 31, § 304, *et seq.* Parsons v. Kelso, 141 Mo. App. 369, 125 S. W. 227. The existence of a recorded mortgage on the property makes the title unmarketable and entitles the purchaser to a return of his deposit, though such mortgage be voidable because not recorded until after the recording of a subsequent conveyance by the mortgagor. Rose v. Adler, 147 N. Y. Supp. 807. Where the contract was that the purchaser should have a fee-simple title free and clear of all taxes, mortgages, or other liens, the purchaser could not be required to take the property subject to the right of a stranger to construct an irrigation ditch through it. Wingard v. Copeland, 64 Wash. 214, 116 Pac. 670. A restriction which prevents the purchaser from using a portion of the frontage of the premises otherwise than for a court yard is an incumbrance entitling him to rescind the contract and recover back his deposit. Wetmore v. Bruce, 54 N. Y. Super. Ct. 149; affd., 118 N. Y. 319, 23 N. E. Rep. 303, citing Trustees v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615, and distinguishing Riggs v. Pursell, 66 N. Y. 199. In Colorado it has been held that an irrigation contract is not appurtenant to the lands irrigated, and that if a vendee of such lands pays a balance due on such a contract under which the land was to be irrigated for a term of years, he cannot look to the vendor to reimburse him. Chamberlain v. Amter, (Colo.) 27 Pac. Rep. 87.

money, the vendor must discharge it whether he has or has not agreed to covenant against incumbrances, before he can compel payment of the purchase money.[72] The mere existence of an incumbrance on the premises on the day fixed for completing the contract, is no breach by the vendor if he be then prepared to remove the incumbrance,[73] and if the holder of the incumbrance will accept payment of the same before maturity.[74] But if the purchaser then makes a tender and demands performance, and the vendor fails to remove the incumbrance, or provide for its removal to the satisfaction of the purchaser, the latter may rescind and recover his deposit.[75]

The question, what is an incumbrance, and under what circumstances the purchaser may, because of its existence, refuse to proceed with the contract, is considered elsewhere in this work.[76] Little difficulty is experienced in determining what is a pecuniary incumbrance, except in the case of undetermined and inchoate liabilities affecting the premises at the time of the contract, such as taxes and essessments. We have seen under what circumstances taxes and assessments upon the warranted premises will be deemed a breach of the covenant against incumbrances.[77] Where the contract is executory, the purchaser is in equity regarded as the owner of the estate, and must pay the taxes accruing between the making of the contract and the execution of the conveyance, unless the parties have entered into some special agreement respecting the taxes.[78] In a case in which the contract provided that the purchaser should pay the taxes accruing between the making of the contract and the execution of a conveyance, the purchaser was held entitled to recover the taxes so paid by him, upon the inability of the vendor to convey for want of title.[79] Where the contract is made after the completion of a public improvement, but before the imposition of an assessment therefor, the purchaser must protect himself by provision in the contract.[80] Where the contract requires the vendor to pay existing taxes, he must pay a special assessment which was a lien on the land at the time of the contract though not then payable.[81] A tax sale of the premises made prior to the contract of sale, is an incumbrance which the purchaser must remove.[82]

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[72] 2 Sugd. Vend. (8th Am. ed.) 192; Glassman v. Condon, 27 Utah 463, 76 Pac. 343.

[73] Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. Rep. 287; Lamb v. De Vault, 139 Ill. App. 398.

[74] Pioneer Min. Co. v. Price, 189 Mo. App. 30, 176 S. W. 474.

[75] Raben v. Risnikoff, 88 N. Y. Supp. 470, 95 App. Div. 68; Ross v. Haynes, (Tex. Civ. App.) 196 S. W. 364.

[76] Post, § 304, *et seq.*, ch. 31. See, also, ante, § 123.

[77] Ante, § 124. "Taxes" include special assessments. Giles v. Peo. Nat. Bank, 198 Ill. 307, 65 N. E. Rep. 1060; Williams v. Monk, 179 Mass. 22, 60 N. E. Rep. 394.

[78] Furber v. Purdy, 69 Mo. 601; Sherman v. Savery, 2 Fed. Fep. 505; Cary v. Gundlefinger, (Ind.) 40 N. E. Rep. 1112; Williamson v. Neeves, 94 Wis. 656, 69 N. W. Rep. 806; Clinton v. Shugart, 126 Iowa, 179, 101 N. W. Rep. 785; Swanston v. Clark, 153 Cal. 300, 95 Pac. 1117. The liability of

As a general rule the purchaser cannot rescind the contract on the ground that the title is incumbered if he can apply the purchase money to the removal of the incumbrance.[83] If he pays the purchase money in ignorance of the incumbrance, he may recover it back, and in an action for that purpose it is not necessary for him to go behind the record and show that the incumbrance has

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the parties for taxes is fixed by statute in a number of the States. Thus, in Nebraska a vendor who sells after April first is liable for the taxes of that year. Campbell v. McClure, (Neb.) 63 N. W. Rep. 926. In a case in Michigan in which the lands sold were wild and uncultivated, and the purchaser did not take actual possession, it was held that the taxes for the current year should be divided equally between the purchaser and the seller. Thompson v. Noble, 108 Mich. 26, 65 N. W. Rep. 746.

[79] Missouri K. & T. R. Co. v. Pratt (Kans.), 67 Pac. Rep. 464.

[80] People v. Gilon, 9 N. Y. Supp. 212. Ante, § 124. So, also, where the improvement was put upon the property after the price was agreed upon by the parties. Charbonier v. Arbona, 68 Fla. 194, 67 So. 44.

[81] Otto v. Young, 227 Mo. 193, 127 S. W. 9.

[82] Green v. Hernz, 37 N. Y. Supp. 887, 2 App. Div. 255.

[83] Post, § 304. Pangborn v. Miles, 10 Abb. N. Cas. (N. Y.) 42; Rinaldo v. Houseman, 1 Abb. (N. Cas.) (N. Y.) 312; Sachs v. Owings, 121 Va. 162, 92 S. E. 997. In Lyon v. O'Kell, 14 Iowa, 233, and Lyon v. Day, 15 Iowa, 469, the court below rejected evidence offered by the defendant that the property was so incumbered that the plaintiff could not perform his contract to convey a good title. This was reversed on appeal. The grounds of the ruling below do not appear. Similar evidence was excluded in Murphy v. Richardson, 28 Pa. St. 288, on the ground that the purchaser had bought subject to the incumbrance, but this decision was reversed on appeal, the court holding that whether in fact the purchase had been so made was a question to be determined by the jury.

not been paid; he has a right to recover if the incumbrance appears unsatisfied of record.[84] If the vendor produces an abstract showing that the incumbrance has been satisfied, he must further show that the person making such entry had authority for that purpose.[85] In a case in which the purchaser paid off an incumbrance which had been fraudulently concealed from him, and the amount so paid, together with what he had already paid to the vendor, amounted to the purchase price of the land, the court stayed the collection of the purchase-money notes and directed that a deed be executed to the purchaser.[86] If the contract expressly require that the premises shall be conveyed to the purchaser free and clear of incumbrances, he cannot be required to accept a conveyance so long as the estate remains incumbered, though he be permitted to deduct the amount of the incumbrances from the unpaid purchase money. Under such a contract the vendor cannot impose upon the purchaser the burden of applying the purchase money to the incumbrances and procuring their satisfaction.[87] The same rule applies in respect to taxes which it is the vendor's duty to pay.[88]

If the purchaser accept a conveyance from a third person who contracted to convey to his vendor, he will be held to have waived his right to have recourse against his vendor to recover back money paid to remove an incumbrance upon the premises.[89] Where the contract obliges the vendor to remove incumbrances from the estate there must be a demand accompanied by a notice of the removal of the incumbrance before he can maintain an action to recover the purchase money.[90] It has been held that if the vendee is protected as an innocent purchaser of the estate without actual or constructive notice of an incumbrance thereon, he cannot elect to waive such protection, rescind the contract and recover back the purchase money merely because such incumbrance exists. As to him, the estate is unincumbered and he must complete the contract.[91] The purchaser cannot, of course, be compelled to pay the purchase money and rest on the promise of the vendor to remove the incumbrance and execute a conveyance afterward. He has a right to see that the purchase money is actually applied to the discharge of the incumbrance.[92] If the incumbrance be one which the vendor can remove, the objection to the title on account of the incumbrance will be waived by the purchaser unless he makes it before the time fixed for the performance.[93]

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[84] Kimball v. Bell, 47 Kans. 757, 28 Pac. Rep. 1015.

[85] O'Neill v. Douthett, 40 Kans. 690, 20 Pac. Rep. 493.

[86] Rodman v. Williams, 4 Bl. (Ind.) 72.

[87] Webster v. Kings Co. Trust Co., 145 N. Y. 275, 39 N. E. Rep. 964, *obiter*, the purchaser in that case having in fact waived his objections.

[88] Zorn v. McParland, 32 N. Y. Supp. 770, 155 N. Y. 684, 50 N. E. 1123; Berger v. Crist, 106 N. Y. Supp. 107, 121 App. Div. 483; Mandel v. Hess, 107 N. Y. Supp. 766.

[89] Herryford v. Turner, 67 Mo. 296.

[90] Fitts v. Hoitt, 17 N. H. 530, the court saying: "The plaintiff had his own time for performing the acts which would by the agreement have entitled him to the payment of the money collected by the defendant, and he alone could know at what time he became entitled. It would be an extreme hardship to permit him, immediately upon the consummation of the act, which

§ 246. **BUYING WITH KNOWLEDGE OF DEFECT OR INCUMBRANCE.** If the purchaser enter into the contract knowing that the title is imperfect or that there are incumbrances on the land, he will, as a general rule, be deemed to have waived his objections to the title, though not necessarily his right to require a conveyance with general covenants for title.[94] But if the vendor expressly agreed to remove defects or clear off incumbrances contemplated by the parties at the time the contract was made, he cannot enforce the payment of the purchase money until he has performed his contract in that regard.[95] Where an objection to the title was

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did not require the knowledge or concurrence of the defendant for its due performance, without notice to him, to maintain an action for the money. Hence, the general rule that where the fact upon which the defendant's liability arises lies peculiarly within the knowledge and privity of the plaintiff, notice thereof must be stated to have been given to the defendant before the commencement of the action." Citing Saund. Pl. & Ev. 132; Rex v. Holland, 5 T. R. 621, 2 Saund. 62a.

[91] Wilkins v. Irvine, 33 Ohio St. 138.

[92] Hilliard Vend. (2d ed.) 277; Wilhelm v. Fimple, 31 Iowa, 131, 7 Am. Rep. 117.

[93] Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. 287; Rosenberg v. Jacobson, 107 N. Y. Supp. 595.

[94] Ante, § 85, "Waiver of Objections." Allen v. Hopson, 1 Freem. Ch. (Miss.) 276; Wiggins v. McGimpsey, 13 Sm. & M. (Miss.) 532; Haag v. Dickinson, 151 Ky. 768, 152 S. W. 930; Paris v. Golden, 96 Kan. 668, 153 Pac. 528. Contra, Daly v. Bernstein, (New Mex.) 28 Pac. Rep. 764, and Wallach v. Riverside Bank, 206 N. Y. 434, 100 N. E. 50.

[95] Black v. Croft, 51 Ga. 368; McCool v. Jacobus, 7 Rob. (N. Y.) 115;

raised by the purchaser and the vendor agreed to refund the purchase money "if it should be adjudged that he had no legal right to sell, and by reason thereof the purchaser should be compelled to give up the premises," it was held that the purchaser could not detain the purchase money unless he had been actually or constructively evicted.[96]

If the purchaser assumes, as a part of the consideration, the payment of an incumbrance upon the property, the existence of such incumbrance is, obviously, no objection to the title.[97] He is, in such case, chargeable with notice of the contents of the instrument constituting the incumbrance, and cannot avoid his

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Furney v. Hemmenway, 53 Ill. 97. In Swindell v. Richey, 41 Ind. 281, it appeared that the owners of land, at a sale thereof by a commissioner, had agreed to pay off a ditch assessment and save the purchaser harmless therefrom, and it was held that the purchaser might set off the assessment against the purchase money in a suit therefor by the commissioner. In Ganz's Appeal, (Pa. St.) 15 Atl. Rep. 883, it was held that a purchaser might set off against the purchase money the amount paid by him to remove outstanding interests, but that he must pay the balance of the purchase money to the vendor. The fact that the vendor contracted to remove the outstanding interests but failed to remove a part of them, does not affect his right to recover subject to the purchaser's right of set-off. Where a sub-purchaser assumes the payment of a balance of purchase money due by his vendor to the original vendor, he cannot object to the title on the ground that it is incumbered by a mortgage in favor of such original vendor. Campbell v. Shrum, 3 Watts (Pa.), 60.

[96] Failing v. Osborne, 3 Oreg. 498.

[97] Feist v. Block, 100 N. Y. Supp. 843, 116 App. Div. 211. For circumstances under which evidence is admissible to show that the purchaser agreed to assume certain incumbrances on the property, see Riggins v. Post, (Tex. Civ. App.) 172 S. W. 210. A purchaser, subject to a mortgage in a specified amount, cannot refuse to perform on the ground that the specified amount is secured by two mortgages instead of one. Greenfield v. Mills, 107 N. Y. Supp. 705, 123 App. Div. 43. Nor because of the failure of the mortgage subject to which he purchased, to show the date of its maturity and the rate of interest on the debt secured. Halpern v. Fisch, 101 N. Y. Supp. 1019, 116 App. Div. 479. Nor because of unusual covenants in the mortgage. Baucher v. Stewart, 122 N. Y. Supp. 202, 136 App. Div. 844. If the purchaser fails to disclose, before the closing day, his intention not to assume an incumbrance on the property, the vendor is entitled to a reasonable time in which to remove the incumbrance. Schuler v. Dooley, 134 N. Y. Supp. 99, 149 App. Div. 814. A purchaser subject to a mortgage is entitled to rescind if foreclosure proceedings had been begun at the time of his purchase. Wacht v. Hart, 105 N. Y. Supp. 78, 120 App. Div. 189.

purchase, in the absence of deception or fraud, because he did not acquaint himself with the particular terms of the instrument and finds them to be different from what he had supposed.[98]

If the purchaser buys knowing that the vendor has only an equitable title, he cannot detain the purchase money or recover back such of it as may have been paid. It may be that the vendor will have the legal title by the time the purchase money is paid.[99] It may be doubted whether the purchaser would be permitted to detain the purchase money even if he bought believing that the vendor has the legal title, unless time were of the essence of the contract, or it should appear that the purchaser would be injured by delay in getting in the legal title. The fact that the incumbrance of which the purchaser complains is a matter of public record, does not affect the right to rescind.[1]

The purchaser seeking to be relieved from his bargain on the ground that the title is defective, need not aver that he was ignorant of the defect at the time of the sale. It is for the seller to allege and prove that the purchaser was aware of the condition of the title.[2]

§ 247. **CHANCING BARGAINS.** The right of the purchaser to rescind an executory contract for the sale of lands by recovering back the purchase money, or detaining that which remains unpaid, depends of course upon the nature of his contract with the vendor. The right of the purchaser in general to an indefeasible title has been elsewhere considered.[3] It is only necessary to say here that the purchaser is bound to complete his contract if both parties were fully advised of objections to the vendor's title, and the purchaser made a chancing bargain, taking the risk of the assertion of adverse claims.[4] In such a case he has neither the right to rescind the contract nor to require a conveyance with covenants for title, because it is the intention of the parties that the vendor shall be relieved from all responsibility or liability of any kind in respect to the title. Many titles are publicly known to be doubtful and are bought and sold with that understanding. There have been instances in which the purchaser has bought such a title, taken a quit-claim deed, and afterwards sold and conveyed at a profit to a person seeking a like opportunity of gain and taking the risk of losing the premises. Consequently nothing is better settled than that in such a case the purchaser cannot refuse to complete the contract on the ground that the title is bad.[5] But the burden will be upon the vendor to show that the purchaser took the risk of the title.[6] The purchaser, however, will not be deprived of his right to require a conveyance with covenants for title by the mere fact that he buys with knowledge that the title is doubtful, for it may be that the covenants he is to receive induce him to enter into the contract.[7] The burden will be upon the vendor to show that the purchaser, seeking to detain the purchase money, took the risk of the title.[8]

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[98] Feltenstein v. Ernst, 97 N. Y. Supp. 376, 113 App. Div. 903, distinguished in Oppenheim v. McGovern, 100 N. Y. Supp. 712, 115 App. Div. 135.

[99] Smith v. Haynes, 9 Me. 128.

[1] Judson v. Wass, 11 Johns. (N. Y.) 525, 6 Am. Dec. 392; Daly v. Bernstein (New Mex.) 28 Pac. Rep. 764.

[2] Taul v. Bradford, 20 Tex. 264; Hurt v. McReynolds, 20 Tex. 595.

[3] Ante, § 5 and post, § 283.

[4] Ewart v. Bowman, 70 S. C. Rep. 357, 49 S. E. Rep. 867; Ellis v. Anderton, 88 N. C. 472. It is true the sale was by an administrator in this case under an order of court, so that the rule *caveat emptor* applied; but no distinction

If the vendor informs the purchaser that he has no title, and sells merely his possession, the purchaser cannot recover back the purchase money on the ground that the title has failed; first, because

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is perceived between a case in which the purchaser expressly agrees to take such title as he can get, and one in which he buys, knowing that if the title is bad he will be compelled to take it. See, further, Twohig v. Brown, 85 Tex. 55, 19 S. W. Rep. 768; Cooper v. Singleton, 19 Tex. 267, 70 Am. Dec. 333; Stewart v. Kreuzer, 127 Md. 1, 95 Atl. 1052; Bushong v. Scrimshire, (Tex. Civ. App.) 172 S. W. 155. There would seem to be no more doubt about the proposition that the purchaser cannot recover back or detain the purchase money when the contract is executory, if he took the risk of the title, than in a case in which he accepts a quit-claim conveyance of the premises, knowing that the title is bad or doubtful. The only practical difference between the two cases would seem to be that the acceptance of the quit-claim with notice, conclusively shows that he took the risk of the title, while in the case of an executory contract the burden devolves on the vendor to show an acceptance of the risk.

[5] Ante, § 11. Jones v. Taylor, 7 Tex. 240, 56 Am. Dec. 48; Neel v. Prickett, 12 Tex. 137; Winne v. Reynolds, 6 Paige (N. Y.), 407, *dict.* Kerney v. Gardner, 27 Ill. 162; Maxfield v. Bierbauer, 8 Minn. 413 (367).

[6] Littlefield v. Tinsley, 26 Tex. 353.

[7] Ante, § 80.

[8] Twohig v. Brown, 85 Tex. 55, 19 S. W. Rep. 768.

he gets all to which he is entitled under the contract, and again, because the money is voluntarily paid, with full knowledge of the facts, and there can be no imputation of fraud or mistake.[9]

§ 248. **EFFECT OF ACCEPTING TITLE BOND.** The fact that the purchaser took from the vendor a bond conditioned to make title to the premises, commonly called a "title bond," does not, when the condition of the bond has been broken, deprive him of the right to recover back the purchase money, *eo nomine*, nor will he be driven to an action on the bond for damages, merely because he did not abandon the contract within a reasonable time after discovery of the vendor's want of title, for it may be that he had reason to believe that the vendor would perfect the title.[10]

The right of the purchaser to resist the payment of the purchase money on failure of the title, where the contract is executory, has been denied in a case in which the purchaser took a bond conditioned to make title with covenants of warranty, and had not been evicted by the adverse claimant. Practically, the acceptance of the title bond by the purchaser was given the same effect, as respects the detention of the purchase money, as the acceptance of a conveyance with covenants of warranty.[11] There are, however, several cases in which the opposite view has been taken.[12] If the purchaser be evicted from part of the premises covered by the title bond, he will be entitled to detain a proportionate part of the purchase money.[13]

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[9] Vest v. Weir, 4 Bl. (Ind.) 135. Here the vendor was a mere trespasser on the land. He sold his possession to the plaintiff for $350, telling him, at the time, that he had no title, and that the land belonged to the United States. The decision in this case was approved in Majors v. Brush, 7 Ind. 235, and there distinguished from Hawkins v. Johnson, 4 Bl. (Ind.) 21.

[10] Hurst v. Means, 2 Sneed (Tenn.), 546; Bellows v. Cheek, 20 Ark. 424.

[11] Coleman v. Rowe, 5 How. (Miss.) 469, 37 Am. Dec. 164, the court saying: "If, then, there has been no fraud, nor any eviction, and the agreement is executed, the vendee can have no claim to relief on the mere ground of a failure of title. 1 Johns. Ch. (N. Y.) 213. But as in the present case the deed has not been delivered, the contract remains executory, and a different rule, it is said, must prevail. This distinction is laid down and supported by the court in the case of Miller v. Long, 3 A. K. Marsh. (Ky.) 335. In that case the right of the vendee to be relieved, where the deed has been delivered, is denied, but it is said (*ob. dict.*) to be otherwise where the contract is executory, to execute the deed in future. In the first case the court recognizes the general rule laid down, that the vendee must resort to his remedy at law upon his covenants. But in cases like the present, where the vendee takes the precaution to secure himself by a penal bond covenanting to convey a title with full covenants, and that appears to be the consideration of his promise to pay the money, though we may consider the covenant to convey as an executory contract, yet it is difficult to conceive how that

If the vendor execute a title bond, it would seem that the purchaser should not be allowed to surrender the possession, rescind the contract and recover back the purchase money, on the ground that the title is bad or unmarketable, until the condition of the bond has been actually broken. If, however, that condition be broken, if the vendor be unable to make title on the day specified, and the purchaser be ready, able and willing to complete the contract, he may rescind and recover back the purchase money already paid.[14]

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circumstance can vary the rule as to relief. In the latter case the vendee has his remedy at law upon the covenants in the bond, and he would seem to be equally subject to the general rule to resort to that remedy, if there is no fraud nor eviction." See, also, McGhee v. Jones, 10 Ga. 127; Black v. Walker, 98 Ga. 31, 26 S. E. Rep. 477; Johnson v. Dorough, 99 Ga. 644, 27 S. E. Rep. 187; Preston v. Walker, 109 Ga. 290, 34 S. E. Rep. 571; Foute v. Elder, 109 Ga. 713, 35 S. E. Rep. 118; Mallard v. Allred, 106 Ga. 503, 32 S. E. Rep. 588; Horne v. Rogers, 110 Ga. 362, 35 S. E. Rep. 715; Strong v. Waddell, 56 Ala. 471, 473, *dictum.* Coleman v. Bank, 115 Ala. 307, 22 So. Rep. 84; Roach v. Rutherford, 4 Des. (S. C.) 126, 6 Am. Dec. 606.

[12] Hurst v. Means, 2 Sneed (Tenn.), 546. Bellows v. Cheek, 20 Ark. 424; Dunnivan v. Hughes, 86 Ark. 443, 111 S. W. 271; Henderson v. Fields, 143 Ga. 547, 85 S. E. 741; Kennedy v. Smith, 10 Ga. App. 644, 82 S. E. 155; Mobley v. Keys, 13 Sm. & M. (Miss.) 677; Brittain v. McLain, 6 Ired. Eq. (N. C.) 165; Benson v. Coleman, 8 Rich. L. (S. C.) 45; Neel v. Prickett, 12 Tex. 137. (Compare Sayre v. Mohney, 30 Oreg. 238, 47 Pac. Rep. 197.) In Georgia it has been held that the obligee in the bond could not rescind nor detain the purchase money, unless he could show clearly a paramount outstanding title against the obligor, and also show fraud on his part, or that he is insolvent, or a non-resident, or show other facts which would authorize interference with the contract by a court of equity. Black v. Walker, 98 Ga. 31, 26 S. E. Rep. 477; Newton v. Bower, 146 Ga. 524, 91 S. E. 684.

[13] Freeman v. Bow, 33 Ky. L. R. 254, 109 S. W. 877.

[14] Smith v. Lewis, 26 Conn. 110; Clark v. Weis, 87 Ill. 438, 29 Am. Rep. 60; Hough v. Rawson, 17 Ill. 588; Smith v. Lamb, 26 Ill. 396, 79 Am. Dec. 381; Sanderlin v. Willis, 98 Ga. 278, 25 S. E. Rep. 437; Kares v. Covell, 180 Mass. 206, 62 N. E. Rep. 244. In Miller v. Owens, Walk. (Miss.) 245 (1826), the vendor and his wife sold to the purchaser certain interests in real property, among others that of an infant child of the wife by a former

A condition in the bond that the obligor shall convey a good and clear title free from all incumbrances, refers to the title which is to pass by the deed and not to the state of things existing at the time of the execution of the bond. Hence, the condition is broken by the condemnation of a part of the premises for the purpose of widening a highway after the execution of the bond, and the obligee is entitled to recover back payments made by him on the land.[15]

§ 249. **INQUIRY INTO CONSIDERATION OF SEALED INSTRUMENT.** At common law the consideration of a sealed instrument could not be inquired into; consequently, in an action on a bond given for the purchase money of land, the defendant could not show that the consideration had failed for want of title in the vendor.[16] This rule, however, has been very generally changed throughout the United States by statutes abolishing all distinctions between sealed and unsealed instruments,[17] or allowing failure of consideration to be set up as a defense to an action on an instrument under seal.[18]

§ 250. **RIGHT TO ENJOIN THE COLLECTION OF THE PURCHASE MONEY WHILE THE CONTRACT IS EXECUTORY.** If the purchaser has had no opportunity to set up the defense of want of title in the vendor in an action for the purchase money, he may have relief in equity by way of injunction. But he will not, in some of the States, be entitled to that remedy, where there is a judgment for the purchase money, unless he had no opportunity

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husband, and executed a bond to make title or indemnify the purchaser against any claim of the infant. While the contract was yet executory, the purchaser refused to pay the purchase money on the ground of the defective title, and judgment was rendered in his favor by the court below. This was reversed on appeal, the court saying that though the vendor "could not sell the right of another person to a tract of land to the prejudice of the real owner, yet having possession and an undivided interest in the premises, and having sold each interest separately, but given possession of the whole to the purchaser, and, as it appears, the purchaser sought the contract and took the security he required, and he and his heirs remaining in the quiet and peaceable possession of the premises, we can see no reason why he should not pay the purchase money."

[15] Kares v. Covell, 180 Mass. 206, 62 N. E. Rep. 244.

[16] Coleman v. Sanderlin, 5 Humph. (Tenn.) 561.

[17] Mullins v. Jones, 1 Head (Tenn.), 519.

[18] Rawle Covts. (5th ed.) § 325.

to make his defense at law.[19] In this respect the rule appears to be the same whether the contract is executed or executory. The vendor, having the legal title, may, of course, maintain ejectment at any time against the purchaser if he fail to pay the purchase money. Failure of the title, it is apprehended, would be no defense to such an action. It would seem, however, that if the purchaser were entitled to detain the premises in order to enforce his lien for the purchase money paid, or if, under the contract, he had a right to compel the vendor to remove incumbrances or objections to the title, an injunction would lie to stay proceedings in the action of ejectment.

The fact that the purchaser had a remedy over by action at law on a title bond executed by the vendor has been held no ground for refusing an injunction against the collection of the purchase money.[20] The injunction will not be granted if the difficulty in obtaining title was brought about by the neglect of the purchaser himself; as where he failed to pay the purchase money in the lifetime of the vendor so that proceedings in chancery to obtain the title from infant heirs at law became necessary.[21] Nor will the injunction be granted on the ground that the title has failed, if it appear that the rights of all adverse claimants have become barred by the Statute of Limitations.[22]

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[19] (As to the right to an injunction where the contract has been executed by a conveyance with covenants for title, see post, ch. 34.) High on Injunctions (3d ed.), § 410; Shipp v. Wheless, 33 Miss. 646; McLaurin v. Parker, 24 Miss. 509; Kebler v. Cureton, Rich. Eq. Cas. (S. C.) 143; Bartlett v. Loudon, 7 J. J. Marsh. (Ky.) 641; Dudley v. Bryan, 6 J. J. Marsh. (Ky.) 231; Moore v. Hill, 59 Ga. 760; Bullitt v. Songster, 3 Munf. (Va.) 54. In this case the vendor had agreed in writing that if the purchaser should be evicted from any part of the land the purchase money should be correspondingly abated. A purchaser paying off incumbrances after the judgment against himself for the purchase money, may have an injunction against the judgment if the vendor is insolvent. Shelby v. Marshall, 1 Blackf. (Ind.) 384. An injunction against proceedings to collect the purchase money will not be granted for the purpose of allowing the purchaser to avail himself of counterclaim, offset or unliquidated demands, which might be availed of in a defense to the action at law. Freize v. Chapin, 2 R. I. 429. Nor if the plaintiff merely seeks damages in equity. Robertson v. Hogshead, 3 Leigh (Va.), 667. High on Injunctions (3d. ed.), § 411. If the purchaser's obligation for the purchase money provide that it shall not be payable until certain disputes respecting the title are ended, the pendency of those disputes constitutes no ground for an injunction against an action on the obligation, because the fact that the disputes are not ended is a complete defense at law. Hence, it has been said that in a contract to pay money on a contingency, it being necessary to allege and prove the happening of the contingency before a judgment at law can be obtained, an injunction against the judgment, if suffered by the payor, cannot be sustained on the ground that the contingency has not occurred. Allen v. Phillips, 2 Litt. (Ky.) 1.

[20] Brittain v. McLain, 6 Ired. Eq. (N. C.) 165; Heavner v. Morgan, 41 W. Va. 428, 23 S. E. Rep. 874.

If the vendor fraudulently concealed or misrepresented the state of his title an injunction will lie to restrain the collection of the purchase money;[23] and that too, it is apprehended, without regard to the fact that the fraud may be or might have been set up as a defense of law.[24] The remedy in equity in such cases is concurrent with that at law.

In Pennsylvania the vendór is entitled to a judgment for the whole of the purchase money, but a stay of execution will be awarded to the purchaser until the vendor removes any lien or incumbrance upon the premises for which he is liable.[25]

The remedy by injunction against proceedings to collect the purchase money is not necessarily in disaffirmance or rescission of the contract; for it may be that the object of the injunction is to compel the vendor to remove defects in the title, or to apply the purchase money to the discharge of incumbrances, or to enforce some equity in behalf of the purchaser which does not require a rescission of the contract.[26] In such case it is customary to grant a temporary injunction, and of course there need be no surrender of the premises by the purchaser. But if he seeks a perpetual injunction, which is in effect a rescission of the contract, he must restore the premises to the vendor. He cannot have both the injunction and the benefit of his purchase.[27] But while a perpetual injunction substantially rescinds the contract, the complainant must pray a rescission in terms; otherwise it will be presumed that he intends to keep both the premises and the purchase money, and the bill will be dismissed.[28] If the purchaser buys with knowledge that the title is defective, he cannot have a perpetual injunction unless it appear that the title cannot be perfected.[29] This seems a reasonable rule, for it may be that the purchase was made with the understanding that the title should be perfected before payment of the purchase money might be compelled. But if the contract was one of pure hazard, the purchaser to get merely such title as the vendor had, there can be no doubt that the injunction should be denied.[30]

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[21] Prout v. Gibson, 1 Cranch (C. C.), 389.

[22] Amick v. Bowyer, 3 W. Va. 7; Piedmont Coal Co. v. Green, 3 W. Va. 54; Peers v. Barnett, 12 Grat. (Va.) 410, where the injunction suit had lingered on the docket until defects in the title were cured by the statute.

[23] Starke v. Henderson, 30 Ala. 438; Lanier v. Hill, 25 Ala. 554. In both these cases the vendor, an administrator *c. t. a.*, had falsely represented that he had authority under the will to sell.

[24] Post, chs. 29, 34, § 329.

[25] Jackson v. Knight, 4 Watts & Serg. (Pa.) 412.

[26] Thus, in Price v. Browning, 4 Grat. (Va.) 72, an injunction was granted until the extent of the purchaser's losses from incumbrances on the premises could be ascertained. And in Reeves v. Dickey, 10 Grat. (Va.) 138, the cause was remanded to the lower court with instructions to grant a temporary injunction until it could be ascertained whether the title could be perfected, and to perpetuate the injunction if it appeared that a good title could never be made.

If by the terms of the contract payment of the purchase money is a condition precedent to the purchaser's right to demand a deed, it has been held that a bill to enjoin the collection of the purchase money on the ground that the title has failed should be dismissed, unless the complainant alleges that he offered to pay the purchase money and demanded a deed. If, however, he had made such tender and demand, and the defendant had refused, or was unable to convey a good title, the collection of the purchase money would be enjoined until the sufficiency of the title could be determined.[31] If the vendor refuse to convey the land by good and sufficient deed, or refuse or neglect to procure the signature of all necessary parties to the conveyance in order that the title may be perfected, the collection of the purchase money may be enjoined.[32] If the vendor seeks a dissolution of the injunction the burden will be upon him to show that he can convey to the purchaser such a title as the contract requires.[33] If an injunction against the collection of the purchase money be dissolved on the ground that the title has been or may be perfected by the vendor, neither costs nor damages should be awarded against the purchaser, the vendor having incurred these by reason of his own default.[34]

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[27] Edwards v. Strode, 2 J. J. Marsh. (Ky.) 506; Markham v. Todd, 2 J. J. Marsh. (Ky.) 364, where it was held that the court might at the time of perpetuating the injunction, decree that the premises be restored to the vendor. Brannum v. Ellison, 5 Jones Eq. (N. C.) 435.

[28] Williamson v. Raney, Freem. Ch. (Miss.) 112.

[29] As to right to injunction under similar circumstances where the contract has been executed by a conveyance with covenant for title, see post, ch. 34. Reeves v. Dickey, 10 Grat. (Va.) 138. In Lucas v. Chapeze, 2 Litt. (Ky.) 31, the complainants had purchased an equitable title with knowledge that a suit by the vendee to obtain the legal title was pending. It was held that an injunction to restrain the collection of the purchase money was properly dismissed in the absence of evidence that the suit to obtain the legal title was not being pursued with reasonable diligence. Williamson v. Raney, Freem. Ch. (Miss.) 112.

[30] Carrico v. Froman, 2 Litt. (Ky.) 178, where the purchaser agreed in writing that the purchase money should not be detained if adverse claims were asserted.

§ 251. **RIGHTS AGAINST TRANSFEREE OF PURCHASE-MONEY NOTE.** The purchaser of a negotiable purchase-money note after maturity takes subject to the vendee's right of defense for want of title to the land.[35] So, also, one who purchases before maturity with notice of the vendee's equities.[36] But a purchaser of the note before maturity for value and without notice, will not be affected by failure of the vendor's title.[37] If the note was not negotiable, the purchaser, whether before or after maturity, takes subject to equities between the vendor and the vendee.[38]

§ 252. **REFUSAL OF VENDOR TO CONVEY FOR WANT OF TITLE.** It has been held in England that if the purchaser execute a note to secure deferred payments of the purchase money he cannot, if the vendor refuses to convey, rescind the contract by detaining the purchase money. He must pay the note and look to his action to recover damages for breach of the contract. The reason is that the purchaser, by executing a distinct instrument promising to pay a part of the purchase money on a particular day, undertakes to pay on that day at all events.[39] This rule was recognized in a case in New York in which the failure of the vendor to convey was occasioned by his want of title.[40] It was unnecessary, however, to decide the point in that case, and it may be doubted whether the rule established by the English case would be followed in America, in a case in which the purchaser had a clear right to rescind the contract on the ground that the title had failed.[41] There would seem to be no reason in requiring the purchaser to pay over money to the vendor which he might immediately recover back from him as damages for breach of the contract.

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[31] Mitchell v. Sherman, Freem. Ch. (Miss.) 120, where the vendor gave bond to convey "a good and sufficient title, as soon as the entire and full amount of the purchase money should be paid."

[32] Jayne v. Brock, 10 Grat. (Va.) 211; McKoy v. Chiles, 5 T. B. Mon. (Ky.) 259, where the vendor failed to procure a relinquishment of his wife's contingent right of dower. Fishback v. Williams, 3 Bibb (Ky.), 342.

[33] Moredock v. Williams, 1 Overt. (Tenn.) 325 (257); Moore v. Cooke, 4 Hayw. (Tenn.) 85 (281).

[34] Fishback v. Williams, 3 Bibb (Ky.), 342. Each party was decreed to pay his own costs. Porter v. Scobie, 5 B. Mon. (Ky.) 387, reversing the court below; Lampton v. Usher, 7 B. Mon. (Ky.) 57. In Reeves v. Dickey, 10 Grat. (Va.) 138, costs were refused the vendor even though the purchaser knew when he bought that the title was defective.

[35] Johnson v. Silsfiell, 6 Baxt. (Tenn.) 41.

[36] Knapp v. Lee, 3 Pick. (Mass.) 452; Lamb v. James, 87 Tex. 485, 29 S. W. Rep. 647.

[37] Gee v. Saunders, 66 Tex. 333.

[38] Timms v. Shannon, 19 Md. 296, 81 Am. Dec. 632.

§ 253. **RIGHT TO RESCIND AS DEPENDENT ON TENDER OF PURCHASE MONEY AND DEMAND OF DEED.** The duty of the purchaser to tender the purchase money and demand a conveyance as a condition precedent to the right to rescind the contract on failure of the title, and to detain or recover back the purchase money, as the case may be, has been elsewhere considered.[42] It may be added here, however, that when the vendor's title is defective and the vendee, upon ascertaining it, refuses to take such title and the vendor, instead of taking measures to cure the defects, simply holds himself ready to convey such title as he has and requests the vendee to accept it, giving him notice that he will be held for any loss, the vendee is not called upon to make any other or further tender or offer of payment in order to rescind the contract by detaining the purchase money or recovering back the payments made.[43] If the vendor fails to take steps to cure defects in the title, pointed out by the purchaser, until the time for curing such defects expires, the purchaser is not bound to tender full performance before suing to recover his deposit.[44] In a case in which there was evidence that the purchaser had paid part of the purchase money and was willing and ready to pay the balance and to accept a deed, which deed, however, was not tendered by the vendor, and could not be given because the title was bad, it was held that the failure of the purchaser to tender the purchase-money and demand a deed did not affect his right to rescind, though there had been no absolute refusal by the vendor to make a deed.[45] If, after tender of the purchase money and demand of a conveyance, the vendor do not perform the contract on his part, the purchaser is not bound to demand the return of his purchase money or notify the vendor of his intent to rescind the contract before he can maintain an action to recover back what he had paid.[46]

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[39] Spiller v. Westlake, 2 B. & Ad. 155, 22 E. C. L. 74; Moggridge v. Jones, 14 East, 486, 3 Camp. 38; Freeligh v. Platt, 5 Cow. (N. Y.) 494; Chapman v. Eddy, 13 Vt. 205.

[40] Lewis v. McMillen, 41 Barb. (N. Y.) 430.

[41] It was intimated by PARKE, J., in Spiller v. Westlake, supra, that the defendant might have resisted the payment of the note in that case if the circumstances had been such that the money in dispute might have been recovered back if the defendant had paid it as a deposit, which is as much as to say that the defendant might have resisted the payment of the note if he had been entitled to rescind the contract.

[42] Ante, § 86. Leach v. Rowley, 138 Cal. 709, 72 Pac. Rep. 403. The mere existence of a mortgage on the property sold does not relieve the purchaser from his obligation to tender the purchase money. Whitney v. Crouch, 172 N. Y. Supp. 729. See the case of Noyes v. Brown (Minn.) 171 N. W. 803, for an instructive review of cases upon the question when the covenants, in the respect stated in the text, are to be considered non-concurrent and independent.

It has been held that if payment of the purchase money and the conveyance of a good title to the purchaser are by the contract to be simultaneous or concurrent acts, the purchaser may resist the payment of the purchase money though he has not been evicted from the premises, unless the vendor shows that he has tendered to the purchaser such a conveyance and title as the contract requires.[47] If, however, under the contract, the purchaser is obliged to pay the purchase money before the making of the conveyance he cannot refuse so to do on the ground that the title is bad, without surrendering or offering to surrender the premises.[48] If under the contract the purchaser is bound to tender the purchase money before he can rescind, the mere abandonment of the possession without such tender, demand of title and refusal, will constitute no defense to an action for the purchase money.[49] If the contract provide that the purchase money shall not be paid until a good title is tendered, or if the vendor permits the purchaser to take possession without any agreement as to when the purchase money shall be paid, the purchaser cannot be required to tender performance or bring the money into court, as a condition precedent to his right to rescind the contract on failure of the title.[50]

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[43] Hartley v. James, 50 N. Y. 41. See, also, Hanson v. Fox, 155 Cal. 106, 99 Pac. 489, 132 Am. St. Rep. 72, 20 L. R. A. (N. S.) 338; Joyce v. Shaffer, 97 Cal. 335, 32 Pac. 320. In McCullough v. Boyd, 120 Pa. St. 552, 14 Atl. Rep. 438, it was held that the purchaser must aver payment or tender of the purchase money in full, or set forth a reason for non-payment, before he can recover back such of the purchase money as he may have paid, where by the terms of his contract, he is not entitled to a conveyance until the purchase money has been fully paid.

[44] Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315; Post, § 311.

[45] Linton v. Allen, 154 Mass. 432, 28 N. E. Rep. 780.

[46] Gillett v. Maynard, 5 Johns. (N. Y.) 85, 4 Am. Dec. 329; Camp v. Morse, 5 Denio (N. Y.), 164; Van Benthuysen v. Crasper, 8 Johns. (N. Y.) 259; Frost v. Smith, 7 Bosw. (N. Y.) 108; Chatfield v. Williams, 85 Cal. 518, 24 Pac. Rep. 839.

There are cases which hold that if the purchaser executes his notes for the purchase money, payable in installments, and takes a bond from the vendor conditioned to make title when the last installment is paid, the covenants are independent, and the purchaser cannot detain any of the installments on the ground that the title is defective,[51] the reasons being, among others, that the vendor may perfect the title before all of the purchase money is paid,[52] and that it may be that he looks to the purchase money itself as a fund for the removal of objections to the title.[53] If, however, the vendor were insolvent or for any other reason the purchaser's rights would be greatly endangered by a rigid observance of the foregoing rule, it is apprehended that the purchase money might be paid into court to be there applied to the clearing up of the title or returned to the purchaser if it should be found that no title could be had. It has also been held that if the vendor execute a title bond conditioned to convey *on payment of purchase money*, such payment constitutes a condition precedent to the conveyance of the title; so that if, after default in the payment of the purchase money, the vendor conveys the premises to a stranger, thereby incapacitating himself from conveying to the purchaser, that fact constitutes no defense to an action for the purchase money. The purchaser must pay the purchase money and look to his remedy on the title bond.[54] And if in such case instead of being merely in default in the payment of the purchase money the purchaser, after paying part thereof, abandons the contract, the vendor is free to sell

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[47] Feemster v. May, 13 Sm. & M. (Miss.) 275, 53 Am. Dec. 83; Wiggins v. McGimpsey, Id. 532, citing Robb v. Montgomery, 20 Johns. (N. Y.) 15; Sage v. Ranney, 2 Wend. (N. Y.) 534; Peques v. Mosby, 7 Sm. & M. (Miss.) 340. But see McMath v. Johnson, 41 Miss. 439, and cases cited infra. If, by the contract, the purchase money is to be paid on a day fixed, and the deed is to be executed at a later day, the covenants are independent, and it is no defense to an action for the purchase money that the conveyance had not been executed and tendered to the purchaser. Vandiver v. Reynolds, 174 Ala. 582, 57 So. 462.

[48] Cases cited in last note. George v. Stockton, 1 Ala. 136.

[49] Clemens v. Loggins, 1 Ala. 622.

[50] 2 Warvelle Vend. 915, 916.

[51] Ante, § 88. Post, ch. 32. 2 Warvelle Vend. 843. Gibson v. Newman, 1 How. (Miss.) 341; Coleman v. Rowe, 5 How. (Miss.) 460, 37 Am. Dec. 164; Clopton v. Bolton, 23 Miss. 78; McMath v. Johnson, 41 Miss. 439, disapproving Peques v. Mosby, 7 S. & M. (Miss.) 540, and Feemster v. May, 13 S. & M.

(Miss.) 275, 53 Am. Dec. 83; Drenner v. Boyer, 5 Ark. 497; Monsen v. Stevenson, 56 Ill. 335; Hudson v. Swift, 20 Johns. (N. Y.) 25. This, however, was an action to recover back the purchase money; but the principle appears to be the same in either case. Ellis v. Hoskins, 14 Johns. (N. Y.) 363; Loveridge v. Coles, 72 Minn. 57, 74 N. W. Rep. 1109.

[52] Greenby v. Cheevers, 9 Johns. (N. Y.) 127.

[53] Green v. Green, 9 Cow. (N. Y.) 46; Ellis v. Hoskins, 14 Johns. (N. Y.) 363.

[54] Foster v. Jared, 12 Ill. 454, the court saying: "The conveyance of the land and the payment of the note in question are not concurrent acts. The payment of the note is to precede the conveyance. The vendor is not bound to execute a conveyance until all the notes are paid. The doctrine that in the case of dependent covenants neither party can recover unless he has fully performed or offered to perform on his part has, therefore, no application to this case. The defendant cannot put the vendor in default until he has paid or offered to pay the entire purchase money. He undertook to pay the first two installments before he was to receive a conveyance. He chose, as respects this portion of the consideration, to rely on the covenants of the vendor (in the title bond) to compel the execution of a deed. It is no excuse that the latter has now no existing capacity to make a good title. It will be enough if he has the title when the defendant has the right to demand a conveyance. He may require a perfect title before he can be called on to convey." Citing Sage v. Ranney, 2 Wend. (N. Y.) 532.

and convey the premises to whom he chooses, and the purchaser cannot, upon such conveyance, recover back any of the payments made. The purchaser by his conduct forfeits what has been paid.[55]

Where the purchase money is payable in installments, and the vendor accepts a payment after all the installments are due, he thereby waives his right to put the purchaser in default and to declare a forfeiture. In such case payment of the purchase money becomes a dependent and concurrent condition, and the vendor must tender a deed before he can declare a forfeiture.[56]

The purchaser cannot be put in default until the vendor has complied with his agreement to furnish an abstract of title; and the burden devolves on the vendor to show waiver of such agreement by the purchaser.[57]

We have seen that in cases in which the payment of the purchase money is not by the express terms of the contract made a condition precedent to the right of the purchaser to demand a conveyance of an indefeasible title, no such payment or tender of payment need be made as a condition precedent to the right to rescind upon an absolute and undisputed failure of the title.[58] This rule applies as well where the purchaser has only an "option" to purchase as where the purchase has been actually made.[59]

§ 254. **OFFER TO RESCIND.** As a general rule the action to recover back the purchase money on failure of the title, or a defense of an action to recover the purchase money on the same grounds, cannot be maintained by the purchaser unless he has given notice to the vendor of his intention to rescind, and has offered to surrender whatever he has received under the contract.[60]

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[55] Rounds v. Baxter, 4 Me. 454; Seymour v. Dennett, 14 Mass. 266.

[56] Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126. Hayt v. Bentel, 164 Cal. 680, 130 Pac. 432.

[57] Liebling v. Renfer, 211 Ill. App. 370.

[58] Ante, this section.

[59] Burke v. Davies, 85 Cal. 110.

[60] 1 Sugd. Vend. (14th ed.) 243; 2 Warvelle Vend. 883; Herbert v. Stanford, 12 Ind. 503, citing Pope v. Wray, 4 M. & W. 451; McQueen v. State Bank, 2 Ind. 413, which were all cases of sales of personal property. Havens v. Goudy, 1 Ohio, 449; Williams v. Thomas, 7 Kulp (Pa. Com. Pl.), 371; Higley v. Whittaker, 8 Ohio, 201; Mullins v. Bloomer, 11 Iowa, 360; Carney v. Newberry, 24 Ill. 203, case of personal property.

The reason of the rule is that the vendor must be given an opportunity to remove objections to the title and to perform the contract on his part. It has been held, however, that if the purchaser did not take possession and has received nothing under the contract, he may recover back or detain the purchase money without an offer to rescind.[61]

§ 255. **PLEADING AND PROOF.** It has been held that the purchaser seeking to recover back or detain the purchase money must set forth in his pleadings facts showing want of title in his vendor, and that a general averment that the title is bad is insufficient.[62] But if the contract be executory and the objection to the title is that it is doubtful or unmarketable, the better opinion seems to be that the burden of proof is on the vendor to show *prima facie* that the title is good.[63] But, obviously, the vendor cannot be compelled to show the non-existence of any and every fact which might invalidate his title, for there would be practically no end to such an inquiry. He could hardly be compelled to offer proof of the competency of every grantor in his chain of title. Having shown a record title free from objection on its face, the burden shifts to the purchaser, who should then point out the defect of which he complains.[64]

The purchaser cannot, on appeal from a judgment against him for the purchase money, object that the title to the estate was defective or incumbered, unless he made that defense in the court below.[65]

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[61] Herbert v. Stanford, 12 Ind. 503, and cases cited supra.

[62] Walker v. Towns, 23 Ark. 147; Copeland v. Lawn, 10 Mo. 266. In an action to recover purchase money, a plea that the vendor had no title when he was required to convey, and that the premises were incumbered by a mortgage, is bad for duplicity. Camp v. Morse, 5 Den. (N. Y.) 161.

[63] Negley v. Lindsey, 67 Pa. St. 217, 5 Am. Rep. 427, SHARSWOOD, J., saying: "How can a defendant (purchaser) show defects in the plaintiff's title unless it is produced to him. It is not enough to say that he may resort to the records. He must have some clue to trace it there. Besides, there are many necessary facts as to which the records will give him no information, such as descents under the intestate laws, the death of tenants for life, and others of a similar kind."

[64] Ante, § 117. Hollifield v. Landrum, (Tex. Civ. App.) 71 S. W. Rep. 979, citing the text.

[65] Snevily v. Egle, 1 Watts & S. (Pa.) 480.

The purchaser seeking to recover his deposit must allege in his complaint that he is ready, willing, and able to pay, and has offered to pay the purchase money, and that he has demanded a deed from the vendor.[66] But such allegations are not necessary when it appears that there are defects in the title which were not, on objection by the purchaser, removed by the vendor and which could not be removed by him within a reasonable time.[67]

§ 255-a. **STATUTE OF LIMITATIONS.** The right of the purchaser to recover the paid purchase money accrues when the vendor tenders a deed and the purchaser rejects the deed because of defects in the title; and the Statute of Limitations begins to run at that time.[68]

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[66] Snowden v. Derrick, 14 Cal. App. 309, 111 Pac. 757; Kister v. Pollak, 109 N. Y. Supp. 204, 125 App. Div. 226.

[67] Snowden v. Derrick, 14 Cal. App. 309, 111 Pac. 757.

[68] Reed v. Sefton, 11 Cal. App. 88, 103 Pac. 1095.

CHAPTER XXV.

OF THE OBLIGATION OF THE PURCHASER TO RESTORE THE PREMISES TO THE VENDOR.

GENERAL PRINCIPLES. § 256.
VENDOR MUST BE PLACED IN STATU QUO. § 257.
RESTORATION OF PREMISES A CONDITION PRECEDENT TO RESCISSION. § 258.
RULE IN PENNSYLVANIA. § 259.
ESTOPPEL OF PURCHASER TO DENY VENDOR'S TITLE. § 259-a.
RESTORATION OF THE PREMISES IN CASES OF FRAUD. § 260.
WHEN PURCHASER NEED NOT RESTORE THE PREMISES. PURCHASER'S LIEN. § 261.
OTHER EXCEPTIONS. § 262.
RESTORATION OF THE PREMISES WHERE THE CONTRACT IS VOID. § 263.

§ 256. **GENERAL PRINCIPLES.** The next cardinal rule which we shall consider as controlling the rights of the parties, when the purchaser seeks to avoid the contract on failure of the title, is as follows:

PROPOSITION II. *A purchaser of lands in undisturbed possession cannot, as a general rule, while the contract is executory, recover back the purchase money on failure of the title, or resist the payment thereof, without restoring, or offering to restore, the premises to the vendor, and placing him in statu quo.*[1]

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[1] 1 Sugd. Vend. m. p. 407, 472 (6th Am. ed.); Nicolson v. Wadsworth, 2 Swanst. 365; Wickham v. Ernest, 4 Madd. 34; Young v. Sincombs, 1 Younge, 275; Tindal v. Cobham, 2 Myl. & K. 385; Cope v. Williams, 4 Ala. 362; Donaldson v. Waters, 30 Ala. 175; Lett v. Brown, 56 Ala. 550; Wade v. Killough, 3 Stew. & P. (Ala.) 431; George v. Stockton, 1 Ala. 136; Clemens v. Loggins, 1 Ala. 622; Stone v. Gover, 1 Ala. 287; Tankersly v. Graham, 8 Ala. 247; Helvenstein v. Higgason, 35 Ala. 259; Eads v. Murphy, 52 Ala. 520; Svoly v. Scott, 56 Ala. 555; Union Stave Co. v. Smith, 116 Ala. 416, 22 So. Rep. 275; Peay v. Capps, 27 Ark. 160; Haynes v. White, 55 Cal. 39; Hicks v. Lovell, 64 Cal. 29, 49 Am. Rep. 679, 27 Pac. Rep. 942; Gates v. McLean, 70 Cal. 42, 11 Pac. Rep. 489; Hannan v. McNickle, 82 Cal. 122, 23 Pac. Rep. 271; Rhorer v. Bila, 83 Cal. 54, 23 Pac. Rep. 274; Worley v. Northcott, 91 Cal. 512, 27 Pac. Rep. 767; Booth v. Saffold, 46 Ga. 278; Cherry v. Davis, 59 Ga. 454; Summerall v. Graham, 62 Ga. 729; Preston v. Walker, 109 Ga. 290, 34 S. E. Rep. 571; Martin v. Chambers, 84 Ill. 579; Long v. Saunders, 88 Ill. 187; Osborn v. Dodd, 8 Bl. (Ind.) 467; Wright v. Blackley,

This proposition is founded upon the plainest principles of equity. The purchaser cannot say to the vendor "our contract is at an end, but I shall continue to occupy the premises until I have no further use for them."[2] If the rule were otherwise the purchaser might retain the possession until the Statute of Limitations should bar the rights of the adverse claimant, and thus acquire the estate without paying any of the purchase money.[3] So long as the purchaser retains possession of the premises, with notice of objection to the title, he is looked upon as waiving the right to rescind.[4] Another reason why the purchaser cannot sue to recover

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3 Ind. 101; Wiley v. Howard, 15 Ind. 169; Dunn v. Mills (Kan.), 79 Pac. Rep. 146, 502; Reeve v. Downs, 22 Kan. 330; Bodley v. McCord, 4 J. J. Marsh. (Ky.) 483; Peebles v. Stephens, 3 Bibb (Ky.), 324, 6 Am. Dec. 660; Childs v. Lockett, 107 La. 270, 31 So. Rep. 751; Hill v. Samuel, 31 Miss. 307; Shipp v. Wheless, 33 Miss. 647; Holladay v. Menefee, 30 Mo. App. 307; Davis v. Watson, 89 Mo. App. 15; More v. Smedburg, 8 Paige Ch. (N. Y.) 600; Gale v. Nixon, 6 Cow. (N. Y.) 445; Lewis v. McMillan, 41 Barb. (N. Y.) 420; Wright v. Delafield, 23 Barb. (N. Y.) 498; Tompkins v. Hyatt, 28 N. Y. 347; Sayre v. Mohney, 30 Oreg. 238, 47 Pac. Rep. 197; Garvin v. Cohen, 13 Rich. L. (S. C.) 153; Kelly v. Kershaw (Utah), 16 Pac. Rep. 488; Florence Oil Co v. McCandless, 26 Colo. 534, 58 Pac. Rep. 1084; Horton v. Arnold, 18 Wis. 212, where buildings on the premises had been destroyed by fire, In a few cases, in which the contract had not been executed by a conveyance, it seems to have been held that the purchaser might detain the purchase money on failure of the title, though he had not been evicted from the premises nor had surrendered the possession to the vendor. Lewis v. McMillan, 31 Barb. (N. Y.) 395; reversed on motion for new trial, 41 Barb. (N. Y.) 420; In Hood v. Huff, 2 Tread. (S. C.) 159 the contract had been executed. In Feemster v. May, 13 Sm. & M. (Miss.) 275, 53 Am. Dec. 83, and Wiggins v. McGimpsey, 13 Sm. & M. (Miss.) 532, the purchaser was held entitled to detain the purchase money, though he was undisturbed in the possession, on the ground that the contract required the vendor to tender a deed conveying a good title before the purchaser could be compelled to pay the purchase money. See ante, § 253.

Recent cases: Francis v. Shrader, (Cal. App.) 177 Pac. 168; Russell v. Hawxhurst, (Cal. App.) 187 Pac. 146, citing Worley v. Nethercott, 91 Cal. 512, 27 Pac. 767, 25 Am. St. Rep. 209; Haile v. Smith, 128 Cal. 415, 60 Pac. 1032; Powell v. Hunter, 257 Mo. 440, 165 S. W. 1009; Allen v. Adams, 162 Iowa 300, 143 N. W. 1092; Gregory v. Keenan, 256 Fed. 949.

[2] More v. Smedburgh, 8 Paige (N. Y.), 600, 606.

[3] Congregation v. Miles, 4 Watts (Pa.), 146.

[4] Bellamy v. Ragsdale, 1 B. Mon. (Ky.) 293; Thompson v. Dulles, 5 Rich. Eq. (S. C.) 370; Hale v. Wilkinson, 21 Grat. (Va.) 75; Rhorer v. Bila, 83 Cal. 51; Brumfield v. Palmer, 7 Bl. (Ind.) 227.

back the purchase money while he is in possession of the land is, that such a suit is a disaffirmance of the contract, and he cannot disaffirm the contract and at the same time have its benefit by retaining possession.[5] And when the vendee is sued for the purchase money at law, and the title has failed, he cannot, even under a statute allowing the interposition of equitable defenses in actions at law, disaffirm the contract in part by detaining a part of the purchase money, and at the same time insist upon a conveyance of the lands. He must make his election between his right to have a specific performance of the contract, and his right to have damages for a breach thereof, or his right to surrender the possession and to recover back so much of the purchase money as he may have paid.[6]

This rule is also an excellent practical test of the *bona fides* of the purchaser in raising objections to the title when no adverse claimant is threatening his possession. If, under such circumstances, he does not offer to restore the premises to the vendor, it will, in most cases, be found that his objections are nice and captious and have been searched out for the purpose of gaining time, when sued for the purchase money.

But while the purchaser cannot recover back the purchase money so long as he retains the possession of the premises, it is not necessary that he be evicted by an adverse claimant before he can assert that right. He may, at any time, unless he has waived his objections to the title or unless the vendor has a right to perfect the title, deliver up the possession to the vendor and demand a return of the purchase money paid, or defend an action for that which remains unpaid.[7]

While the purchaser cannot, where he has elected to rescind the contract, recover back the purchase money without restoring the premises to the vendor, it has been held, as we have seen, that he may elect to affirm the contract, keep the premises, and recover the purchase price as damages, if the title has completely failed.[8] If this decision be sound, the rule that the purchaser seeking to recover back the purchase money must restore the premises to the vendor is of slight importance, as it might be evaded by a mere change in the purchaser's pleadings. Of course these observations do not apply where the purchaser seeks to *detain* the purchase money on failure of the title, for as a general rule the purchaser can maintain no action for inability to convey a good title unless he has paid the purchase money in full.[9]

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[5] Hurst v. Means, 2 Swan (Tenn.), 594.

[6] Watkins v. Hopkins, 13 Grat. (Va.) 743; Shiflett v. Orange Humane Society, 7 Grat. (Va.) 297.

[7] 2 Sugd. Vend. (7th Am. ed.) 126, note. Timms v. Shannon, 19 Md. 296, 81 Am. Dec. 632.

If the purchaser refuse to pay the purchase money on the ground that the title is bad, and at the same time refuse to restore the premises, he is liable to an action of ejectment by the vendor, and may be evicted.[10] And the fact that he has made expensive improvements on the premises will not justify him in refusing to give up the possession. He should not be encouraged to make improvements while the purchase money is unpaid.[11] But it has been held that if the purchaser in possession refuse to pay the purchase money on the ground that the title is defective, and the vendor, without notifying the purchaser of his intention to rescind the contract, resell the premises to a third party, the original purchaser, if sued in ejectment by the subsequent purchaser, may set up the failure of the vendor's title as a defense, if the case be one in which the vendor is not entitled to claim the purchase money already paid as aforesaid, or in which, by reason of moneys expended in improvements, or from other causes, it would be inequitable to deprive the purchaser of the possession.[12] We have already seen that the purchaser cannot, while the contract is executory, get in an outstanding title and set up the same against the vendor when sued for the purchase money or the possession. He must surrender the possession before he will be permitted to litigate or dispute the vendor's title.[13]

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[8] Ante, § 3. Fletcher v. Button, 6 Barb. (N. Y.) 646.

[9] Ante, § 1. Clarke v. Locke, 11 Humph. (Tenn.) 300.

[10] 1 Sugd. Vend. m. p. (14th Eng. ed.) 347; Gates v. McLean, 70 Cal. 42; Garvey v. La Shells, 151 Cal. 52, 91 Pac. 498; Gervaise v. Brookins, 156 Cal. 103, 103 Pac. 329, distinguishing Haile v. Smith, 128 Cal. 415, 60 Pac. 1032. See generally, as to the right of the vendor to maintain ejectment against a purchaser who refuses to pay the purchase money, Jackson v. Moncrief, 5 Wend. (N. Y.) 26; Hawn v. Norris, 4 Binn. (Pa.) 77; Mitchell v. De Roche, 1 Yeates (Pa.), 12; Marlin v. Willink, 7 S. & R. (Pa.) 297; Browning v. Estes, 3 Tex. 462, 49 Am. Dec. 760; Whiteman v. Castleburg, 8 Tex. 441. In Harle v. McCoy, 7 J. J. Marsh. (Ky.) 318, 23 Am. Dec. 407, it was said that mere non-payment of the purchase money without previous notice of an intent to rescind, would not justify ejectment against the purchaser. The rule in this respect has been nowhere more clearly or succicntly stated than in the head note to the case of Worley v. Nethercott, 91 Cal. 512, 27 Pac. Rep. 767, which is as follows: "A purchaser of land in possession thereof under a contract of sale, by the terms of which the vendor is to give a warranty deed of the property, conveying a good and perfect title thereto, cannot, upon the vendor's failure and inability to convey a good and perfect title, retain both the land and the purchase money until a perfect title shall be offered him; but he must pay the purchase price according to the contract and receive such title as the vendor is able to give, if he chooses to retain the possession of the land, or he may rescind the contract, restore the possession to the vendor and recover the purchase money paid, together with the value of his improvements, after deducting therefrom the fair rental value of the premises; and if he fails and refuses to adopt either course, he is liable to an action of ejectment by the vendor.

The mere failure of the vendor to convey, for want of title, at the time stipulated by the contract, is not such a rescission of the contract as will justify the purchaser in detaining the purchase money without giving up the possession of the premises. An agreement to convey within a reasonable time after the sale is not a condition precedent to the right of the vendor to maintain an action on a bond for the purchase money payable at a day certain.[14]

§ 257. **VENDOR MUST BE PLACED IN STATU QUO.** The purchaser must not only restore the premises to the vendor as a condition precedent to rescission, but he must return them in as good condition as they were when received. The vendor has a right to demand that he be placed in the same condition in which he was, with respect to the premises, before the contract was made.[15] But it has been held that if a state of affairs making it impossible to place the vendor in *statu quo* has been produced by his sole act without the concurrence, in deed or will, of the purchaser, the rule does not apply.[16] As a consequence of this rule the purchaser cannot recover back or detain the purchase money without accounting for the use and occupation of the land,[17] unless he is liable to account to the true owner for the rents and profits.[18] In a case of an executed contract, as has been seen,[19] the rents and profits, unless recoverable by the true owner, are set off against the covenantee's demand for interest on the purchase money. In England it has been held that if possession of the land was delivered to the purchaser the vendor could not be put *in statu quo* by restoring the premises to him,[20] but this doctrine seems to have gained no foothold in America, where the right to rescind has generally been allowed on failure of the title, notwithstanding delivery of possession to the vendee.[21] If, instead of seeking to rescind the contract by recovering back the purchase money, the purchaser affirm it by maintaining an action to recover damages for the vendor's fraud in imposing a worthless title upon him, the purchaser may recover without surrendering or offer to surrender the premises.[22] If, in such case, he had paid the purchase money, the measure of his damages would be the difference between the value of the premises with a good title and their value as the title actually was.

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[11] Cherry v. Davis, 59 Ga. 454; Gates v. McLean, 70 Cal. 42.

[12] Estell v. Cole, 52 Tex. 170.

[13] Ante, §§ 202, 219. Isler v. Eggers, 17 Mo. 332; Harvey v. Morris, 63 Mo. 475; Pershing v. Canfield, 70 Mo. 140.

[14] Stone v. Gover, 1 Ala. 287.

[15] Post, ch. 30, § 279. Guttschlick v. Bank, 5 Cranch (C. C. U. S.), 435. In Concord Bank v. Gregg, 14 N. H. 331, a mill on the purchased premises was destroyed after it had been conveyed to the purchaser, but the loss having occurred without fault on his part, and there being nothing to show that

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the loss would not have occurred if the vendor himself had been in possession, it was held that he must accept a reconveyance of the premises. The contract had been rescinded because of fraudulent representations by the vendor.

[16] Shackelford v. Handly, 1 A. K. Marsh. (Ky.) 500, 10 Am. Dec. 753.

[17] Goodloe v. Woods, (W. Va.) 80 S. E. 113; Burrows v. Harter, 165 Cal. 45, 130 Pac. 1050. The rule that the vendor's claim for rent is balanced by the purchaser's claim for interest on the paid purchase money, does not apply where the paid purchase money is not in proportion to the value of the use of the property. Kilborn v. Johnson, (Tex. Civ. App.) 164 S. W. 1108.

[18] Collins v. Thayer, 74 Ill. 138; Whitney v. Cochran, 1 Scam. (Ill.) 209; Anderson v. Ohnoutke, 84 Neb. 517, 121 N. W. 577; Weitzel v. Leyson, 23 S. D. 367, 121 N. W. 868.

[19] Ante, § 172.

[20] Hunt v. Silk, 5 East, 449; Blackburn v. Smith, 2 Exch. 783.

[21] Taft v. Kessel, 16 Wis. 278.

[22] Stockham v. Cheney, 62 Mich. 10.

The purchaser, of course, cannot recover back or detain the purchase money if he has disabled himself from placing his vendor *in statu quo* by conveying the premises to a stranger.[23]

§ 258. **RESTORATION OF PREMISES A CONDITION PRECEDENT TO RESCISSION.** It has been held that a purchaser of lands seeking rescission of the contract at law by recovering back the purchase money, must restore or offer to restore whatever he has received on account of the contract as a *condition precedent* to the maintenance of the action.[24] "In equity," the court observed in the same case, "a different rule prevails, as the action at law proceeds *upon* a rescission of the contract, while in equity the action proceeds *for* a rescission of the contract." Elsewhere, under statutes allowing courts of law to administer equitable relief, it was held that the judgment, where the purchaser seeks to *detain* the purchase money, could be so framed as to require the purchaser to surrender the land before he can have the benefit of the verdict.[25] Where, however, courts of law have no jurisdiction to direct a surrender of the premises before the judgment or verdict shall become operative, it is apprehended that the purchaser's action or defense, as the case may be, must fail, unless he shows that he has surrendered or offered to surrender the premises to the vendor.[26]

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[23] Rodgers v. Olshoffsky, 110 Pa. St. 147, 2 Atl. Rep. 44; McKeen v. Beaupland, 33 Pa. St. 488; Strong v. Lord, 107 Ill. 26. Where the purchaser's note contained an indorsement that it was not to be paid unless the title proved to be good, and the purchaser resisted payment on the ground that the title to a part of the land had failed, but did not seek to rescind the contract, it was held that he could not be compelled to pay the note until the title should be made good, though he had conveyed away a part of the land. Smeich v. Herbst, 135 Pa. St. 539, 19 Atl. Rep. 950.

[24] Johnson v. Burnside, (S. D.) 52 N. W. Rep. 1057.

[25] Sizemore v. Pinkston, 51 Ga. 398. In Taft v. Kessel, 16 Wis. 297, it was said: "There seems to be no objection to a rule allowing a purchaser, brought into court as a defendant, to claim a rescission and a recovery of the purchase money paid, without a previous surrender of the possession, leaving the matter to be disposed of by the judgment, which can be so framed as to adjust the rights of both parties upon equitable terms." This was an "action" to enforce a contract for the sale of lands (practically a suit in equity), but it is believed that the above observations of the court apply with equal force in an action at law by or against the purchaser in which he seeks rescission of the contract.

[26] Young v. Harris, 2 Ala. (N. S.) 108. In an action to recover back the

§ 259. **RULE IN PENNSYLVANIA.** In Pennsylvania the rule that the purchaser cannot keep both the estate and the price of it is declared, but instead of requiring the purchaser to surrender the estate as a condition precedent to the maintenance of an action to recover back the purchase money, it is there held that the vendor must take the initiative, and return the purchase money if he finds that he cannot make title, and then, if the purchaser refuses to give up the possession, turn him out by action of ejectment.[27] The application of this doctrine in an action in which the purchaser seeks either to recover back the purchase money or to obtain that which is unpaid, would seem to be fraught with injustice to the vendor, for he would be thereby forced to the expense and annoyance of another and independent action to do that which might be accomplished in one. It has been held in the same State, in several

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purchase money on failure of the title, if the evidence does not show who is in possession, the court, on appeal, will presume that the purchaser surrendered the possession before bringing the action. Pino v. Beckwith, 1 N. Mex. 19.

[27] In Gans v. Renshaw, 2 Pa. St. 34, 44 Am. Dec. 152, it was held that a purchaser, by articles of agreement, was not bound to restore the possession to the vendor and give up the contract before he could make objections to the title in an action brought for the purchase money. A tender of a conveyance with warranty against incumbrances had been rejected by the purchaser on the ground that the premises were incumbered by certain liens, and the vendor brought an action for the purchase money. The opinion of the court was delivered by GIBSON, C. J., who said: "It is said it was his (the purchaser's) duty, if the title was not such as he bargained for, to give back the possession and declare his determination to abandon the contract. And for not having done so he is to pay a sound price for an unsound title! * * * But whose business was it to move towards a rescission of the contract? Not the defendant's He was at liberty to fold his arms and await the movements of the plaintiff, whose cue it was to take the next step towards an abandonment or a completion of the purchase. It was not for the defendant to know what title the plaintiff should be able to make when he should come to tender the conveyance. The plaintiff's power to perform his part was best known to himself, and if he found the defect in his title to be irreparable what was he to do? Certainly, not to bring an action for the purchase money in order to force a rotten title on the purchaser for a good one, and this on the basis of his own default. It would be his duty to apprise the vendee of his inability, restore whatever had been paid, and demand the possession. In that case equity would not enjoin him from proceeding on his legal title to get back the property, but not to compel the vendee to pay for what he did not get." See, also, Nicoll v. Carr, 35 Pa. St. 381.

cases, that the purchaser cannot, on failure of the title, recover back the purchase money without offering to return the premises to the vendor.[28]

§ 259a. **Estoppel of Purchaser to Deny Vendor's Title.** The general rule is that a vendee, in possession of the premises under the contract, is estopped to deny the title of his vendor; that is to say, he cannot buy in an outstanding title to the property and set up such title as against the vendor without offering to pay the contract price less the cost of the outstanding title.[29] But this rule does not apply where, at the time of the contract, he was already in possession as owner claiming title, and his entry was not under the vendor. He must have been put in possession on the faith of the contract.[30] Nor does the rule apply in a case in which the sale was induced by the fraudulent representations of the vendor.[31]

§ 260. **RESTORATION OF THE PREMISES IN CASES OF FRAUD.** The mere fact that the vendor was guilty of fraud in respect to the title would not, it seems, justify the purchaser in retaining both the land and the purchase money.[32] There are cases which, at the first glance, might appear to countenance such a doctrine, but upon closer examination it will be found that they establish nothing beyond the proposition that the purchaser is not obliged to surrender the possession, where the title fails, as a *condition precedent* to the rescission of the contract. At law it seems that he would be compelled to give up, or to offer to give up, the possession before trial, even where the vendor has been guilty of fraud, except in those States in which courts of law have the power to enter judgment for the purchaser, conditioned upon his delivery of the premises to the vendor.[33]

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[28] Morrow v. Rees, 69 Pa. St. 368; Pearsoll v. Chapin, 8 Wright (Pa.), 9; Babcock v. Case, 61 Pa. St. 427, 100 Am. Rep. 654; Wright v. Wright, 12 Pa. Co. Ct. Rep. 238.

[29] Post, notes 32, 33, § 308; 29 Am. & Eng. Encyc. of L. 706; Tyler on Ejectment, 559; Chavez v. Bergere, 231 U. S. 482, 34 S. C. 144, 58 L. Ed. 325; Galloway v. Finley, 12 Pet. 293, 9 L. Ed. 1079; Roller v. Effinger, 88 Va. 641; Harrison v. Boyer, 72 W. Va. 632, 78 S. E. 787, 46 L. R. A. (N. S.) 209; Lightfoot v. Brower, 133 Ga. 766, 66 S. E. 1094; Francis v. Shrader, (Cal. App.) 177 Pac. 168; Bennett v. U. S. Land, etc., Co., 16 Ariz. 44, 141 Pac. 717; Nance v. Rourke, 161 N. C. 646, 78 S. E. 757; Groves v. Whittenberg, (Tex. Civ. App.) 165 S. W. 889.

[30] Green v. Couse, 127 N. Y. 386, 28 N. E. 15, 13 L. R. A. 206, 24 Am. St. Rep. 458; Buffalo Coal Co. v. Vance, 71 W. Va. 148, 76 S. E. 177; Nashville, etc., Ry. Co. v. Proctor, 160 Ala. 450, 49 So. 377; Groves v. Whittenberg, (Tex. Civ. App.) 165 S. W. 889.

[31] Post, § 260.

[32] Wimberg v. Schwegeman, 97 Ind. 528; Vance v. Shroyer, 79 Ind. 380; Wiley v. Howard, 15 Ind. 169; Vining v. Leeman, 45 Ill. 246; Whitlock v. Denlinger, 59 Ill. 96; Laforge v. Matthews, 68 Ill. 328; Fratt v. Fiske, 7 Cal. 380; Lett v. Brown, 56 Ala. 550; Brannum v. Ellison, 5 Jones Eq. (N. C.) 435; Staley v. Ivory, 65 Mo. 74; Linsey v. Ferguson, 3 Lans. (N. Y.) 196; Underwood v. Parker, (Ky.) 7 S. W. Rep. 626; Goodin v. Decker, (Colo.) 32 Pac. Rep. 832; Groves v. Stouder, 58 Okl. 744, 161 Pac. 239;

Buckingham v. Thompson, (Tex. Civ. App.) 135 S. W. 652; 2 Warvelle Vend. 919. In Pearsall v. Chapin, 44 Pa. St. 9, the court below instructed the jury that in a case of fraudulent representations the vendor had a right to recover back the price without first tendering a reconveyance. This was reversed on appeal, the court saying: "If the court has stated this point correctly a defrauded vendee may recover back the price without rescinding the contract, and while retaining the price acquired by it, and, perhaps, without liability to return it, since the vendor cannot allege his own fraud in order to reclaim it; he may rescind for what he gave and affirm for what he got, and thus is allowed by law to return injustice by fraud, and invited to learn the art of being duped as a mode of profitable speculation. We do not so understand the law." In an action to recover back the purchase money on the ground of fraud, the purchaser must show an actual rescission by him, notice thereof to the vendor, and, as a general rule, an offer to put the vendor *in statu quo* by returning the property, unless it is utterly worthless. Morrow v. Rees, 69 Pa. St. 372.

[33] Coffee v. Newson, 2 Kelly (Ga.), 442; Phenix v. Bijelich, 30 Nev. 257, 95 Pac. 351; Taft v. Kessel, 16 Wis. 297; Young v. Harris, 2 Ala. (N. S.) 108, where it was said: "The decisions of this court are uniform, when the question has arisen at law, that the vendee, while he retains the possession, cannot refuse to pay the purchase money; otherwise, it might happen that he would get the land without paying for it, as a court of law could exact no condition from him as the price of affording its aid. But in a court of chancery, where the rights of the parties can be accurately adjusted, no reason is perceived why the vendee, who has been induced by the fraudulent representations of the vendor, to invest his money in the purchase of land, should be required, as a prerequisite to relief in equity, to relinquish possession of the land, and with it, it may be, his only hope of reimbursing himself. This point has not before been presented to this court, but we hesitate not to say that when one, by the fraudulent silence or fraudulent representations of another in relation to material facts concerning the title of land, the falsehood of which he had not the means of ascertaining and could not have ascertained by reasonable diligence, is induced to invest his money in the purchase of land, or has made on the faith of such purchase, valuable and

But the rule that the purchaser electing to rescind the contract must restore the possession to the vendor, even in a case of fraud, does not apply where the purchaser is already in possession under a prior purchase, and is induced to take a quit claim from a third person who fraudulently represents that he has title to the premises. In such a case the purchaser may refuse to pay a note given in consideration of the quit claim without surrendering the premises to the payee.[34] The rule that the purchaser cannot deny the vendor's title has no application where the purchaser is already in possession when the contract is made, and the vendor has fraudulently misrepresented or concealed the state of the title.[35]

If the vendor fraudulently misrepresent the state of his title, it is not necessary that the purchaser shall return a title bond executed by the vendor before he can be permitted to rescind. He may rely upon such misrepresentations as a defense to an action for the purchase money without returning the bond.[36]

§ 261. **WHEN PURCHASER NEED NOT RESTORE THE PREMISES. PURCHASER'S LIEN.** The purchaser is not obliged to return the premises before suing to recover back the purchase money if the vendor refuse to receive them.[37] Nor does any such obligation rest upon him if, through mistake or fraud on the part of the vendor, he purchased his own property.[38] The most important

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lasting improvements, he can have relief in chancery *before an eviction and without an abandonment of the possession*." See, also, Whitworth v. Stuckey, 1 Rich. Eq. (S. C.) 408. 1 Sugd. Vend. m. p. 247. In Greenlee v. Gaines, 13 Ala. 198, 48 Am. Dec. 49, it was held that the purchaser need not surrender the possession if the fraudulent vendor were insolvent, and the detention of the premises was necessary for his (the purchaser's) indemnity.

[34] Watson v. Kemp, 41 Ga. 586.

[35] Hammers v. Hannick, 99 Tex. 412, 7 S. W. Rep. 345, citing Taylor Landlord & Tenant, 416, 514.

[36] Coburn v. Haley, 57 Me. 347; Wyman v. Heald, 17 Me. 329.

[37] Johnson v. Burnside, (S. D.) 52 N. W. Rep. 1057; Elliott v. Boaz, 9 Ala. 772; Smith v. Robertson, 23 Ala. 324; Culbertson v. Blanchard, 79 Tex. 486; 15 S. W. Rep. 700.

[38] Phillips v. O'Neal, 87 Ga. 727, 13 S. E. Rep. 819. "This," says Mr. Washburn, "is but litle more than carrying out the old idea of a use raised in favor of a vendee who has paid the purchase money of an estate. And when the contract is executory as fast as the purchase money is paid in, it is a part performance of such contract, and to that extent the payment of the money, in equity, transfers to the purchaser the ownership of a corre-

exception to the rule, however, and one which has been recognized in several of the States, is that the purchaser need not restore the premises if it is necessary for him to retain them for his indemnity, where the vendor is insolvent or cannot be compelled to respond in damages for his breach of the contract.[39] In such case, however, the burden devolves on the purchaser to show that the vendor is insolvent or unable to answer in damages.[40] The purchaser will not be allowed to keep the premises where the vendor, although a non-resident and unable to make title, is fully solvent, and was a non-resident at the time the contract was made, and has remained so ever since.[41]

As against the vendor and those claiming under him with notice, the law gives the purchaser a lien on the purchased premises to secure to him the reimbursement of whatever purchase money he may have paid, in case the title fails.[42]

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sponding portion of the estate. * * * The mode of enforcing such liens is by a bill in equity to have satisfaction of the debt made, and to that end the court may order enough of the land to be sold to satisfy the lien. But it can be enforced only in a suit or proceeding brought for the purpose. It cannot be reached by a collateral proceeding. 2 Washb. Real Prop. 93 (509).

[39] Duncan v. Jeter, 5 Ala. 604, 39 Am. Dec. 342; Read v. Walker, 18 Ala. 323; Garner v. Leaverett, 32 Ala. 410; Hickson v. Linggold, 47 Ala. 449; Griggs v. Woodruff, 14 Ala. 9; Elliott v. Boaz, 6 Ala. 777; McLaren v. Irvin, 63 Ga. 275; Taft v. Kessel, 16 Wis. 273; McIndoe v. Morman, 26 Wis. 588, 7 Am. Rep. 96; Payne v. Atterbury, 1 Harr. Ch. (Mich.) 414; Wickman v. Robinson, 14 Wis. 493, 80 Am. Dec. 789; Davis v. Heard, 44 Miss. 50; Bibb v. Prather, 1 Bibb (Ky.), 313, 2 Am. Dec. 711; Shirley v. Shirley, 7 Bl. (Ind.) 452. COLCOCK, J., in Rutledge v. Smith, 1 McCord Ch. (S. C.) 402.

[40] Wyatt v. Garlington, 56 Ala. 576.

[41] Parks v. Brooks, 16 Ala. 529.

[42] 2 Sugd. Vend. (14th ed.) 672; 2 Warvelle Vend. 884; 2 Story Eq. Jur. § 1218, n. See, also, cases cited, supra, this chapter. Taft v. Kessel, 16 Wis. 273; Newman v. Maclin, 5 Hayw. (Tenn.) 241; Perkins v. Hadley, 4 Hayw. (Tenn.) 148; Pilcher v. Smith, 2 Head (Tenn.), 208; Hilton v. Duncan, 1 Cold. (Tenn.) 316, 320; Benson v. Shotwell, 87 Cal. 49, 25 Pac. Rep. 249; Galbraith v. Reeves, 82 Tex. 357, 18 S. W. Rep. 696; Coleman v. Floyd, (Ind.) 31 N. E. Rep. 75; Griffith v. Depew, 3 A. K. Marsh. (Ky.) 177; 13 Am. Dec. 141; Bullitt v. Eastern Ky. L. Co., 99 Ky. 324, 36 S. W. Rep. 16; Fort Jefferson Imp. Co. v. Dupeyster, (Ky.) 66 S. W. Rep. 1048; Craft v. La Tourette, 62 N. J. Eq. 206, 49 Atl. Rep. 711; Everett v. Mansfield, 148 Fed. 374, 78 C. C. A. 188; Groves v. Stouder, 58 Okl. 744, 161 Pac. 239; Hough v. Fink, (Tex. Civ. App.) 141 S. W. 147; Stockwell v. Melbern, (Tex.

Of course, such a lien could not prevail against the true owner,[43] and it is obvious that if the purchaser were liable to the latter for rents and profits, he could derive no benefit from the retention of the premises. There may be cases, however, in which no such liability exists, as where the vendor, selling a fee, had only a life estate. In such a case, the purchaser would be permitted to enjoy the life estate until he is fully reimbursed the purchase money paid and sums expended in permanent improvements. The purchaser will not be entitled to a lien, as against a subsequent *bona fide* purchaser, without notice of his rights.[44] But, as against a subsequent purchaser with notice, his lien will be enforced.[45]

Civ. App.) 185 S. W. 399; Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937, 127 Am. St. Rep. 862; Delano v. Saylor (Ky.) 113 S. W. 888; Selkir v. Klein, 100 N. Y. Supp. 449.

In New York it is held that the purchaser is not entitled to the lien when he sues at law to recover his deposit, such suit being an election to rescind the contract, and that the lien can be enforced only in an equitable proceeding. Davis v. Rosenzweig, 192 N. Y. 135, 84 N. E. 945; Garrett v. Cohen, 117 N. Y. Supp. 129, 63 Misc. Rep. 450; Goodman v. Schwab, 121 N. Y. Supp. 69, 136 App. Div. 492; Elterman v. Hyman, 126 N. Y. Supp. 6, 141 App. Div. 208; Feldblum v. Land Co., 135 N. Y. Supp. 349, 151 App. Div. 24. It is there held, also, that in equity the lien does not cover the costs of examining the title, though such costs be recoverable in an action at law. Occidental Realty Co. v. Palmer, 102 N. Y. Supp. 648, 117 App. Div. 505; Ungrich v. Shuff, 105 N. Y. Supp. 1013, 119 App. Div. 843. Contra, Gerstell v. Shirk, 210 Fed. 223, 127 C. C. A. 41, where held, also, that the purchaser's lien in equity is not defeated by the fact that he might recover, at law, the amount due him, nor by want of marketable title in the vendor. A suit by the purchaser to enforce his lien in equity, is not a rescission of the contract on his part. Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937, 127 Am. St. Rep. 862. Nor does the purchaser, by suing at law to recover the payments made, waive his right to the lien. Flickinger v. Glass, 222 N. Y. 404, 118 N. E. 792.

[43] Thus, in McWilliams v. Jenkins, 72 Ala. 480, it was held that the purchaser's lien could only extend to such lands, or portions thereof, as the vendor had the legal right to convey, and that, having no right to convey his homestead lands, the purchaser could have no lien thereon, as against the claim of the vendor's children, for the rents while the purchaser was in possession. And in Scott v. Battle, 84 N. C. 184, a purchaser, whose deed was void because executed by a married woman alone and without privy examination, was denied a lien upon the land for the purchase money paid. See also, Villone v. Feinstein, 116 N. Y. Supp. 384, 132 App. Div. 31.

[44] Chase v. Peck, 21 N. Y. 581, 585, *dictum*.

[45] Clark v. Jacobs, 56 How. Pr. (N. Y.) 519.

The purchaser's lien will, after a time given the vendor for repayment has expired, be enforced by sale of the land.[46] If the purchaser be able to follow and identify the purchase money paid by him, he may impress it with a trust.[47] But it seems, that the purchaser has no lien on the purchase money after it has been appropriated by the vendor, even though the latter fraudulently concealed the state of the title.[48] Nor, will he be allowed a lien on the land as against subsequent judgment creditors of the vendor, his contract not having been recorded, as required by statute to charge subsequent purchasers and creditors with notice.[49]

The purchaser is also entitled to the value of any improvements placed by him on the premises, less the fair rental of the property while in his possession.[50]

§ 262. **OTHER EXCEPTIONS.** The rule that the purchaser cannot detain the purchase money without restoring the possession, of course does not apply where the title fails to part of the premises only, and the purchaser does not seek a rescission but elects to take such title as the vendor can make, with abatement of the purchase money as to that part to which the title has failed.[51]

It sometimes happens that the purchaser in good faith seeks to detain the purchase money without intending or desiring to rescind or abandon the contract, and with no intent to avail himself of the want of title as a mere excuse for detaining both the purchase money and the possession of the premises, as where suit against the purchaser has been begun or threatened by an adverse claimant. In such case it seems that the purchaser, anxious to preserve his bargain, may detain both the premises and the unpaid purchase money, the contract being executory, until the rights of the adverse claimant can be determined. Thus, where the purchaser, a woman, was sued for a balance of the purchase money and she filed an answer alleging that she had been sued in trespass by an adverse claimant of the land, whose title she was informed and believed was paramount to that of her vendor, and prayed that the vendor's suit against her might be stayed until the trespass suit was determined, it was held that the answer presented a good defense, though there was no offer to restore the premises to the vendor.[52]

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[46] Jett v. Locke, 5 J. J. Marsh. (Ky.) 591.

[47] Ross v. Davis, 122 N. C. 265, 29 S. E. Rep. 338.

[48] 2 Sugd. Vend. (8th Am. ed.) 200.

[49] Newberry v. French, 98 Va. 479, 36 S. E. Rep. 519.

[50] Florence Oil Co. v. McCandless, 26 Colo. 534, 58 Pac. Rep. 1084.

[51] Walker v. Johnson, 13 Ark. 522; Wheat v. Dotson, 7 Eng. (Ark.) 699; Smeech v. Herbst, 135 Pa. St. 539, 19 Atl. Rep. 950. Compare Lewis v. McMillan, 31 Barb. (N. Y.) 395, 41 Barb. (N. Y.) 420. A representation by the vendor that the purchaser would have the privilege of building to a brick wall on the adjoining lot of a third person, is not one which affects the title to the lot sold; hence the purchaser may, without restoring the lot to the vendor, set up the non-existence of the easement as a defense, *pro tanto*, to an action for the purchase money. Noojin v. Carson, 124 Ala. 458, 27 So. Rep. 490.

It has been held that a purchaser *in possession* of the premises resisting the payment of the purchase money on the ground that the title is bad, must show affirmatively the existence of a paramount title in a third person in order to sustain that defense.[53] It might, perhaps, be inferred from these cases that if the purchaser were able to establish the existence of the paramount title, he might detain the purchase money without surrendering the possession of the premises. If such be the effect of these decisions, they are opposed to the current of authority in England and America. It is true that it has been held that a purchaser *in possession* under an executory contract cannot enjoin the collection of the purchase money merely because the vendor has no title, or a defective title,[54] unless the vendor has been guilty of fraud,[55] or is insolvent and unable to respond in damages for breach of the contract.[56] But these cases, it is to be observed, do not militate against the right of the purchaser to rescind the contract and recover back the purchase money, as a general rule, if the title is bad or unmarketable. They merely deny his right to do either so long as he remains in the undisturbed possession and enjoyment of the premises. There are cases, however, which deny the right of the purchaser to deliver up the possession and recover back or detain the purchase money where the title is bad or doubtful, unless the vendor is insolvent.[57] It seems impossible to reconcile such decisions with the rule that a purchaser cannot be required to take a doubtful title, or one that will probably involve him in litigation.

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[52] Gober v. Hart, 36 Tex. 139, the court saying: "In this case the appellant purchased the land and paid a large proportion of the purchase money, and went into possession of the purchased premises; and she had a right to retain the same as against her vendors until a tender of a good and valid title; and in order to make her defense a good one she was not bound to make an offer to restore possession, as she did not seek to rescind the contract of sale, but sought to have it perfected in good faith, according to the contract of sale and purchase. She does not resist the payment of the note, but only asks that the enforcement of the payment be stayed until appellees can make her a good title; and this she had a right to ask, and it should have been granted her."

[53] Cantrell v. Mobb, 43 Ga. 193; Sawyer v. Sledge, 55 Ga. 152. In both cases the contract was executory.

[54] Blanks v. Walker, 54 Ala. 117.

[55] Id. Young v. Harris, 2 Ala. 108; Elliott v. Boaz, 9 Ala. 772; Bonham v. Walton, 24 Ala. 514.

§ 263. **RESTORATION OF THE PREMISES WHERE THE CONTRACT IS VOID.** In some cases it has been held that if the contract for the sale of the land was void, *e. g.*, within the Statute of Frauds, the purchaser might recover back his purchase money without surrendering the possession of the land to the vendor, the reason assigned being that there is no contract to rescind.[58] Such a reason is eminently unsatisfactory. It is difficult to perceive how the purchaser can have any greater rights under an illegal contract than he could have under one that is lawful and valid, or why the non-existence of a contract should entitle him to hold both the land and the purchase money. Neither does it seem that there is any right or justice in forcing the vendor to the expense and vexation of an action of ejectment or unlawful detainer to regain possession of the premises, when circuity of action might be avoided in the first instance by requiring the purchaser to deliver up the land as a condition precedent to restitution of the purchase money. Accordingly it has been held that the invalidity of the contract of sale should occasion no exception to the rule that the purchaser cannot recover back the purchase money so long as he retains possession of the premises.[59]

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[56] Kelly v. Allen, 34 Ala. 663; Magee v. McMillan, 30 Ala. 420; McLemore v. Mabson, 20 Ala. 137.

[57] Hancock v. Cloud, 65 Ga. 208. This was an action to recover the purchase money of land, the contract being still executory. The purchaser had bought from one who had purchased at his own sale as administrator, and finding the title doubtful, for that reason had offered to pay the purchase money if the heirs would ratify the sale, and, in default of such ratification, to rescind and give up the possession; and his plea showed these facts. The plea was stricken out, and the purchaser was required to perform the contract on the ground that it did not appear that the sureties on the administrator's bond were insolvent or that the purchaser had been or ever would be disturbed in the possession of the land. Plainly the effect of such a decision might be to compel the purchaser to buy a lawsuit.

[58] Barickman v. Kuykendall, 6 Bl. (Ind.) 21; McCracken v. San Francisco, 16 Cal. 591, 628. COPE, J., dissenting. Hurst v. Means, 2 Swan (Tenn.), 594. In Wiley v. White, 3 Stew. & Port. (Ala.) 355, it was held that if a sale was void for want of authority in the seller, the purchase money might be recovered back by the purchaser without surrendering the possession. The contract, however, had been executed in this case by a conveyance, but whether with or without covenants for title, does not appear. The case of Walker v. Constable, 1 Bos. & Pul. 406, was cited by the court in Hurst v. Means, supra, in support of this proposition. It seems, however, that in that case, the contract being within the Statute of Frauds and void, the purchaser was merely denied a recovery of the expenses of examining the title, and was allowed to recover the purchase money on a count for money had and received. The case does not show whether the plaintiff had or had not restored the possession.

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[59] Cope v. Williams, 4 Ala. 362, where it was said by COOLIER, C. J.: "Morality forbids the idea that one man should take possession of another's property under a contract which at most is merely void, and notwithstanding its continuous enjoyment, refuse to make for it any remuneration. Here the seller does not seek to recover of the purchaser upon his contract for payment, but the action is by the buyer, and assumes the utter invalidity of the contract, and asserts a right to be refunded what has been paid under it, although the purchaser's possession has never been molested, and the vendor had not refused to execute the contract. Such a demand is against equity and good conscience, and cannot be entertained." See, also, the dissenting opinion of COPE, J., in McCracken v. San Francisco, 16 Cal. 638. In Reynolds v. Harris, 9 Cal. 338, it was held that no eviction was necessary to enable the purchaser to recover back the purchase money where the title had failed and the contract was void under the Statute of Frauds. But in this case the purchaser had given up the possession, and it was not decided that the mere invalidity of the contract would justify the purchaser in detaining the possession.

OF VIRTUAL RESCISSION BY PROCEEDINGS AT LAW AFTER THE CONTRACT HAS BEEN EXECUTED.

Detention of the Purchase Money.

CHAPTER XXVI.

OF DETENTION OF THE PURCHASE MONEY WHERE THERE HAS BEEN A BREACH OF THE COVENANT OF SEISIN.[1]

GENERAL RULE. § 264.
QUALIFICATIONS OF THIS RULE. § 265.
BREACH OF COVENANT AS TO PART OF THE PREMISES. § 266.

§ 264. **GENERAL RULE.** It has been frequently declared that an executed contract for the sale of lands cannot be rescinded upon the sole ground of want of title in the vendor, unattended by any circumstances of fraud or mistake in the execution of the contract.[2] Few cases can be found in which, after delivery of possession and execution of a conveyance on the part of the vendor, and payment of the purchase money and acceptance of a conveyance on the part of the purchaser, the vendor has been ordered to restore the purchase money to the purchaser, and the purchaser directed to reconvey the premises to the vendor, upon the ground that the title has failed.[3] And in many of the States the rule is established that if the purchaser has accepted a conveyance with covenants for title, and has not been actually or constructively evicted from the premises by one having a better right, nor compelled to satisfy an incumbrance on the estate, he cannot detain the unpaid purchase money in his hands, though a clear failure of the vendor's title should appear. We have seen that if he is evicted from the premises or forced to discharge an incumbrance thereon, he may set up that fact as a defense by way of counterclaim or recoupment

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[1] It was the desire of the author to present in unbroken sequence in this part of his work each of the cardinal rules which govern the right of the purchaser upon failure of the title, to detain or to recover back the purchase money, since the exercise of this right in most instances amounts in substance to an election to rescind the contract. But inasmuch as the averment of an eviction under title paramount as a defense to an action for the purchase money, is substantially a cross-action by the purchaser on the covenant of warranty, and is, therefore, an affirmance of the contract, it has been deemed proper to consider that subject in a chapter under the subdivisions "Affirmance by Proceedings at Law after the Contract has been Executed," and "Action for Covenant Broken," ante, §§ 108, 180.

[2] Beebe v. Swartwout, 3 Gil. (Ill.) 168; Ohling v. Luitjens, 32 Ill. 23.

[3] See the case of Hart v. Hannibal & St. J. R. R. Co., 65 Mo. 509. The purchaser filed his petition (declaration) alleging that he bought the land in 1863, paid the purchase money in full and took a conveyance, with covenants of seisin, etc., that his vendor had no title to the land; that the title was outstanding in a person named, and that he had offered to rescind the con-

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tract, and tendered a reconveyance to the vendor. The plaintiff had not inclosed or cultivated the land, but there was nothing to prevent him from taking possession and occupying the premises. There was a judgment for the plaintiff, which was reversed on appeal, the court saying: "The parties tried the cause as if the plaintiff had sued the defendant for a breach of the covenant of seisin, and judgment was rendered for the amount of the purchase money and interest. Had it been such a suit, the plaintiff would only have been entitled to nominal damages, as no actual or constructive eviction was shown. But the suit was distinctly brought for a rescission of the executed contract of sale. The petition contained no allegation of fraud or misrepresentation of facts in relation to the title, and without such allegations a court of equity has no authority to grant the relief prayed. The vendee in such case must rely on the covenants contained in his deed." In the case of Simpson v. Hawkins, 1 Dana (Ky.), 305, the court said: "Where contracts are executed by conveyances we are of opinion that there can be no rescission of a contract in any case unless it has been tainted by actual fraund. If the warranty of title has been broken so as to entitle the vendee to damages, or if the vendee be entitled to damages upon a covenant of seisin, he may apply to the chancellor, where the vendor is insolvent, to set off those damages against the unpaid portion of the purchase money. The ground upon which the chancellor interferes in such cases is the prevention of the irreparable mischief which otherwise might result from the insolvency. He ought not to act upon the principle of rescinding the contract. On the contrary, he should affirm the contract, and secure to the party such damages as he might be entitled to for a partial or total violation thereof by the obligor. If a deed of conveyance be executed for any quantity of land, and the vendee is put into possession thereafter, in case he loses half or three-fourths of the land, the law only authorizes a recovery, upon the warranty, of damages commensurate with the loss. The chancellor must follow the law and not lay hold of such a partial loss, and require the vendor to take back the portion of the land saved and return the purchase money for that, under the idea of *rescinding contracts*." In Vance v. House, 5 B. Mon. (Ky.) 540, it was said by the court: "This is the case of an *executed* contract, where the conveyance has been made and *accepted* with warranty of title, and possession delivered and uninterruptedly enjoyed, without eviction or molestation. In such a case a bill for the dissolution of the contract and the payment of the consideration enjoined cannot be sustained except in the case of fraud, in-

in an action for the purchase money.[4] No particular hardship is involved in requiring a grantee, who has paid the whole purchase money, to await an eviction or disturbance of his possession before he can recover back the purchase money, or rather its equivalent in the shape of damages, from the grantor. But that he should be compelled to pay over the purchase money when there is a moral certainty of his eviction by an adverse claimant, and a possibility that his judgment against the grantor for damages may be worthless when recovered, does violence to common principles of equity and right. Such, however, is the consequence of a rigid application of the maxim *caveat emptor.* But in some of the States the restraints of this maxim or rule have been thrown off in a large degree. We shall see that in the State of Pennsylvania the purchaser is permitted to detain the purchase money, though he took a conveyance *without covenants for title*, if he purchased without notice of the defect in the title.[5] And, with the same qualification, in the States of Texas and South Carolina, the existence of a paramount title to the premises in a stranger, is a good defense to an action for the purchase money, though the purchaser holds under a deed with general warranty, and has not been disturbed in the possession of the premises.[6] In a number of other States he is permitted to enjoin the collection of the purchase money if he can show that by reason of the non-residence or insolvency of the grantor his remedy by action for breach of the covenant of warranty will prove unavailing when the right to maintain the action shall have accrued.[7] The decisions in these States, together with those in other States, directly or incidentally affirming the right of the purchaser to detain the purchase money

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solvency or non-residency of the vendor, and a palpable and threatening danger of immediate or ultimate loss, without legal remedy by reason of the defects in the title conveyed and the inability of the vendee to protect himself against eviction under it. And to sustain such a bill after the vendee has accepted the conveyance, the *onus* lies on him to establish to the satisfaction of the chancellor that the defect of title and imminent danger of eviction exists."

[4] Ante, § 180; Prop. IV.

[5] Post, § 271.

[6] Ante, §§ 189, 190.

[7] Post, § 331.

where there has been a total failure of the title, upon reconveying or offering to reconvey the premises to the grantor, justify us, it is believed, in laying down the following proposition:

PROPOSITION III. *If the contract has been executed by a conveyance with a covenant of seisin or of good right to convey, and it clearly appears that the covenantor had no title, the covenantee, though he has not been disturbed in the possession, will, it seems, in some of the American States, be permitted to set up the breach of the covenant of seisin as a defense to an action for the purchase money, upon condition that he reconvey the premises to the covenantor, and do all that may be necessary to put him in statu quo.*[8]

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[8] Owens v. Rector, 44 Mo. 390, 392; Powell v. Hunter, 257 Mo. 440; 165 S. W. 1009; Herron v. Barbour, 57 Okl. 71; 155 Pac. 506; S. C. 182 Pac. 243; Mercer Co. Bank v. Hayes, 34 N. D. 601; 159 S. W. 74; McDaniel v. Bryan, 8 Ill. 273; Mudd v. Green, (Ky.) 14 S. W. Rep. 347; Cartwright v. Culver, 74 Mo. 179; Kirtz v. Peck, 113 N. Y. 222, 231; 21 N. E. Rep. 130; Lowry v. Hurd, 7 Minn. 356 (282); Buell v. Tate, 7 Bl. (Ind.) 55; Marvin v. Applegate, 18 Ind. 425; McDunn v. Des Moines, 34 Iowa, 467; Beard v. Dulaney, 35 Iowa, 16; Barnett v. Clark, 5 Sneed (Tenn.) 436; Land Co. v. Hill, 3 Pick. (Tenn.) 589, 598; 11 S. W. Rep. 797; Kimball v. West, 15 Wall. (U. S.) 377; Michael v. Mills, 17 Ohio, 601; Smith v. Hudson, 45 Ga. 208. See, also, the cases cited, post, § 271, "Rule in Pennsylvania," and, ante, §§ 189, 190, "Rule in South Carolina and Texas," and, post, § 331, "Insolvency and Non-residence of the Covenantor." Sir Edward Sugden says that where the title is defective the covenantee would not be bound to wait until eviction, but might bring his action of covenant, and, if necessary, offer to reconvey the interest or title actually vested in him. 2 Sugd. Vend. (14th ed.) 611. No authority is cited for the proposition, and it has been doubted by Mr. Dart. Dart Vend. (5th ed.) 792. In Lawless v. Collier, 19 Mo. 480, it was held that the rule which limits the recovery in an action on a covenant of seisin, to a nominal sum, until there has been an eviction, has no application where the title conveyed has been defeated, and the grantee or his assigns hold by a title adverse to that acquired from their grantor, and that in such case there can be no necessity for submitting to the form of an eviction in order to be entitled to a recovery of full damages for a breach of the covenant of seisin; neither is there any necessity for a reconveyance to the grantor, in order to sustain such recovery. It is true these principles were declared in an action for breach of the covenant of seisin, but they are fully as applicable where such breach is sought to be availed of as a defense to an action for the purchase money. In Akerly v. Vilas, 21 Wis. 88; 99 Am. Dec. 165, which was an action to foreclose a purchase-money mortgage, it was held that the defendant might, under a statutory provision allowing a counterclaim to be set up in foreclosure proceedings, counterclaim for a breach of the covenant of seisin, though he was in the undisturbed possession of the

In one of those cases the court said: "We fully recognize the principle that the true consideration of the notes given for the purchase money, was the land, and not the covenants in the deed; and as the title to the land had been defeated by an incumbrance

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premises. See, also, Merritt v. Gouley, 58 Hun (N. Y.), 372, 12 N. Y. Supp. 132. The proposition stated in the text was admitted, though the point was not expressly decided, in Yazel v. Palmer, 81 Ill. 82. There had been a conveyance in that case, but whether with or without covenants for title does not appear. The grantee had resold and conveyed the premises, and when sued for the purchase money, set up want of title as a defense. The court said: "He (the original grantee) cannot withhold the purchase money, and still retain the plaintiff's title, whatever it was, which he obtained by the conveyance. Before he can recoup the value of the land to which he says the title failed, he must cause his grantee to reconvey it, or offer to do so, back to plaintiff. No defense can be interposed until the parties have been placed *in statu quo* by a reconveyance, or an offer to reconvey to plaintiff whatever title defendant received from plaintiff, no matter what its title may be." In Moyer v. Shoemaker, 5 Barb. (N. Y.) 319, it was held that the covenantee could not maintain assumpsit to *recover back* the purchase money on failure of the title, without reconveying the premises. The right to rescind, provided the covenantee would make the adverse claimant a party, so that the rights of all parties might be adjusted in the suit, was admitted in Wiley v. Fitzpatrick, 3 J. J. Marsh. (Ky.) 583, 586. In Brick v. Coster, 4 Watts & S. (Pa.) 499, it was said that an affidavit of defense by a grantee, *with warranty*, in a suit for the purchase money, would be insufficient unless it alleged adverse claims to be good, or that affiant believed them to be good. If the objection to the title be an outstanding incumbrance, the grantee will be entitled to detain the purchase money until the grantor removes the incumbrance. Brown v. Montgomery, (Tex. Civ. App.) 31 S. W. Rep. 1079. In Wisconsin there are *dicta* in several early cases which support the proposition stated in the text. Taft v. Kessel, 16 Wis. 273; Noonan v. Illsley, 21 Wis. 138; 84 Am. Dec. 742; Mecklem v. Blake, 22 Wis. 495; 99 Am. Dec. 68. But they are inconsistent with later decisions in that State. In Smith v. Hughes, 50 Wis. 625, it was said: "The counterclaims of the defendant, for a rescission of the bargain and for damages, are predicated upon the breach of the covenant of seisin in the deed of the respondents, executed and delivered in July, 1872. It is too well settled that only executory contracts can be rescinded, to require discussion. This method of relief is the converse of specific performance, and in its very nature can have application only to executory contracts, and this court has settled the question beyond controversy by repeated decisions. In direct application to this case, it is held in Booth v. Ryan, 31 Wis. 45, that, especially, a rescission cannot be made after a deed with full covenants, together with possession, have been delivered in full execution of the contract of sale. * * * The remark in the opinion of Chief Justice DIXON, in Mecklem v. Blake, 22 Wis. 495; 99 Am. Dec. 68, intimating that a recission might be made in such a case, was clearly *obiter*, prior to the deed to the defendant, the title at the time of the maturity of the notes had failed; and so the consideration of the notes failed if the defendant so chose to treat it, and the defendant then had the right to repudiate the contract of sale and the notes, for the reason that the consideration of the notes had failed. But the mere declaration that he repudiated the contract was not sufficient to effectuate that purpose. He should have put the other parties *in statu quo* by a reconveyance of the land, or, at least, a release of the covenants of the deed, so that any subsequent title acquired by the grantor, would not enure to his benefit, and vest in him."[9] These views, undoubtedly at variance with the current

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and without due consideration." In McClennan v. Prentice, 77 Wis. 124; 45 N. W. Rep. 943, it was held, in an action for breach of a covenant of seisin in which it appeared that the plaintiff had never been in possession of the premises, that the burden of proof was on the grantor to show that he was seized of an estate in fee at the time of the execution of the deed, *and that in the absence of such proof the grantee might, on tendering a reconveyance, rescind the contract and recover back the purchase price paid, with interest, etc.* This case came again before the court, and is reported in 85 Wis. 427. Without disapproving the decision at the former hearing, the court announces a rule inconsistent therewith, namely, that an executed contract cannot be rescinded, except upon the ground of mistake. Apparently, the court draws a distinction between a recission by a decree of a court of equity and a virtual rescission accomplished at law, by permitting the purchaser to recover back or detain the purchase money in the shape of damages for a breach of the covenant of seisin. In Taylor v. Lyon, 2 Dana (Ky.), 279, it was said: "If he (the purchaser) took no covenant of seisin, *which would have enabled him, without an eviction*, to put the title to a legal and decisive test at any time, he cannot call on the chancellor to suppy such an omission in the contract, and, by anticipating an eviction, to decree a rescission." In Jackson v. Norton, 6 Cal. 187, the right of the covenantee to a perpetual injunction against the collection of the purchase money, provided he reconveyed the premises to the grantor, was conceded. In Baird v. Goodrich, 5 Heisk. (Tenn.) 20, the covenantee, on failure of the title and suit against him to recover the land, filed a bill against the covenantor's representative to attach the estate of the covenantor in his hands, and hold it so that it might be forthcoming to answer the covenantor's liability in case the plaintiff should lose the property. There was a demurrer on the ground that the plaintiff's remedy was on his covenants, but the demurrer was overruled. In the recent case of Cross v. Lumber Co., 139 Tenn. 79; 201 S. W. Rep. 141; Ann. Cas. 1918 D, 983, it was held that when the contract requires the conveyance of a good title to the purchaser, such contract remains "executory" notwithstanding a conveyance of the property to the purchaser, the title conveyed being not good.

[9] Deal v. Dodge, 26 Ill. 458. See, also, Whitlock v. Denlinger, 59 Ill. 96.

of American authority, find support in a number of adjudicated cases.[10]

The equity of this rule is undeniable. That a purchaser with a confessedly bad title must pay the purchase money and await an eviction from the premises before he can have the benefit of a covenant of seisin by his grantor, may easily be productive of great hardship; for when that eviction occurs the covenantor may be insolvent or a non-resident; or the remedy against him may be barred by the Statute of Limitations, for the statute begins to run, not from the time of the eviction, but from the delivery of the deed containing the covenant.[11] Therefore, it might be that the covenantee could be compelled to pay money with the certainty of a right accruing sometime in the future to recover it back, but with no prospect of enforcing that right. The answer to this has been that the hardship so produced is the result of the purchaser's own negligence in failing to examine the title. This answer is unsatisfactory: First, because there are many defects of title not apparent from the public records nor upon the face of the instruments under which the vendor claims, and which the most skillful examination of the title would not disclose; and, secondly, because the very purpose for which a covenant of seisin is taken is to protect the purchaser against defects of title which may have been overlooked or undiscovered. Another reason assigned for refusing to permit the purchaser to detain the purchase money upon a breach of the covenant of seisin, is the temptation which that defense offers to purchasers to search out defects in the title when pressed for the purchase money.[12] This objection loses its force if the right of the purchaser to detain the purchase money be confined to cases in which there is a clear and undoubted failure of the title, a hostile assertion of the adverse title, and a moral certainty of the eviction of the grantee. It has also been urged that the purchaser may protect himself by insisting upon an express provision in the conveyance that the purchase money may be detained and the premises be restored to the grantor if the title should be found to be bad,[13] and that if he neglects a precaution of this kind, he should not complain when required to pay the purchase money and await an eviction by one having the better title. Such a provision, however, is so much out of the usual course, that its absence would scarcely warrant a presumption of laches against the purchaser.

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[10] See the cases cited above.

[11] Rawle Covts. (5th ed.) § 229. Matteson v. Vaughn, 38 Mich. 373; Spoor v. Green, L. R., 9 Exch. 99. In Sherwood v. Landon, 57 Mich. 219, the eviction did not occur until ten years after the covenant of seisin was made, while an action on the covenant was held to be barred after six years.

[12] Rawle Covt. (5th ed.) § 329. See also Id. §§ 178, 183, 184.

A number of cases may be found in which it is decided that a mere breach of the covenant of seisin, unattended by an eviction from the premises, is no defense to an action for the purchase money.[14] In most of these cases, however, it will be seen either that the covenantee was seeking to *recover back* the purchase money; or that he had purchased with notice of the want of title; or that he was seeking to keep both the land and the purchase money; or that he could show no more than that the title was doubtful and not absolutely bad. Consequently, they cannot be deemed conclusive against the alleged right of the covenantee to resist the payment of the purchase money, where he reconveys or offers to reconvey the premises to the grantor, upon a complete

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[13] In Weaver v. Wilson, 48 Ill. 125, and Smith v. Newton, 38 Ill. 230, it was provided in a purchase-money note and mortgage, that they should not be payable if the title was not perfected. Where a deed with general warranty provided that deferred payments of purchase money should not be made until "acreage of clear title should be determined," it was held that the purchaser might detain the purchase money though there had been no eviction. American Assn. v. Short, (Ky.) 30 S. W. Rep. 978.

[14] Ante, p. 481, cases cited in McConihe v. Fales, 107 N. Y. 404; 14 N. E. Rep. 285; Parkinson v. Sherman, 74 N. Y. 92; 30 Am. Rep. 268.

Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519; 7 Am. Dec. 554, and Bumpus v. Platner, 1 Johns. Ch. (N. Y.) 213, are the leading cases cited to sustain the doctrine that a purchaser cannot, on breach of the covenant of seisin, detain the purchase money unless he has been evicted. The objections to the title in those cases amounted to no more than that it was doubtful or unmarketable. In neither case was there any one asserting or prosecuting an adverse title, nor was any offer made to reconvey the premises. Such objections as were made appear to have been ferreted out merely for the purpose of delaying the collection of the purchase money. Chancellor KENT rendered the decision in both these cases, and afterwards, in Johnson v. Gere (2 Johns. Ch. 546), granted an injunction staying the collection of the purchase money, upon an allegation that there was an outstanding paramount title in a stranger, which was being prosecuted by suit in ejectment against the covenantee. Johnson v. Gere, however, has been disapproved in many subsequent New York decisions. See Miller v. Avery, 2 Barb. Ch. (N. Y.) 595; Platt v. Gilchrist, 3 Sandf. (N. Y. S. C.) 118. The cases cited by Mr. Rawle (Covt. for Title [5th ed.] 637) to the proposition that the purchase money cannot be detained upon a mere breach of the covenant of seisin, may be seen below, with others in parentheses. Some pains have been taken to indicate briefly the grounds of the decision in most of these cases, for in nearly all of them there were circumstances to bring the case within the exceptions to the rule stated at the head of this chapter; such, for example, that the purchaser made no offer to reconvey the premises to the grantor, or that the objections to the title were of a misty or doubtful character.

Noonan v. Lee, 2 Bl. (U. S.) 499. In this case, it is true that the covenantee offered to restore the property, but, for all that appeared to the contrary, he was advised of the state of the title when he bought. It also appeared that he took the property with a particular purpose in view, after the accomplishment of which he attempted to throw the purchase back on the hands of the vendor without having paid any of the purchase money. Beck v. Simmons, 7 Ala. 76. Here the covenantee purchased knowing that the title was defective. Burkett v. Munford, 70 Ala. 423. The contract was executory in this case, and the court merely decided that a rescission should be denied in such a case if the purchaser had not restored the premises to the grantor, unless, indeed, it was necessary for him to detain the property until he should be indemnified for what he had already paid. Roberts v. Woolbright, 1 Ga. Dec. 98; McGhee v. Jones, 10 Ga. 127, 133. Here, also, the contract was executory, the vendor having executed a bond to make title, and to that bond the court seems to have given the effect of a conveyance with general warranty, so far as the right to detain the purchase money is concerned. Miller v. Long, 3 A. K. Marsh. (Ky.) 334; Perciful v. Hurd, 5 J. J. Marsh. (Ky.) 670; Lewis v. Morton, 5 T. B. Mon. (Ky.) 1. Here the objections to the title were more than thirty years old. So, also, in Vance v. House, 5 B. Mon. (Ky.) 537; Casey v. Lucas, 2 Bush (Ky.), 55. Here it was said that, no danger of eviction being alleged, the covenantee could not have a rescission of the contract without an effort to procure the title, or without showing that a good one could not be made. English v. Thomason, 82 Ky. 281. (In Buford v. Guthrie, 14 Bush [Ky.], 690, the rule that an executed contract for the sale of lands cannot be rescinded except upon the ground of fraud or mistake, seems to have been asserted without any qualification whatever. See, also, Gale v. Conn, 3 J. J. Marsh. [Ky.] 38.) Beebe v. Swartwout, 3 Gil. (Ill.) 162. In this case there had been a constructive eviction, the covenantee not having been able to get possession of part of the land, and the court considered that the remedy at law on the bond was sufficient. Ohling v. Luitjens, 32 Ill. 23; Lovingston v. Short, 77 Ill. 587. Here the covenantee not only bought with notice that the title to part of the land was doubtful, and asked for a rescission as to that part, but failed to show that any one was claiming or asserting a paramount title to that portion. Middlekauff v. Barick, 4 Gill (Md.), 290. In this case the purchaser took a conveyance with covenants which did not embrace the defect of which he complained. Haldane v. Sweet, 55 Mich. 196.

and palpable failure of the title. In a State in which the rule that a breach of the covenant of seisin is no ground for detaining the purchase money unless the covenantee has been evicted, appears to be firmly rooted, it is, nevertheless, admitted that a judgment in ejectment against the covenantee in favor of an adverse claimant will justify an injunction against the collection of the purchase money, though it is clear that such a judgment does not amount to an eviction, unless the covenantee chooses to

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Rescission was denied here (1) because the covenantee bought with notice of certain physical incumbrances of which he complained, and (2) that the objections made to the title consisted of doubtful outstanding claims. Wilty v. Hightower, 6 Sm. & M. (Miss.) 345. In this case the covenantee was seeking to *recover back* and not to detain the purchase money, and it was of course held that his remedy was on the covenants. McDonald v. Green, 9 Sm. & M. (Miss.) 138. The contract was executory in this case. So, also, in Green v. McDonald, 13 Sm. & M. (Miss.) 445. (See Walker v. Gilbert, 7 Sm. & M. [Miss.] 456.) Cooley v. Rankin, 11 Mo. 647. The objections to the title in this case were such as showed it to be merely doubtful and not absolutely bad. Edington v. Nix, 49 Mo. 135. Rescission was refused because the covenantee made no offer to restore the premises, and was seeking to recover back and not to detain the consideration. Beach v. Waddell, 4 Halst. (N. J. Eq.) 299. It was not shown here that the title had failed. Leggett v. McCarty, 3 Edw. Ch. (N. Y.) 124. There was no offer to return the premises here, and the court said that while the covenantee held possession it would be unreasonable to say that he might not be compelled to pay the purchase money. Woodruff v. Bunce, 9 Paige Ch. (N. Y.) 443; 38 Am. Dec. 559; Whitworth v. Stuckey, 1 Rich. Eq. (S. C.) 404; Van Lew v. Parr, 2 Rich. Eq. (S. C.) 321; Maner v. Washington, 3 Strobh. Eq. (S. C.) 171. The entire purchase money had been paid in this case, and the object of the camplainant was to recover it back. Buchanan v. Alwell, 8 Humph. (Tenn.) 516. The contract was executory in this case. Young v. Butler, 1 Head (Tenn.) 639. In this case the covenantee expressly declined to restore the possession because he had gone on the land to live and had made valuable improvements. Cohen v. Woolard, 2 Tenn. Ch. 686; Jones v. Fulgham, 3 Tenn. Ch. 193; Long v. Israel, 9 Leigh (Va.), 564. Here the covenantee sought to *recover back* and not to detain the purchase money, and the court said (per TUCKER, P.) that they had never gone so far as to relieve a covenantee complaining of failure of title except where the application was to restrain the recovery of the purchase money. In Young v. McClung, 9 Grat. (Va.) 336, 358, the purchaser bought at a judicial sale, and, with full knowledge of the defective title, allowed the sale to be confirmed without objection. In Prevost v. Gratz, 3 Wash. (C. C.) 434, 439, the land was in the possession of adverse claimants, and there was no obstacle to complete and immediate relief on the covenants for title. The court went so far as to deny the right of the covenantee to detain the purchase money, though the surrender the possession to the adverse claimant.[15] In such a case, it would be against conscience to compel the covenantee to pay over the purchase money to the covenantor, and take the risk of an inability to get it back in the form of damages, after he shall have been evicted by legal process upon the judgment.

The permanent detention of the unpaid purchase money upon a breach of the covenant of seizin is in effect a rescission of the

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covenant of warranty had been broken by a constructive eviction. In that respect the case would hardly be deemed an authority at the present day. Ante, § 180. Greenleaf v. Queen, 1 Pet. (U. S.) 138. The contract was executory in this case. Patterson v. Taylor, 7 How. (U. S.) 132. The title in this case was not absolutely bad; it was merely doubtful or unmarketable at most, the covenantor having been in possession under color of title for more than twenty years. Kimball v. West, 15 Wall. (U. S.) 377, 379. This was a suit to rescind the contract and recover the whole consideration, $22,000, and it appeared at the hearing that the covenantor had at his own cost removed all objections to the title. Smoot v. Coffin, 4 Mackey (D. C.), 407. It did not appear in this case that there was a clear outstanding title in a stranger.

[15] Green v. McDonald, 13 Sm. & Marsh. (Miss.) 445, where it was said by the court: "It seems that the objection to granting relief before eviction in cases of the failure of consideration arising from defects in the title is placed chiefly on the ground of incompetency of a court of chancery as not possessing any direct jurisdiction over legal titles. It is conceded that it may try titles to land when the question arises incidentally, but it is understood not to be within its province when the case depends on a simple legal title and is presented directly by the bill. If this be the true reason why a previous eviction is necessary to authorize the interposition of the court, a judgment at law establishing a failure of title would be held sufficient for that purpose without eviction." If this be true it may be added that it is difficult to perceive why the same reasoning would not apply in a court of law when the purchaser sets up a judgment in ejectment as a defense to an action for the purchase money. In Jaques v. Esler, 4 N. J. Eq. 461, it was said: "It is well settled that the purchaser of real estate by deed of warranty has a right to relief in equity against the vendor who seeks to enforce the payment of a bond and mortgage given for the purchase money until a suit actually brought to recover the premises by a person claiming them by paramount title shall have been determined. He is not obliged to look merely to the covenants in the deed. He is not to be driven to such circuity of action, nor to rely upon that as his sole security. The fund in his hands is a security of which it would be inequitable to deprive him." It is true that these objections were made with respect to the right of the covenantee to enjoin the collection of the purchase money before eviction, but the principle of the decision is applicable in any case in which the purchaser seeks to detain the purchase money so long as the title is actually threatened.

contract;[16] and, therefore, this alleged right of the purchaser has been denied in some cases upon the ground that an executed contract cannot be rescinded unless the agreement was founded in fraud or mistake.[17] The wisdom and expediency of this rule is obvious where the contract has been in fact fully executed, that is, where the whole purchase money has been paid and the purchaser is in possession of the premises. The vendor may have invested the purchase money in other property, or the purchaser may have dealt with the estate in such a manner that it may be impossible to put the vendor in as good a position as he was in before the contract was executed. But it may be seriously doubted whether a contract for the sale of lands can be said to be "executed" so long as any part of the purchase money remains unpaid,[18] especially in America, where it is a common practice to execute a conveyance to the purchaser as soon as the contract of sale is made, and to take a mortgage or trust upon the property to secure the unpaid purchase money. In England, where transfers of real property are comparatively infrequent, it seems that conveyances are seldom made to purchasers until all the purchase money has been paid, and, therefore, in that country there are few, if any, occasions to modify the rule against the rescission of executed contracts, so as to permit the detention of unpaid purchase money upon a clear failure of the title.

An able and discriminating text writer admits the right of the purchaser to recover the consideration money as damages for a breach of the covenant of seisin, where the failure of title is clear and undoubted and the breach affects the whole title, and declares that the effect of such a recovery is to revest the title, such as it is, in the covenantor.[19] But elsewhere the same author lays down that equity will not enjoin the collection of the purchase money and rescind an executed contract for the sale of lands merely because the title has failed; in other words, that the covenantee cannot detain the purchase money merely because the covenantor

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[16] A perpetual injunction against proceedings to collect the purchase money practically amounts to rescission of an executed contract. McWhirter v. Swaffer, 6 Baxt. (Tenn.) 342, 347; Golden v. Maupin, 2 J. J. Marsh. (Ky.) 237, 241.

[17] McClennan v. Prentice, 85 Wis. 427.

[18] A contract is said to be *executed* when nothing remains to be done by either party. A contract is said to be *executory* when some future act remains to be done. Story on Cont. (5th ed.) § 92. Farrington v. Tennessee, 5 Otto (U. S.), 683. Fox v. Kitton, 19 Ill. 519, 533. Fletcher v. Beck, 6 Cranch (U. S.), 137. A contract for the sale of lands is "executed" when the purchase money is paid, possession given, and a deed delivered to the pur-

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chaser. Frazer v. Robinson, 42 Miss. 121. In no case can a contract for the sale of lands be said to be "executed" until the purchase money has been paid and a conveyance made to the purchaser. Herbemont v. Sharp, 2 McCord L. (S. C.) 265; Robinson v. Robinson, 44 Am. 227, 235. Of course a contract for the sale of lands is fully executed by the acceptance of a conveyance, in the sense of the rule that excludes evidence of any antecedent agreement repugnant to or inconsistent with the conveyance. Long v. Hartwell, 34 N. J. L. 116. In Adams v. Reed, (Utah) 40 Pac. Rep. 720, it was held that the contract would not be regarded as "executed," notwithstanding a quit-claim conveyance had been executed by the vendor and accepted by the vendee, if the deed conveyed land other than that called for by the contract.

[19] Rawle Covts. (5th ed.) 264. Mr. Rawle's text contains no positive statement to this effect, but such a statement is found in a note on the page cited. The author observes: "In the first edition of this treatise it was said: 'If nothing had been paid and no pecuniary loss had been suffered, and the possession had not been disturbed, and the purchaser did not offer to convey, it is believed that nominal damages only would in general be allowed. The technical rule, therefore, that the covenant for seisin is broken, if at all, at once and completely, is as respects the damages little more than a technical one.' Covenants for Title (1st ed.), 83 (citing the case of Collier v. Gamble, 10 Mo. 472, where it had been held that 'the reasonable rule was to recover nominal damages only until the estate conveyed was defeated or the right to defeat it had been extinguished'), and this passage was cited in the more recent case of Overhiser v. McCollister, 10 Ind. 44, and held to be 'obviously just.' The treatise then went on to say: 'Cases may, of course, occur in which, although the purchaser may have paid nothing to buy in the paramount title, and may still be in possession, yet where the failure of the title is so complete and the loss so morally certain to happen, that a court might feel authorized in directing the jury to assess the damages by the consideration money.' Upon subsequent consideration the opinion was formed that the first passage above quoted did not correctly express the law, and it was omitted in the second edition. Since then the case in Missouri came up again (Lawless v. Collier, 19 Mo. 480), where the second of the passages above quoted was referred to and the case decided accordingly. It is believed that the text as now offered contains the true statement of the law, *and that if the breach of the covenant has occurred, affecting the whole of the title, * * * the plaintiff has a right to recover damages measured by the consideration money, the effect of whose receipt will be, subject to the exceptions hereafter to be noticed, to revest the title, such as it is, in the covenantor.*" If this be sound law and the same author's further proposition, that the covenantee may for the avoidance of circuity of action detain the purchase

has no title.[20] If the purchaser may recover back the purchase money as damages upon a breach of the covenant of seisin, it would seem that upon the same evidence and for the avoidance of circuity of action he should be permitted to detain the purchase money by way of recoupment of the covenantor's demand, just as he may do upon a breach of the covenant of warranty; and it is difficult to discover any reason for admitting that defense in the one case which would not apply with equal force in the other. If he paid the money over to the covenantor he might immediately recover it back as damages for breach of the covenant. As this recovery is permitted only upon condition that the covenantee reconvey the premises to the covenantor, or upon the assumption that the effect of a judgment for the covenantee operates of itself to reinvest the covenantor with such title as he conveyed, it is plain that a rescission of the contract is thereby practically accomplished. The covenantee gets back his purchase money and the premises are restored to the covenantor. We have seen that the covenantee may voluntarily surrender the possession to an adverse claimant, or buy in his rights, if the adverse title has been hostilely asserted; and that such action on his part amounts to a constructive eviction from the premises and constitutes a breach of the covenant of warranty, entitling him to recover damages against

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money, whenever he has a present right to recover damages (Covt. [5th ed.] § 332), be sound, the conclusion is irresistible that a clear and indisputable want of title in the covenantor will justify the covenantee in detaining the purchase money, provided he reconveys the premises to the grantor. Mr. Rawle practically admits this conclusion, but adds that the temptation offered to purchasers to ferret out defects in the title when pressed for the purchase price is such as to induce a leaning in favor of the rule that unless there has been a *bona fide* eviction, actual or constructive, the grantee is without relief. (Covts. for Title, § 329.) See, also, Rawle Covts. (5th ed.) §§ 179, 185, 258, where the author assumes the right of the purchaser on breach of the covenant of seisin to recover substantial damages before eviction. This assumption is in aid of the author's view that the covenantee cannot, before or after eviction, buy in the outstanding title and require the covenantee to take it in satisfaction of the broken covenant. The reason which he gives for that view is, that the covenantee cannot be required to elect between the acceptance of the after-acquired title and the recovery of damages for breach of the covenant of seisin or of warranty, or *to give up his right to rescind the contract by reconveying the premises to the grantor.*

[20] Rawle Covts. (5th ed.) §§ 376, 378.

the covenantor, or to set up those facts as a defense to an action against him for the purchase money.[21] In principle and in practical results there is little difference between the exercise of these rights, and the detention of the purchase money upon a reconveyance of the estate to the grantor after an adverse title has been hostilely asserted against the covenantee. The law is chiefly solicitous that the covenantee shall not enjoy the benefit of the contract while evading its obligations, and this object is accomplished by compelling him either to give up the premises to the paramount claimant, or to surrender them to the covenantor, or to apply the purchase money to the removal of adverse claims.

The virtual rescission of an executed contract for the sale of lands by detention of the purchase money in an action at law would seem to be attended with no serious difficulty where none, or a small portion, of the purchase money, has been paid, and the courts have power to enter judgment for the defendant, with condition that it shall be inoperative unless he reconvey the premises to the grantor. But much practical difficulty arises where a considerable part of the purchase money has been paid, for in most instances purchasers are unwilling, by reconveying the premises, to sacrifice what they have already paid in pursuance of the contract. If, however, the purchaser should prefer to lose what he may have paid rather than pay out more money for a bad title, no reason is perceived why he should not be permitted to do so. He must either submit to his loss or suffer a constructive eviction by compounding with the adverse claimant, except in a few of the States, where he may have an injunction to stay the collection of the purchase money, without, it seems, being required to convey the premises to the grantor, in view of the imminency or extreme probability of his eviction.[22]

§ 265. **QUALIFICATIONS OF THE FOREGOING RULE.** A purchaser who has not been evicted by a paramount claimant should not, upon a breach of the covenant for seisin, be permitted to detain the purchase money, unless he offers to reconvey the premises to the grantor, and to make good to the latter any loss or damage he may have sustained by reason of the purchaser's occupation and possession of the premises.[23] Neither should that right be accorded the purchaser unless it appears that there is a moral certainty of his eviction by one whose better title is clear and undisputed, and who is hostilely asserting that title. In each and every case in which this defense is set up, the burden will be upon the defendant to show, by clear and satisfactory evidence, the absolute want of title in the grantor.[24] The mere objection that the title is doubtful or unmarketable should be no ground for detaining the purchase money, after a conveyance with covenants for title has been accepted. As was said by the court in a case frequently cited: "The vendee has accepted the deed, he has received possession, he has enjoyed it without disturbance; he alone has stirred up adversary claims, and, when so stirred, neither himself nor the alleged claimants have been able to make good their claims. After such acceptance of the possession and deed and covenant of warranty, a vendee, before eviction or disturbance, cannot receive the aid of a court of equity to assist him to withhold the purchase money or rescind the contract, but by taking on himself the burden of showing a defect in the title of the vendor of a latent character, and of proving superior outstanding subsisting adversary rights and interests."[25] Nor should the defense of want of title be admitted in any case in which the purchaser accepted a conveyance with notice of the defect; for while notice of a defect of title does not affect the right of the purchaser to recover on the covenants for title, it will, as a general rule, deprive him of the right to rescind the contract on the ground that the title has failed.[26]

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[21] Ante, §§ 150, 187.

[22] Post, § 337.

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[23] Deal v. Dodge, 26 Ill. 458; Melicharek v. Calkins, (Cal. App.) 183 Pac. 457. Cases may easily be supposed in which the better *legal* title is in a stranger, with no probability that it will ever be asserted against the purchaser. Thus, in some of the States, neither a married woman nor her heirs are estopped by her covenant of warranty from recovering her separate estate from a purchaser who holds under a conveyance by her not executed in the manner required by statute to pass her title, though the other heirs may be in the full enjoyment of the consideration of such conveyance. Instances have occurred in which parties who might have had the benefit of such a defect have freely and voluntarily relinquished all their rights in the premises.

[24] Ante, § 117. Vance v. House, 5 B. Mon. (Ky.) 540; Zerfing v. Seelig, 14 S. Dak. 303, 85 N. W. Rep. 585.

[25] Cooley v. Rankin, 11 Mo. 642; Lewis v. Morton, 5 T. B. Mon. (Ky.) 1. In an action on a bond for purchase money of land, the defense that the title was doubtful is insufficient; the title must be proven to be absolutely bad. Crawford v. Murphy, 22 Pa. St. 84; Schott v. McFarland, 1 Phil. (Pa.) 53. In Clanton v. Burges, 2 Dev. Eq. (N. C.) 13, a much cited case, the court, by RUFFIN, J., after describing the objection to the title on which the

The grantee seeking to rescind for want of title in the grantor, must have acted promptly on discovery of the failure of title, and must be able to place the grantor *in statu quo*. In a case in which he had been guilty of great delay after discovery of the want of title, and had also placed an incumbrance on the property, he was denied relief.[27]

With these qualifications it is believed that little inconvenience

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application for an injunction was founded, as a minute outstanding interest, dependent upon a contingency, observed that it could never form grounds for rescinding a contract "at the instance of a purchaser who is in possession under a conveyance executed with full covenants for quiet possession, from a vendor not alleged to be in failing circumstances, who made on the treaty, a full communication of his title. To grant the prayer of the bill would be to proclaim encouragement to dishonest dealing, and an invitation to purchasers to expose latent defects in their vendor's title, instead of curing them by enjoyment."

[26] Payne v. Cabell, 7 T. B. Mon. (Ky.) 198. See, also, Whitworth v. Stuckey, 1 Rich. Eq. (S. C.) 408, where it was said: "In the frequent fluctuations of the commercial prosperity of the country — fluctuations to which our country seems more liable than any other — there is a corresponding fluctuation in the value of property. He who purchases land at a high price will be tempted, when there follows a great fall of value, to discover and bring forward some claim which may have the effect of ridding him of his bargain. But this is a betrayal of his vendor's title and against good faith. The case has occurred of a vendee who, upon such a fall of property, has been at great expense of time, labor and money, in seeking information from individuals and searching public offices in order to ferret out a paramount title, which there was not the remotest probability would ever be prosecuted, which did not appear to be known to the person in whom it was vested, and which there was hardly a probability that he would prosecute successfully even if he knew it. This was scarcely less than a fraud; yet, according to the doctrine contended for, relief ought to have been granted in such a case, for there was clearly an outstanding title in some one." Anderson v. Lincoln, 5 How. (Miss.) 279; Gartman v. Jones, 24 Miss. 234; Merritt v. Hunt, 4 Ired. Eq. (N. C.) 406; Henry v. Elliott, 6 Jones Eq. (N. C.) 175. Contra, Herron v. Barbour, (Okl.) 182 Pac. 243.

[27] Johnson v. Williamson, 145 Ind. 645, 43 N. E. Rep. 1054.

would result from a rule which would permit the grantee to detain the unpaid purchase money upon a clear breach of the covenant of seisin. Without them, such a rule would invite purchasers to find loopholes by which to escape from their improvident bargains, and result in injury to the entire commonwealth by lessening the stability of transactions in real property.

§ 266. **BREACH OF THE COVENANT OF SEISIN AS TO PART OF THE PREMISES.** It has been said that upon a "partial" breach of the covenant of seisin, the rule limiting the covenantee's recovery to nominal damages before eviction does not apply, as where a tenant for life conveys with covenant for seisin in fee, and that in such a case the covenantee can only be required to pay the value of the life estate, and may recoup the difference between the value of the life estate and the fee. The same authority extends this principle to cases in which the title to a specific part of the subject fails.[28] Treating this as a proposition that the covenantee may detain the purchase money *pro tanto,* though he has not been disturbed in the possession of the part to which title has failed, it is difficult to perceive upon what grounds rests the distinction between such a case and one in which there has been a complete failure of title to the entire estate.

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[28] Rawle Covts. (5th ed.) §§ 186, 187.

CHAPTER XXVII.

OF THE DETENTION OR RESTITUTION OF THE PURCHASE MONEY WHERE THE DEED CONTAINS NO COVENANTS FOR TITLE.

GENERAL PRINCIPLES. § 267.
EXCEPTION. VOID CONVEYANCES. § 268.
MERGER OF PRIOR AGREEMENTS. § 269.
MERGER IN CASES OF FRAUD. § 270.
RULE IN PENNSYLVANIA AS TO DETENTION OF THE PURCHASE MONEY. § 271.

§ 267. **GENERAL PRINCIPLES.** The next rule which we shall state in respect to the detention or recovery back of the purchase money, after the contract has been executed by the delivery and acceptance of a conveyance, is as follows:

Proposition V.[1] *If the contract has been executed by a conveyance of the land to the purchaser without general covenants for title, he can, if the title fails, neither recover back*[2] *the purchase*

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[1] For Proposition IV, see ante, § 180.

[2] Co. Litt. 384, a, note; Sugd. Vend. (14th Eng. ed.) 251, 549. 2 Kent Com. (11th ed.) 622 (473); Rawle Covts. (5th ed.) § 321; Maynard v. Mosely, 3 Swanst. 651; Bree v. Holbech, Doug. 654; Urmston v. Pate, 4 Cruise Dig. 90; Typee v. Webb, 14 Beav. 14; Cripps v. Reade, 6 T. R. 606; Thomas v. Powell, 2 Cox Ch. 394; United States v. Bank of Ga., 10 Wh. (U. S.) 433; Union Pac. R. Co. v. Barnes, 64 Fed. Rep. 80; Corbett v. Dawkins, 54 Ala. 282; Story v. Kemp, 51 Ga. 399; Botsford v. Wilson, 75 Ill. 132; Niles v. Harmon, 80 Ill. 396; Barry v. Guild, 126 Ill. 439, 18 N. E. Rep. 759; Major v. Brush, 7 Ind. 232; Jenkinson v. Ewing, 17 Ind. 505; Starkey v. Neese, 30 Ind. 224; Stratton v. Kennard, 74 Ind. 303; Allen v. Pegram, 16 Iowa, 172; Weightman v. Spofford, 56 Iowa, 172. In Louisinaa, where the civil law prevails and the rule *caveat emptor* has but little foothold, it has nevertheless been held that a purchaser taking a conveyance with special warranty, and warranty of only such title as the vendor had under a particular grant, was not entitled to compensation on failure of the title through a defect not covered by the warranty. Pilcher v. Prewitt, 10 La. Ann. 568; Lyons v. Fitzpatrick, 52 La. Ann. 697, 27 So. Rep. 110. To the text: Getchell v. Chase, 37 N. H. 106; Bates v. Delavan, 5 Paige Ch. (N. Y.) 306; Banks v. Walker, 2 Sandf. Ch. (N. Y.) 348; Whittemore v. Farrington, 7 Hun (N. Y.), 392; Granger v. Olcott, 1 Lans. (N. Y.) 169; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Wheeler v. State, 190 N. Y. 406, 83 N. E. 54, 123 Am. St. Rep. 555; Drott v. Stevens, 163 Wisc. 571, 158 N. W. 329; St. Francis Levee Dist. v. Lumber Co., 86 Ark. 221, 110 S. W.

money, nor detain[3] *that which remains unpaid, either at law or in equity; unless the vendor was guilty of fraud, or the contract was founded in mistake of the parties as to some fact upon which the title depended.*

805; Goodman v. Hadley, (Tex. Civ. App.) 122 S. W. 282; Joyce v. Ryan, 4 Gr. (Me.) 101; Emerson v. Wash. Co., 9 Gr. (Me.) 94; Soper v. Stevens, 2 Shep. (Me.) 133; Gates v. Winslow, 1 Mass. 65. In this case it was said that the condition of the purchaser was the same as that of one who gives away voluntarily a sum of money. Earle v. De Witt, 6 Allen (Mass.), 520; Bemis v. Bridgman, 42 Minn. 496, 44 N. W. Rep. 793; Pintard v. Martin, 1 Sm. & M. Ch. (Miss.) 126; Higley v. Smith, 1 Chip. (Vt.) 409; Maynard v. Moseley, 3 Swanst. 655 (reported from Lord NOTTINGHAM'S MSS.), where it was said by that eminent jurist that although the purchaser had been evicted, "yet he that purchases lands without any covenants or warranties against prior titles, as here, where the defendants sold only their own title, if the land be afterward evicted by an older title, can never exhibit a bill in equity to have his purchase money again upon that account; possibly there may be equity to stop the payment of such purchase money as is behind, but never to recover what is paid, for the chancery mends no man's bargain, though it sometimes mends his assurance; and it cannot be truly said that the defendants keep the money for nothing, since they have done all which was agreed to be done for it, but if the plaintiff had bought that which falls out to be worth nothing, he can complain of none but himself." In Bree v. Holbech, Doug. 654, a leading English case, a personal representative found among the papers of his testator a mortgage deed, and assigned it for the mortgage money, affirming and reciting in the deed of assignment that it was a mortgage deed made or mentioned to be made between the mortgagor and mortgagee for that sum. It was decided that the assignee could not recover back the mortgage money, though the mortgage was a forgery, unless the assignor knew it to be a forgery. The question was whether there was any fraud. If the personal representative had discovered the forgery and then assigned the mortgage as a true security it would have been different. He did not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the assignee to look to the goodness of it.

[3] 1 Sugd. Vend. (14th Eng. ed.) 251; 2d. id. 549, 552; Rawle Covts. (5th ed.) § 321; Roswall v. Vaughan, 2 Cro. 196; Greenleaf v. Cook, 2 Wh. (U. S.) 13; Noonan v. Lee, 2 Black (U. S.) 499; Buckner v. Street, 15 Fed. Rep. 365; Griel v. Lomax, 86 Ala. 135, 5 So. Rep. 325, *ob. dict.*; Strong v. Waddell, 56 Ala. 471; Crowell v. Packard, 35 Ark. 348; Alexander v. McCauley, 22 Ark. 553; Reese v. Gordon, 19 Cal. 147; Hastings v. O'Donnell, 40 Cal. 198; O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873; Barkhamstead v. Case, 5 Conn. 528, 13 Am. Dec. 92; McDonald v. Beall, 55 Ga. 288; Patten v. Stewart, 24 Ind. 332; Bethell v. Bethell, 92 Ind. 318; Gibson v. Richart, 83 Ind. 313; Horner v. Lowe, 159 Ind. 406, 64 N. E. Rep. 218; Brandt v. Foster, 5 Cl. (Io.) 287; Butler v. Miller, 15 B. Mon. (Ky.) 627; Middles-

This proposition forms, so to speak, the most conspicuous landmark in the outlines of the law defining and limiting the right of the purchaser of lands to relief at law or in equity in case the title fails. The rule therein formulated has been acknowledged from an early period, and has been followed, with few exceptions, both in England and America down to the present time. The reasons for the rule are clear and satisfactory. They are, in the first place, that a purchaser who has failed to protect himself by demanding appropriate covenants, is not entitled to relief; and, in the second place, that if covenants were demanded and refused, the vendor should not be held liable for defects, the risk of which he expressly declined to assume. The purchaser is still less entitled to relief if he makes a catching bargain, that is, agrees to assume the risk of the title, and to accept a conveyance without covenants.[4] "Such deeds," it has been said, "are made because

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kauff v. Barrick, 4 Gill (Md.), 290; Smith v. Chaney, 4 Md. Ch. 246; Mitchell v. Christopher, (Minn.) 58 N. W. Rep. 873; Hulett v. Hamilton, (Minn.) 61 N. W. Rep. 672; Insurance Co. v. Marshall, (Minn.) 57 N. W. Rep. 658; Pritchard v. Steamboat Co., 169 N. C. 457, 86 S. E. 171, L. R. Ann. 1916 A. 961. Norton v. Stroud Bank, 17 Okl. 295, 87 Pac. 848. A rule varying from that stated in the text exists in the State of Pennsylvania. See post, this chapter, § 632; McIntyre v. Long, 71 Tex. 86, 8 S. W. Rep. 622; Heisch v. Adams, (Tex.) 16 S. W. Rep. 790; Scott v. Slaughter (Tex. Civ. App.), 80 S. W. Rep. 643; Baldwin v. Drew, (Tex. Civ. App.) 180 S. W. 614; Commth. v McClanachan, 4 Rand (Va.) 482. In Scudder v. Andrews, 2 McL. (U. S.) 464, n, and Wiley v. White, 3 Stew. & P. (Ala.) 355; Gray v. Ward (Tenn. Ch. App.), 52 S. W. Rep. 1028, and perhaps in a few other cases, besides the Pennsylvania and South Carolina decisions hereafter noticed, there are *dicta* to the effect that the purchase money may be detained on failure of the title, notwithstanding the absence of covenants in the conveyance. There are no authorities cited in support of these intimations. In Louisiana where the civil law prevails, it has been held that a purchaser with special warranty and notice of a government suit affecting the title, who has never been evicted and probably never will be, and who has not impugned his vendor's title, cannot insist on security against hostile claims. Pilcher v. Prewitt, 10 La. Ann. 568; Medina v. Stoughton, 1 Salk. 211, per Lord HOLT: "If the seller of goods have not the possession, it behooves the purchaser to take care, *caveat emptor*, to have an express warranty, or a good title; and so it is in the case of land, whether the seller be in or out of possession, for the seller cannot have them without a title, and the buyer is at his peril to see to it."

[4] Breckenridge v. Waters, 5 T. B. Mon. (Ky.) 150, 17 Am. Dec. 46; Butler v. Miller, 15 B. Mon. (Ky.) 617.

the vendor is unwilling to warrant the title; they are accepted because the grantee is willing to take the hazard of the title and believes it worth the price he pays for it, or agrees to pay."[5] These observations undoubtedly apply with full force in a locality in which it is customary to give general covenants of warranty, but lose much of their application wherever it is the custom to give only a quit claim, or a conveyance with limited or special covenants for title. In the former case it is a fair presumption that the attention of the parties was drawn to the state of the title, and that the purchaser expressly bought merely such title as the vendor had. In the latter case, that is, where it is customary to give only limited covenants, no presumption that the defective title was considered in the bargain necessarily arises. The purchase price agreed to be paid will generally be a fair test of the real understanding of the parties in this respect. If the purchaser pays the full fee simple market value of the premises, it could hardly be presumed that he knew the title was questionable, but was nevertheless willing to pay as much for a clouded title as for one undoubtedly clear. These considerations have, in one of the States at least, led to a great relaxation of the rule stated at the beginning of this chapter, with respect to the right of the grantee to detain the unpaid purchase money where the title has failed.[6] But the rule of the common law and that which prevails in most of the American States is, without question, that "a vendor selling in good faith is not responsible for the goodness of his title, beyond the extent of the covenants in his deed. This rule, experience has shown, reconciles the claims of convenience with the duties of good faith. The purchaser is stimulated to employ vigilance and care in reference to the things as to which they will secure him from injustice, while it affords no shelter for bad faith on either part."[7]

The rule is thus laid down by Sugden: "If one sells another's estate, without covenant or warranty for the enjoyment, it is at the peril of him who buys, because, the thing being in the realty, he might have looked into the title, and there is no reason he should have an action by the law where he did not provide for himself." This is one of the plainest applications of the maxim *caveat emptor.*[8] For the purposes of this rule a quit-claim conveyance, or a conveyance, with "special warranty," or limited covenants for title, is the same as a conveyance without covenants for title, unless the defect of which the grantee complains, was caused by the act of the grantor or some one claiming under him.[9] So, if the warranty be against a particular specified claim, the covenantee cannot complain of the loss of the land through other claims.[10]

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[5] McNeal v. Calkins, 50 Ill. App. 17.

[6] Post, § 271.

[7] Language of the court in Refeld v. Woolfolk, 22 How. (U. S.) 328.

If the purchaser accept a deed without covenants for title, that is, a mere quit-claim, the fact that he did so under protest, claiming the right under his contract to require a deed with a covenant against the grantor's acts, has been held not to entitle him to detain the purchase money on failure of the title and loss of part of the premises; even though the defect in the title consisted of a prior conveyance by the vendor himself.[11]

In some cases it has been strongly contended that a sale of lands in which it does not appear that the vendor was aware of the infirmity of his title, establishes a case of mistake as to the title, and affords ground for relief if the vendor conveyed with special or limited covenants. Such a doctrine would provide an escape for the purchaser from nearly every improvident bargain, if the title should be faulty, and the better opinion seems to be that the vendee taking a quit-claim deed, is entitled to no relief on the ground of mistake, unless the mistake is as to the existence or non-existence of some particular fact upon which the validity of the vendor's title depends. The vendor may feel assured of the sufficiency of his title, yet be unwilling to *insure* the purchaser against recondite claims, which the most searching investigation might fail to disclose.[12] If the deed contain special or limited covenants only, and it was executed in a locality or section where the practice is to insert general covenants, it will be presumed that the parties knew or suspected that the title was defective, and that the purchaser agreed to take merely such title as the vendor could make.[13] It has also been contended that the grantee should be permitted to recover back the purchase money when he loses the estate, without regard to the question of covenants for title, upon the principle of the common law enounced in the case of Moses v. McFerlan, that assumpsit will lie in any case to recover money which the defendant, *ex æquo et bono,* ought not to retain in his hands.[14] But it is generally considered that this rule must be subordinated to that other principle of the common law, *caveat emptor.*

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[8] 1 Sugd. Vend. (8th Am. ed.) 534 (356).

[9] Cross v. Noble, 67 Pa. St. 78. The grantee may, by his conduct, estop himself from claiming that there has been a breach of warranty; as where, knowing the objections to the title, he took a deed with special warranty, and agreed to a compromise judgment in favor of adverse claimants of the land. Sour Lake Co. v. Jackson, (Tex. Civ. App.) 130 S. W. 662.

[10] Terrell v. Herron, 4 J. J. Marsh. (Ky.) 519; Breckenridge v. Waters, 5 T. B. Mon. (Ky.) 154, 17 Am. Dec. 46; Morrison v. Caldwell, 5 T. B. Mon. (Ky.) 439, 17 Am. Dec. 84.

[11] Porter v. Cook, 114 Wis. 60, 89 N. W. Rep. 823.

The rule that a purchaser who has taken no covenants for title can have no relief if evicted from the premises by one having a better right, is satisfactory in all cases in which it appears that the purchaser intended to accept the risks of a defective title, provided that rule be limited to cases in which the estate is lost through a defect in the title proper, that is, through the assertion of an outstanding paramount title in a stranger. But it is not easy to perceive any sound reason why a purchaser who pays off a prior incumbrance on the land, or who redeems from a purchaser under such incumbrance, should not be *subrogated* to the rights of the incumbrancer without regard to the existence or non-existence of covenants for title in the conveyance under which he holds, and allowed to set off the incumbrances against the unpaid purchase money. The doctrine of subrogation is the creature of equity, and is in no wise dependent upon any contract or covenant between the parties.[15] The incumbrancer might subject the estate in the hands of the vendor to the payment of his debt, and his assignee would have the same right. Inasmuch, then, as any person buying the incumbrance, or paying it off, other than a mere volunteer, would be accorded that right, justice would seem to require that a purchaser, paying off the incumbrance to protect his estate, should be treated as an equitable assignee of the rights, powers and privileges of the incumbrancer, though he took a conveyance without covenants for title; unless, indeed, it should appear that the existence of the incumbrance was known to him and influenced the consideration of the conveyance.

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[12] Clare v. Lamb, 10 L. R., C. P. 334. In Hitchcock v. Giddings, 4 Price, 135, where relief was granted on the ground of mistake, a remainder man had sold his interest in ignorance of the fact that the remainder had been barred by a common recovery suffered by a tenant in tail. This was upon the principle that if A. sell property to B., under the impression that it is still in existence, when, in fact, it has been destroyed, there it a mistake of fact which entitles B. to detain or recover back the purchase money. See post, ch. 35, "Mistake."

[13] Oliver v. Piatt, 3 How. (U. S.) 410; Miller v. Fraley, 23 Ark. 743; Woodfolk v. Blount, 3 Hayw. (Tenn.) 147, 9 Am. Dec. 736; Lowry v. Brown, 1 Coldw. (Tenn.) 459.

[14] 2 Burr. 1012.

It is suggested that in those localities in which it is the custom to convey with special warranty only, the purchaser should insist upon a provision in the conveyance by which he would have the right to detain the purchase money and surrender the estate to the vendor, if a paramount title thereto should be asserted in the future. But if such an agreement should be made, care should be taken to see that it is actually inserted in the conveyance. We shall see that similar agreements, forming part of the executory contract of sale, have been held to be merged in a conveyance of the premises without warranty, and were, therefore, unavailable to the purchaser where evicted by an adverse claimant.[16]

§ 268. **EXCEPTION. VOID CONVEYANCE.** An exception to the rule that the purchaser cannot recover back or detain the purchase money in a case where he has taken a conveyance without covenants for title has been held to exist in those cases where, for want of authority in the vendor to convey, the deed is absolutely void,[17] as where the sale and conveyance was made by an assignee in bankruptcy who had no authority for want of jurisdiction in the court to appoint him.[18] So, also, where the grantor, an administrator, had acquired title by purchasing the premises at his own sale and had paid the purchase money out of the funds of the estate.[19] So, where a married woman, who had not been privily examined when she joined her husband in executing a deed, ejected the purchaser, the representatives of the husband were restrained from collecting the purchase money.[20] It has been held that if the grantor be a married woman, and her deed be void for non-joinder of her husband or other reason, the purchaser cannot recover back the purchase money from her, unless the same remains undisposed of in her hands, or has been converted into other property so that it can be traced.[21] The rule that the grantee is entitled to no redress where the deed does not contain covenants of title, does not apply where the conveyance was of lands forming a part of the public domain to which the grantor had no title. The reason for this exception is that public lands cannot be made the subject-matter of private contract, and such a conveyance, being utterly void, the grantee therein is entitled

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[15] Sheldon Subrogation, ch. 1. Compare, Hancock v. Wiggins, 28 Ind. App. 449, 63 N. E. Rep. 242.

[16] Post, § 269.

[17] Shearer v. Fowler, 7 Mass. 31; Williams v. Reed, 5 Pick. (Mass.) 480, where the question rose upon a garnishment of the vendor by a creditor of the vendee, the creditor claiming that the vendee was entitled to a return of

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the purchase money, and seeking to subject it to his claim. Dill v. Wareham, 7 Met. (Mass.) 438; Holden v. Curtis, 2 N. H. 61.

[18] Earle v. Beckford, 6 Allen (Mass.), 549; 83 Am. Dec. 651.

[19] Beck v. Ulrich, 13 Pa. St. 636, 53 Am. Dec. 507.

[20] Lane v. Patrick, 3 Murph. (N. C.) 473.

[21] Scott v. Battle, 85 N. C. 184, 191, 39 Am. Rep. 694, where it was said: "If in a case like the present a *feme covert* should retain and have actually in hand the money paid her as the consideration for her imperfect and disaffirmed contract, her vendee would be permitted to recover the same at law, or if she had converted it into other property so as to be traceable, he might pursue it in its new shape by a proceeding *in rem*, and subject it to the satisfaction of his demand. But if she has consumed it, as it is admitted this plaintiff has done, the party paying it is without remedy; and this because of the *policy* of the law which forbids all dealings with *femes covert*, unless conducted in the manner prescribed by the statute, and which throws the risk in every such case upon the party that knowingly deals with her." See, also, Martin v. Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; Jones v. Cohen, 82 N. C. 75, 81. A contrary view to the above was taken in Shroyer v. Nickell, 55 Mo. 264, where it was held that a *feme covert* grantor, suing to recover the premises, her deed being void for want of proper acknowledgment, must refund the purchase money, and judgment in her favor was made conditional upon such repayment. This seems the more equitable view.

to have the purchase money restored, and he may recover it back in *assumpsit*.[22]

These principles have been extended to a case in which the void conveyance contained covenants for title, and the grantee had not been disturbed in the possession. In that case, the conveyance was by an officer of a court under an order which was void for want of jurisdiction. It was held that the grantee might detain the purchase money, though the conveyance contained covenants for title, and the grantee had not been evicted or disturbed by adverse claimants.[23]

The rule that the purchaser cannot recover back the purchase money when the contract has been performed on the part of the vendor by the execution of a conveyance, does not apply where the conveyance is rejected by the vendee as being insufficient and not such as he is entitled to receive under the contract.[24]

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[22] Lamb v. James, 8 Tex. 485, citing Garber v. Armentrout, 32 Grat. (Va.) 235; Lawson's Rights & Rem. § 3691.

[23] Puckett v. McDonald, 6 How. (Miss.) 269. The court said in this case: "We freely admit the doctrine that where the vendee of land is let into possession under a deed with full covenants, and there has been no eviction nor any fraud, that he cannot resist the payment of the purchase money on the alleged ground of a defect of title. In such case, he is driven to his remedy upon the covenants in his deed. This case, however, is widely different from those where this doctrine is applied. Here the vendors were only acting as trustees in carrying into execution an order of the probate court. That order is void, and consequently nothing passes or can pass by their subsequent act. The sale is virtually made by the court, and the administrators act only as commissioners to execute the order of sale. Their covenants in such circumstances cannot furnish a foundation upon which an action can be maintained against them personally, nor any protection to the vendee; nor can the vendee be supposed to place any reliance upon such assurances, since the contract itself, from its nature, is intended to convey only the title of the deceased (the sale of the decedent's lands had been ordered on an *ex parte* application of his administrators without notice to the heirs). The purchaser must necessarily in such case rely upon the title of the deceased, and the validity of the order of sale by the court. This view of the subject appears to be fully sustained by the authorities. See 2 Stew. (Ala.) 335 (Wiley v. White); 8 Mass. 46 (Bliss v. Negus). It is absolutely void, and so shown to be by the record of the court. No eviction is, therefore, necessary, since the paramount title of the heirs is as effectually established by the evidence as it could be by the record of eviction." See, as to the necessity of surrender of the premises in the case of a void *executory* contract, ante, § 263.

§ 269. **MERGER IN THE CONVEYANCE OF ALL AGREEMENTS RESPECTING THE TITLE.** All agreements between the parties respecting the title, whether verbal or in writing, are, as a general rule, merged in the conveyance of the premises; so that, notwithstanding an agreement by the vendor that the purchase money should be applied to the removal of adverse claims, or should be withheld if the title failed, the purchaser, accepting a conveyance without covenants for title, will, in the absence of fraud or mistake, be compelled to pay the purchase money.[25] And promises, express or implied, to give a good title are merged in a conveyance without covenants.[26] This doctrine has also been applied in exoneration of the purchaser. Thus, it has been held that an agreement of the purchaser to erect a building of a certain value on the granted premises, was merged in a conveyance of the premises subsequently made, in which such agreement was not mentioned.[27]

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[24] Guttschlick v. Bank of the Metropolis, 5 Cranch (C. C.), 435. In this case, it seems that the purchaser rejected the deed on the ground of insufficient execution by the vendor, a bank, the deed being from the president of the bank, under his private seal, and not under the seal of the corporation. The court said that the purchaser might offer the deed in evidence with other facts showing the title to be defective.

[25] Rawle Covts. (5th ed.) § 320; Howes v. Barker, 3 Johns. (N. Y.) 506, 3 Am. Dec. 526, where it was held that this rule prevented the purchaser from showing that there was a mistake in the quantity of land conveyed, and from maintaining an action of assumpsit to recover the deficiency. Followed in Houghtaling v. Lewis, 10 Johns. (N. Y.) 297, and Bull v. Willard, 9 Barb. (N. Y.) 641, upon similar facts. The presumption of law is, that the acceptance of a deed in pursuance of articles is satisfaction of all previous covenants, and where the conveyance contains none of the usual covenants, the law supposes that the grantee agreed to take the title at his risk, or else that he would have rejected it altogether. Share v. Anderson, 7 Serg. & Rawle (Pa.), 43, 10 Am. Dec. 421, where the promise was to indemnify the purchaser against incumbrances. Crotzer v. Russell, 9 Serg. & R. (Pa.) 78; Ludwick v. Huntzinger, 5 W. & D. (Pa.) 51; Shontz v. Brown, 27 Pa. St. 131, where it was held that a bond to convey an indefeasible title was merged in a conveyance with special warranty. These cases seem inconsistent with later Pennsylvania decisions. See Close v. Zell, 141 Pa. St. 390, 21 Atl. Rep. 770; Whitemore v. Farrington, 7 Hun (N. Y.), 592; Griffith v. Kempshall, 1 Clark Ch. (N. Y.) 571; Earle v. De Witt, 6 Allen (Mass.), 520; Williams v. Hathaway, 19 Pick. (Mass.) 387; Bever v. North, 107 Ind. 545, 8 N. E. Rep. 576; Philbrook v. Emswiler, 92 Ind. 590; Ice v. Ball, 102 Ind. 42, 1 N. E. Rep. 66; Thompson v. Christian, 28 Ala. 399; Seitzinger v. Weaver, 1 Rawle (Pa.), 377; Jones v. Wood, 16 Pa. St. 25. Compare Selden v. Williams, 9 Watts (Pa.), 12; Brown v. Morehead, 8 S. & R. (Pa.) 569; Anderson v. Long, 10 S. & R. (Pa.) 55, and Pennsylvania cases cited infra, this section. In Johnson v. Hathorn, 3 Keyes (N. Y.), 126, it was held that an executory agreement, whether written or oral, is not merged in

The case of Smith v. Chaney[28] affords a good illustration of this rule. There the vendor had agreed in writing at the time of the sale to abate the purchase money in proportion to the quantity of the land sold of which peaceable possession could not be given. Afterwards the purchaser accepted a conveyance of the premises without covenants, and having lost a part of the land through

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a subsequent writing by way of partial execution, unless the latter is accepted in substitution or in full performance of the contract. In Coleman v. Hart, 25 Ind. 256, it was said that if the agreement was *verbal* it would be merged in the covenants of the deed; and this upon the familiar principle that a written contract is conclusively presumed to include all contemporaneous agreements between the parties. The rule under consideration, however, obviously depends upon a different principle of wider application, which is that the conveyance is a *second contract* of a solemn character, superseding all former contracts relating to the title, whether verbal or in writing. In Kramer v. Ricke, 70 Iowa, 535, 25 N. W. Rep. 278, there was a conveyance with warranty to the purchaser, and a contemporaneous agreement in writing by the vendor to remove all adverse claims at his own expense. In an action for the purchase money the purchaser defended on the ground that the plaintiff had not perfected the title as agreed, and the agreement in question was admitted in evidence. The question of merger of the agreement in the conveyance was not raised; the court and the parties seem to have assumed that the agreement was properly admitted in evidence. In a case in which the purchaser took a quit-claim deed of the premises, knowing that there was a defect in the title, and the vendor by a separate writing agreed to perfect the title, but without specifying any time therefor, and the purchaser, at the request of the vendor, executed his note to a third person for the purchase money, it was held that the giving of the note to a third party and the taking of the obligation of the vendor was a waiver of any defense to the note on account of the defective title, and that if the purchaser had any remedy it was upon the obligation of the vendor. The question of merger of this obligation in the quit claim was not raised. James v. Hays, 34 Ind. 272.

[26] Clark v. Post, 113 N. Y. 17, 20 N. E. Rep. 573.

[27] West Broadway Real Est. Co. v. Bayliss, (Md.) 31 Atl. Rep. 442. The question how far this decision is in conflict with the rule that collateral stipulations of which the deed is not necessarily a performance are not merged therein, deserves consideration. Post, this chapter.

[28] 4 Md. Dec. 246.

defect of title, sought to restrain the collection of the purchase money by injunction, but the court said: "This deed must be understood as taking the place of all previous agreements upon the subject, and as containing the full and entire contract of the parties; and yet we do not find in it any covenant in regard to the title of the vendor. It seems to me that if the purchaser had designed to guard himself against an apprehended deficiency in the number of acres, or any other defect in the title, to the whole or any part of the land, he should have taken care to have had proper covenants inserted in the deed."

The foregoing rule has been greatly modified in the State of Pennsylvania. It will be seen hereafter that a peculiar doctrine obtains in that State by which a purchaser who has taken a conveyance without covenants for title in ignorance of any objections to the title is permitted to *detain* the purchase money upon failure of the title.[29] Another class of decisions there, having no necessary connection with this doctrine, establish the rule that an agreement by the vendor to remove incumbrances on the premises, or to refund the purchase money if the title should fail, and to reimburse the vendee for all costs and expenses incurred, will not be merged in a deed containing a covenant of special warranty, but no covenant which would embrace such agreement; and that if the title should fail or incumbrances should appear the purchaser may not only *detain*, but may *recover back* the purchase money. Such an agreement is there considered to be independent of and collateral to the deed, whether made before or after the execution of the deed, and though not in writing has been held not to be obnoxious to the rule that a written instrument cannot be added to, modified or explained by a contemporaneous parol agreement.[30] These decisions seem plainly in conflict with Smith v. Chaney, *supra,* and with the weight of American authority upon the point. At the same time it cannot be denied that they establish a rule which in many cases will prevent hardship and effectuate the intent of the parties. It is not always that they can have the advice and assistance of skilled conveyancers in the execution of their contracts. The popular idea of a conveyance is that its principal office is merely to pass the title of the grantor, and few purchasers having a title bond or written contract to indemnify them against loss in case the title failed, would consider it necessary to have the same assurance repeated in the conveyance. In the eyes of the parties the one instrument is as binding as the other, and the merger of the indemnity in the conveyance is, it is believed, in most cases, to make for them a contract that they never intended.

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[29] Post, § 271.

[30] Close v. Zell, 141 Pa. St. 390, 21 Atl. Rep. 770. This case contains a full exposition of the Pennsylvania doctrine stated in the text. Mr. Justice GREEN, delivering the opinion of the court, said: "In the second count of the plaintiff's statement their cause of action is substantially set out as a parol contract of indemnity against a defective title to certain real estate conveyed to the plaintiffs by the defendant's testator, which was the operative inducement to the plaintiffs to purchase the title from their vendor. The deed contained the usual covenant of special warranty, but no covenant of title, and as there is no breach of any of the covenants of the deed, no cause of

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action arises under it. This proceeding is, therefore, not in any sense a proceeding to change, alter, modify or reform the deed in question in any respect. It is not alleged or claimed that any covenant or stipulation was omitted from the deed by fraud, mistake or accident, but the deed just as it is set forth in the statement in substance, together with an allegation that the grantor agreed with the plaintiffs at the time of the sale and delivery of the deed that he would refund to them the whole of the consideration money paid by the grantees to the grantor, and all interest and all costs and expenses incurred in the event that the grantees should not acquire under the deed a good title to the premises sold. The question arises whether such a contract is merged in the deed subsequently executed or whether it survives the deed and confers a cause of action which may be enforced upon a failure of the title. It will be observed that the contract, which in this case was verbal, precedes and is independent of the deed. It stipulates for indemnity against the consequences of the taking of the title conveyed by the deed. If, notwithstanding the deed and the title thereby sought to be conveyed, the grantees subsequently sustained loss by reason of the fact that they acquired no title by the deed, is there any legal reason why they cannot recover from the grantor the money which he had received from them and which he promised he would refund to them in case the title failed? This is a question which has been several times adjudged by this court." The learned judge then cited and reviewed the cases of Drinker v. Byers, 2 Pen. & W. (Pa.) 528; Brown v. Moorhead, 8 S. & R. (Pa.) 569; Frederick v. Campbell, 13 S. & R. (Pa.) 136; Richardson v. Gosser, 26 Pa. St. 335; Cox v. Henry, 32 Pa. St. 18, and Anderson v. Washerbaugh, 43 Pa. St. 115, and continuing said: "It thus appears from the cases now cited that, whether the agreement for indemnity was made before or at the time of the sale or afterwards, the right to recover indemnity in an action on the special agreement is sustained, and that whether the agreement was by writing or spoken words is a matter

§ 270. MERGER IN CASES OF FRAUD. Where the vendor has made fraudulent representations respecting the title, the acceptance of a conveyance will not merge either the purchaser's right to recover back the purchase money, or to recover damages for the loss of his bargain in an action for the deceit,[31] unless he had notice of the fraud when the conveyance was made.[32] A contrary view of the law has been taken in one case,[33] but that decision was after-

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of indifference. Such an agreement is not merged in the deed if made before or at the time of the deed, and is not destroyed by a covenant of general warranty in the deed if made thereafter. The same doctrine was applied in the case of Robinson v. Bakewell, 25 Pa. St. 424, in an action upon a similar bond, given one day after the deed, and although the deed contained a covenant of general warranty, and a recovery was had for all costs, charges and expenses, including counsel fees incurred in defending the title. We again enforced the same doctrine in Walker v. France, 112 Pa. St. 203, 5 Atl. Rep. 208. Where the warranty set up was entirely in parol, and preceded the execution of the written agreement for the sale of the land from which this part of the contract was omitted. GORDON, J., said: 'That a written agreement may be modified, explained, reformed, or altogether set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it, must now be regarded as a principle of law so well settled as to preclude discussion.' It is not at all necessary to invoke the support of this principle to sustain the present proceeding. There is no question here of altering the deed for the lots in question by inserting a clause left out of it by mistake, fraud or accident. The case is only cited to show that where the parol stipulation is the inducing cause to the execution of the written instrument the law is sufficiently flexible to give relief in this manner, if the evidence is of a perfectly clear and satisfactory character. But the case is of authority on the point that a contract in the nature of guaranty as to the quality of the land conveyed is not merged in the conveyance and may be enforced independently of it." This case has been approvingly cited in McGowan v. Bailey, 146 Pa. St. 572, 23 Atl. Rep. 372, 387; Kemp v. Pennsylvania R. Co., 156 Pa. St. 430; Elkin v. Timlin, 151 Pa. St. 491, 25 Atl. Rep. 139. See, also, Witbeck v. Waine, 16 N. Y. 535; Bogart v. Burkalter, 1 Den. (N. Y.) 125; Carr v. Roach, 2 Duer (N. Y.), 25 Colvin v. Schell, 1 Grant's Cas. (Pa.) 226; Selden v. Williams, 9 Watts (Pa.), 9. See, also, White v. Murray, 218 Fed. 933.

[31] Chitty Cont. (10th Am. ed.) 359. Alvarez v. Brennan, 7 Cal. 503, 78 Am. Dec. 274; Wright v. Carillo, 22 Cal. 604; Gwinther v. Gerding, 3 Head (Tenn.), 198; Sargent v. Gutterson, 13 N. H. 473; Dupree v. Savage, (Tex. Civ. App.) 154 S. W. 701.

[32] Vernol v. Vernol, 63 N. Y. 45. Thweatt v. McLeod, 56 Ala. 375.

[33] Peabody v. Phelps, 9 Cal. 213, where it was held that an action for false and fraudulent representations as to the naked fact of title in the vendor of real property cannot be maintained by the purchaser under a conveyance with

wards questioned by the court in which it was rendered, and would apparently have been overruled if so to do had been necessary to

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express covenants for title, his remedy in such case being upon the covenants. The court, by Field, J., after observing that they had been unable to find any case in which the exact point had been decided, and after considering several analogous cases (Wardell v. Fosdick, 13 Johns [N. Y.] 325, 7 Am. Dec. 383; Monell v. Colden, 13 Johns. [N. Y.] 396, 7 Am. Dec. 390; Leonard v. Pitney, 5 Wend. [N. Y.] 31; Culver v. Avery, 7 Wend. [N. Y.] 380, 22 Am. Dec. 586; Whitney v. Allaire, 1 Comst. [N. Y.] 313; Bostwick v. Lewis, 1 Day [Conn.], 250; 2 Am. Dec. 73; Wade v. Thurman, 2 Bibb [Ky.], 583), continued: "In the execution of a conveyance, all previous representations pending the negotiation for the purchase are merged. The instrument contains the final agreement of the parties and by it, in the absence of fraud,[*] their rights and liabilities are to be determined." This case, if intended to establish the proposition that the acceptance of a conveyance where the vendor was guilty of fraud as to the title, waives all rights consequent upon the fraud and confines the purchaser to his remedy upon the covenants, whether he had or had not notice of the fraud at the time the deed was accepted, would seem not to be in harmony with other authorities. In 2 Sugd. Vend. 533, it is said: "Although the purchase money has been paid, and the conveyance is executed by all the parties, yet if the defect do not appear on the face of the title deeds, and the vendor was aware of the defect and concealed it from the purchaser, or suppressed the instrument by which the incumbrance was created, or on the face of which it appeared, he is in every such case guilty of a fraud and the purchaser may either bring his action on the case, or file his bill in equity for relief." See, also, 1 Sugd. Vend. 56. The practical consequence of forcing the purchaser to his action on the covenants, is to deprive him of the right to recover damages for the loss of his bargain, the measure of damages in that action being limited to the consideration money and costs in defending against the adverse claimant. Rawle Covt. § 159. In Andrus v. St. Louis Smelting Co., 130 U. S. 643, 9 Sup. Ct. Rep. 645, Field, J., who delivered the opinion in Peabody v. Phelps, supra, when one of the justices of the Supreme Court of the State of California stated the rule thus: "Where the vendor holding in good faith under an instrument purporting to transfer the premises to him, or under a judicial determination of a claim to them in his favor, executes a conveyance to the purchaser with a warranty of title and a covenant of peaceable possession, his previous representations as to the validity of his title, or the right of possession which it gave, are regarded, however highly colored, as mere expressions of confidence in his title, and are merged in the warranty and covenant, which determines the extent of his liability." In such a case, it may be observed, the vendor could scarcely be deemed guilty of fraud, and the rule thus laid down in no wise conflicts with the proposition that actual fraud by the vendor is not merged in the acceptance of a conveyance without notice of the fraud.

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[*] That is, fraud by which the purchaser is induced to accept the conveyance, as distinguished from fraudulent representations as to the title when the contract was made; else the observations of the court would appear to be contradictory.

the decision of the case.[24] But if the purchaser, with every opportunity of discovering the fraud of the vendor by examining the records after the making of the contract, and before its completion by a conveyance with covenants of general warranty, accept such a conveyance without examining the title, he will be compelled to pay the purchase money and look to his covenants for redress in case he should be thereafter evicted.[25] If the matters alleged by the grantee to have been falsely represented to him by the vendor, are equally open to both parties, and the grantee examines the title, and relies upon the evidences furnished by the public records, and not upon the representation of the vendor, the contract will not be rescinded, but the grantee will be left to his remedy upon the covenants, if any.[36]

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[24] Wright v. Carvillo, 22 Cal. 604. The case is also disapproved in Kimball v. Saguin (Iowa), 53 N. W. Rep. 116.

[25] Ante, § 104. Griffith v. Kempshall, Clarke Ch. (N. Y.) 576, the court saying: "In this case the sale was a public auction, pursuant to previous notice. It may perhaps be fairly presumed that the company casually collected at such auction were ignorant of the state of the title to the lands offered for sale. They could hardly be expected, preliminary to bidding, to have made searches for themselves as to the title. To obviate any hesitation on this ground on the part of the bidders, the defendants, the sellers, by one of their number and by the auctioneer employed by them, declared according to (the complaint) that a clear and unincumbered title to the lots sold would be given to those who might become purchasers. Upon the faith of this title the bids were made. What is the amount of this declaration of the sellers? Unquestionably that the person so bidding should have a clear and unincumbered title; and this assurance could be enforced by any of the purchasers at such sale before taking their deeds. The deeds were not of course ready at the day of sale. The purchaser, under this assurance, would have or could claim time to examine into the state of the title. They could not be compelled to complete the purchase until such time was given them. If upon such examination, they ascertained that the title was incumbered or invalid, they might abandon their purchases, because the assurance held out at the sale was not sustained by the fact. Or the purchasers might, if they chose, instead of examining into the title, take their deeds, protecting themselves by proper covenants as to title and against incumbrances. They have chosen to take the latter course. By so doing, I apprehend, the assurance made at the sale is merged in the covenants contained in the deeds. The execution and acceptance of the deeds is the completion of the executory contracts made by the bidding at the auction, and the terms of that executory contract cannot now be inquired into, unless there was fraud in the representations so made. It seems to me that the representations made at the sale were nothing more than this, that the title was clear and unincumbered; and if it did not prove so, the bidding at the sale should not amount to a contract. It was for the purchasers, after the sale and before taking their deeds, to ascertain whether this was so, whether the title was such as would be satisfactory to them; or, in other words, whether they were willing to take the deeds and consider the contract complete and perfect. They have chosen to consider the contract complete and perfect, by the acceptance of deeds without inquiry or investigation, guarding themselves by covenants from

If the purchaser expressly contracted for a good title and was afterwards induced to accept a quit-claim conveyance through the fraudulent representations of the vendor respecting the title, the contract is not merged in the conveyance, and the purchaser is entitled to a rescission of the contract and to recover back or detain the purchase money.[37]

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the grantors. They have thought it proper so to do, and execute their mortgages for the purchase money, and further, to make valuable erections upon the premises so purchased. It is true the bill charges that they did all this, relying upon the truth of the representations made by the sellers. I cannot think this allegation will aid the complainants. They had abundant means and opportunities to ascertain for themselves the truth of the representations; and, in my opinion, these assurances were given for the purpose of enabling the purchasers so to do. They did not choose to avail themselves of such means. They have been negligent, and this court will hardly feel itself called upon to repair, by its decree, their want of diligence and care of their own interests and rights." The main points of difference between Griffith v. Kempshall, supra, and Peabody v. Phelps, supra, are: (1) That the first case was a suit to restrain the collection of the purchase money on the ground of the vendor's fraud until he should remove certain incumbrances; while the second was an action at law to recover damages for the deceit, and the effect of the decision was to drive the plaintiff to his action on the covenant, in which he could recover no damages for the loss of his bargain. (2) That in the first case there was a covenant of general warranty, while in the second the covenant was limited to the acts of the grantor and his heir; so that while the first case merely drives the purchaser to a different form of redress, the second case not only deprives him of damages for the loss of his bargain (*i. e.*, the value of the premises in excess of the purchase money), but the premises having been lost through paramount title and not through any one claiming under the grantor, denies him any relief whatever. (3) In the first case a considerable period elapsed between the making of the contract and the acceptance of the conveyance in which the purchaser might have examined the title. In the second case it seems that the sale was immediately consummated by a conveyance, so that the purchaser could not have examined the title without deferring the conveyance.

[36] Farnsworth v. Duffner, 142 U. S. 43.

[37] Rhode v. Alley, 27 Tex. 445, where it was said: "It cannot be questioned

In a case in which the sale was without fraud in the first instance, false representations respecting the title, made by the vendor some time afterwards when a deed is accepted and a security for the purchase money given, have been held no ground for rescinding the contract or detaining the purchase money.[28] It may be doubted whether this decision can be reconciled with those which hold that fraud of which the purchaser is ignorant is not merged in a conveyance with covenants for title.

§ 271. **RULE IN PENNSYLVANIA.** The decisions in Pennsylvania upon the right of a purchaser to detain the purchase money must be carefully distinguished from those rendered elsewhere, for they establish a doctrine which does not, in its entirety, exist in the other States. The principal features of that doctrine are that wherever the title of the vendor fails the purchaser may detain the purchase money whether the contract be executed or executory, and, if executed, whether the deed contains covenants for title or not, unless he expressly assumed the risk of the title, and that the purchaser may defeat the recovery of the purchase money in every such case by showing a clear outstanding title in another, or a valid incumbrance on the property equal to the purchase money,

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that it is competent for a purchaser of land who has received a deed with special warranty to show that a fraud has been practiced upon him in respect to the title. If a vendor of land has a perfect title in himself, his vendee may well be content to accept from him a deed with special warranty because such a deed would, in that case, vest an unimpeachable title in the vendee. Ordinarily, when a vendor accepts a quit-claim deed or a deed with special warranty, the presumption of law is that he acts upon his own judgment and knowledge of the title, and he will not be heard to complain that he has not acquired a perfect title. But where, in the negotiations preliminary to the execution of the contract, the purchaser stipulates for a perfect title and is afterwards induced, by the false or fraudulent representations of the vendor, to accept a quit-claim deed with special warranty, in the belief that he is acquiring a perfect title, and one free from litigation at the time, he will be permitted to show that he was deceived in respect to the title, and may be relieved against such contract." Citing, among other cases, Hayes v. Bonner, 14 Tex. 629, in which, however, the contract had not been executed by a conveyance, but the purchaser had, by reason of the vendor's fraud, agreed to accept a quit-claim conveyance. See, also, Wilson v. Higbee, 62 Fed. Rep. 723; Ballou v. Lucas, 59 Iowa, 24, 12 N. W. Rep. 745; Atwood v. Chapman, 68 Me. 38, 28 Am. Rep. 5.

[28] Kirkland v. Wade, 61 Ga. 478.

though he has not been evicted or disturbed in the possession.[39] The results of those decisions may be conveniently stated in the following propositions:

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[39] In Beaupland v. McKeen, 28 Pa. St. 130, 70 Am. Dec. 115, the court said, **Woodward**, J., delivering the opinion: "We have gone further in Pennsylvania in relieving purchasers of real estate from payment of purchase money on the ground of defects and incumbrances than courts of justice have gone in any other State or country where the common law obtains. All administer not only equitable relief while the contract remains executory, but after it has been executed by deed made and delivered, we give the purchaser, besides the full benefit of any covenants his deed may contain, the right to defend himself from payment of the purchase money, however solemn the instrument by which it is secured, if he can show a clear outstanding defect or incumbrance, unless he expressly assumes the risk of it. In England and in most of the States around us the equitable right of the purchaser to detain unpaid purchase money depends on the covenants in his deed. He is not compelled to pay what he could recover back in damages by action at law, but, as his equity springs from breach of a legal covenant, he has no title to relief where there is no covenant, or a covenant but no breach." It must not be supposed from this language that the presence or absence of covenants in the conveyance to the purchaser is of no importance in this State. Under certain circumstances either is of the utmost importance, as will be seen hereafter.

An exellent summary of the Pennsylvania doctrine is contained in the case of Wilson v. Cochran, 46 Pa. St. 230, 86 Am. Dec. 574. It is there said: "The detention of purchase money on account of breaches of the vendor's covenant is a mode of defense that is peculiar to our Pennsylvania jurisprudence, but the principle is well settled with us that where a vendor has conveyed with covenants on which he would be liable to the vendee in damages for a defect of title, the vendee may detain purchase money to the extent which he would be entitled to recover damages upon the contract, and he is not obliged to restore possession to his vendor before or at the time of availing himself of such a defense. Where there is a known defect, but no covenant or fraud, the vendee can avail himself of nothing, being presumed to have been compensated for the risk in the collateral advantages of the bargain. But where there is a covenant against a known defect, he shall not detain purchase money unless the covenant has been broken. If the covenant be for seisin or against incumbrances, it is broken as soon as made if a defect of title or incumbrance exist, but if it be a covenant of warranty it binds the grantor to defend the possession against every claimant of it by right, and is consequently a covenant against rightful eviction. To maintain an action for breach of it, an eviction must be laid and proved, not necessarily by judicial process or the application of physical force, but by the legal force of an irresistible title. There must be proof at the least of an involuntary loss of the possession. And as the right to detain purchase money is in the nature of an action on the covenant, and is allowed to prevent circuity, the vendee who seeks to detain by virtue of a covenant of warranty is as much

(1) A purchaser who has received a conveyance of the purchased premises may defend himself against the payment of the purchase money whether the conveyance be with or without[40] covenants for title, wherever there is a clear failure of title on the part of the vendor, and whether there has been an eviction or not, unless he expressly assumed the risk of the title, or unless the defect of title was known to him and he expressly took a covenant against it for his protection.[41] If the defect of title consist of an incumbrance it is not necessary that he shall have discharged it in order to avail himself of the right to detain the purchase money.[42] Nor is it necessary that he shall have restored the possession of the premises to the vendor before making such a defense, if the retention of the premises be necessary to indemnify him for what he has already paid,[43] unless the vendor is merely seeking to foreclose a security for the purchase money, such as a vendor's lien, in which no judg-

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bound to prove an eviction as if he were plaintiff in an action of covenant. Until eviction the covenant is part of the consideration of the purchase money he agreed to pay, and holding the covenant he may not withhold the purchase money. But after eviction he has a right to have his damages deducted from the purchase money.

[40] The expression "without covenants," as used here and in the following pages, means without covenants embracing the defect of which the purchaser complains. If the defect be one not created by the grantor or his assigns, a conveyance with special or limited warranty only is the same as a conveyance with no covenants at all, as respects the right to detain the purchase money. Cross v. Noble, 67 Pa. St. 78.

[41] Steinhauer v. Witman, 1 S. & R. (Pa.) 438, the leading case: Hart v. Porter, 5 S. & R. (Pa.) 201; Share v. Anderson, 7 S. & R. (Pa.) 61, 10 Am. Dec. 421; Carnahan v. Hall, Add. (Pa.) 127; Goucher v. Helmbold, 1 Miles (Pa.) 407; Beaupland v. McKeen, 28 Pa. St. 130, 70 Am. Dec. 115; Lloyd v. Farrell, 48 Pa. St. 73; Youngman v. Linn, 52 Pa. St. 413; Cross v. Noble, 67 Pa. St. 74; Wilson's Appeal, 109 Pa. St. 106. In Seaton v. Barry, 4 W. & S. (Pa.) 184, a partitioner who had taken the whole premises at a valuation was allowed to detain the valuation money to the extent of an incumbrance on the premises created by the ancestor. It will be remembered that a warranty of title is implied in cases of partition and exchange. Ante, § 137.

[42] Roland v. Miller, 3 W. & S. (Pa.) 390; Poke v. Kelly, 13 S. & R. 165. In this case, however, the contract was executory.

[43] Wilson v. Cochran, 46 Pa. St. 257, 86 Am. Dec. 574; Poyntell v. Spenser, 6 Pa. St. 256. The same rule exists where the contract is executory. Renshaw v. Gaus, 7 Pa. St. 117. But, of course, the purchaser must ultimately give up the possession. He cannot keep the land and the purchase money too. Congregation v. Miles, 4 Watts (Pa.) 146.

ment or decree over against the purchaser in case of a deficiency is asked. In such a case, if none of the purchase money has been paid and there has been no breach of any covenant by the vendor, it is no concern of the purchaser whether the title be good or bad and he must restore the possession.[44]

An exception to the rule that the purchaser may detain the purchase money, though he has accepted a conveyance without covenants for title, exists in those cases where there is a deficiency in the quantity of land conveyed, unless the deficiency is so great that it is evidence of deceit.[45] Where the contract has been executed by deed, it will not be opened to allow for a deficiency in quantity even though there was a mistake as to the true quantity.[46]

(2) The adverse title or incumbrance which will justify the purchaser in rescinding the contract and detaining the purchase money after a deed has been executed and where there has been no eviction, must not be merely such as creates a doubt as to the title; it must amount to a clear failure of the title,[47] and if an incumbrance,

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[44] Hersey v. Turbett, 27 Pa. St. 424. See, also, Hulfish v. O'Brien, 5 C. E. Green (N. J.), 230, and ante, § 184.

[45] Bailey v. Snyder, 13 S. & R. (Pa.) 160; Dickinson v. Voorhees, 7 W. & S. (Pa.) 353; Coughenour v. Stauft, 27 Pa. St. 191; Rodgers v. Olshoffsky, 110 Pa. St. 147, 2 Atl. Rep. 44.

[46] Farmers' Bank v. Galbraith, 10 Pa. St. 490.

[47] Ludwick v. Huntzinger, 5 W. & S. (Pa.) 58; Brick v. Coster, 4 W. & S. (Pa.) 494; Culler v. Motzer, 13 S. & R. (Pa.) 356, 15 Am. Dec. 604; Penn. v. Preston, 2 Rawle (Pa.), 19; Bradford v. Potts, 9 Pa. St. 37; Crawford v. Murphy, 22 Pa. St. 87; Asay v. Lieber, 92 Pa. St. 377; Little v. Thropp, 245 Pa. 539, 91 Atl. 924. A different rule prevails where the contract is still executory. A suit to recover purchase money on articles of agreement is in the nature of a bill for specific performance; hence, where the title to the land is doubtful or not marketable, the plaintiff cannot recover. Murray v. Ellis, 112 Pa. St. 492, 3 Atl. Rep. 845; Hertzberg v. Irwin, 11 Norris (Pa.), 48. In Ludwick v. Huntzinger, 5 W. & S. (Pa.) 58, the court, after stating the rule as above when the contract has been executed, continued: "It is proper to observe that a different principle governs where the contract for the purchase of land remains *in fieri*, and the action is brought on the contract itself with a view to enforce the payment of the purchase money according to its terms. There, if it should appear that the title of the vendor to the land is anywise doubtful, the vendee will not be held bound to pay the purchase money for it (5 Binn. 365), unless it should also appear that he had expressly agreed to do so. Dorsey v. Jackman, 1 S. & R. (Pa.) 42, 7 Am. Dec. 611; Pennsylvania v. Sims, Add. (Pa.) 9."

it must equal in amount the whole of the unpaid purchase money.[48] If the incumbrance goes only to a part of the purchase money, or if the title fails as to part of the premises only, the contract will not be rescinded, but the purchase money will be abated to the extent of the loss or injury suffered.[49]

(3) Mere constructive notice of the existence of an incumbrance or defect of title, as where these are disclosed by the record or lie in the chain of the vendor's title, is not sufficient to charge the purchaser with notice of the defective title and raise the presumption, where there are no covenants, that he assumed the risk of the title.[50]

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[48] McGinnis v. Noble, 7 W. & S. (Pa.) 454; Dentler v. Brown, 11 Pa. St. 298. In these two cases it was also held that the purchaser was not bound to pay off an incumbrance maturing at a time when no installment of the purchase money was due. Harper v. Jeffries, 5 Whart. (Pa.) 26; Mellon's Appeal, 32 Pa. St. 127. The rule stated in the text is also applicable where the contract is still executory. Garrard v. Lautz, 12 Pa. St. 192; Garrett v. Crosson, 32 Pa. St. 375; Renshaw v. Gaus, 7 Pa. St. 117.

[49] Lee v. Dean, 3 Whart. (Pa.) 331; Stehley v. Irwin, 8 Pa. St. 500; White v. Lowery, 27 Pa. St. 255; Beaupland v. McKeen, 28 Pa. St. 134, 70 Am. Dec. 115.

[50] Thomas v. Harris, 43 Pa. St. 231; Murphy v. Richardson, 28 Pa. St. 293; Roland v. Miller, 3 W. & S. (Pa.) 390, *semble;* Banks v. Ammon, 27 Pa. St. 172, *semble;* Wilson v. Cochran, 46 Pa. St. 232, *semble;* 86 Am. Dec. 574. In Thomas v. Harris, 43 Pa. St. 241, it was said upon this point: "In the case now before us, the only ground for a presumption that the purchaser agreed to run the risk of any claim of the widow to dower is that he took a deed from her under a decree of the court for the estate of the deceased husband, and also for her own interest, when, it is said, he knew or should have known that she was entitled to dower in the land if she conveyed only her husband's interest. No evidence of actual knowledge is in the case. * * * He is chargeable, therefore, only with constructive notice of any defect in the title. In such a case there is no reason that a purchaser binds himself to pay the purchase money, no matter what may prove the defects of title. It is only when he has actual knowledge of the defect that he is presumed to waive compliance with the covenant of his vendor. Were it not so, a vendor's deed on record to a third person would not excuse a subsequent purchaser from him from paying all the agreed purchase money after he has accepted a deed, an injustice too revolting to find any place in the law.

But where the question is whether the vendor has fraudulently withheld from the purchaser knowledge of the existence of an incumbrance on the premises, and whether the purchaser had waived the right to rescind by performing the contract with notice of the incumbrance, a different rule from that stated in the text has been applied in Pennsylvania. In such a case, Stephens' Appeal, 87 Pa. St. 202, it was held that the record of the incum-

If the purchaser has taken covenants with knowledge of the existence of a defect or incumbrance, his right to recover on the covenants will not be affected thereby, for it will be presumed that he took the covenants expressly for his protection.[51] But if he took no covenants, then it becomes important to inquire whether he intended to risk the title, and upon this question his knowledge of the existence of the defect or incumbrance is of the utmost importance.[52]

(4) The fact that the purchaser, with knowledge of the defective title, accepts a deed without covenants against the defect, raises a presumption that he assumed the risk of the title,[53] and was compensated for the risk in the collateral advantages of the bargain;[54] but such presumption is not conclusive, and may be rebutted by the purchaser in an action against him for the pur-

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brance "was constructive notice to the purchaser equally as effective as actual notice," citing Evans v. Jones, 1 Yeates (Pa.), 172; Kuhn's Appeal, 2 Barr (Pa.), 264. Both of these, however, were cases arising between the purchaser and a prior purchaser or creditor, and not between purchaser and vendor upon the question of notice as affecting the right to rescind. In Peck v. Jones, 70 Pa. St. 84, where the record disclosed the defect and there was nothing to show that the vendor had actual knowledge thereof, the court said that the purchaser was as much chargeable with notice of the defect from the record as the vendor.

Nor is the rule that constructive notice of defects from their appearance of record will not affect the purchaser's rights against the vendor held to apply in Pennsylvania, where the purchaser seeks to rescind an executory contract and recover back payments made in ignorance of the existence of an incumbrance on the property. In such a case it is said that the constructive notice which the record of a judgment lien, standing in the line of the vendor's title, gives to the vendee, is as effectual as actual notice. Boyd v. McCullough, 137 Pa. St. 7, 20 Atl. Rep. 630.

[51] Thomas v. Harris, 43 Pa. St. 241.

[52] Cases cited supra, n. 41, p. 724.

[53] Ludwick v. Huntzinger, 5 W. & S. (Pa.) 58; Lighty v. Shorb, 3 Pa. 447, 23 Am. Dec. 334; Smith v. Sillyman, 3 Whart. (Pa.) 589; Hart v. Porter, 5 S. & R. (Pa.) 201; Fuhrman v. Loudon, 13 S. & R. (Pa.) 386, 15 Am. Dec. 608; Beidelman v. Foulk, 5 Watts (Pa.), 308; Ross' Appeal, 9 Pa. St. 491. He is chargeable with constructive notice of the incumbrance if the fact of its existence could have been discovered by inquiry of a party in possession of the property. Lazarus v. Coal Co., 246 Pa. 178, 92 Atl. 121.

[54] Lighty v. Shorb, 3 Pa. St. 452, 34 Am. Dec. 334; Youngman v. Linn, 52 Pa. St. 413; Lazarus v. Coal Co., 246 Pa. 178, 92 Atl. 121.

chase money.[55] This rule is materially modified by that which follows next.

(5) The acceptance of a deed without covenants, when the purchaser has notice of a *pecuniary incumbrance* on the property, which can be discharged out of the purchase money, does not raise a presumption that the purchaser assumed the risk of the title; that is, the payment of the incumbrance in addition to the purchase money.[56] On the contrary, the presumption is that the purchaser intended to apply the purchase money to the satisfaction of the incumbrance. It has been held, however, that this rule does not apply where the purchaser secures the purchase money by the execution of a written obligation to pay the same after he receives notice of the incumbrance.[57] The exception would seem practically to destroy the rule, for it is but seldom that the vendor delivers a conveyance of the property until he has received a written obligation of some kind to pay the purchase money.

If the purchaser has notice of an incumbrance or defect, and takes a deed with a covenant which embraces it, the presumption is that the covenant was taken by the purchaser for his protection, and he cannot detain the purchase money unless the covenant has been broken.[58]

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[55] Rawle Covts. § 344. Thomas v. Harris, 43 Pa. St. 231; Drinker v. Byars, 2 Pa. St. 528. The rule stated in the text is the inevitable conclusion from the decision rendered upon the facts in this case, though it is not therein announced in so many words. Doubts having arisen about the title, the purchaser took from the vendor an agreement to save him harmless in case any adverse title should be successfully maintained, and then accepted a deed *without covenants* against the anticipated claims. The purchaser lost a part of the property by the successful assertion of these claims, and he was allowed to set up that fact as a defense to an action on the purchase-money mortgage. "Such a decision," Mr. Rawle observes, "could not have been made if the purchaser's notice and the absence of a covenant were deemed conclusive evidence that he was to run the risk of the title," and Mr. Rawle's observation is fully sustained by the case of Smith v. Chaney, 4 Md. Ch. 246, where, under precisely similar circumstances, the purchaser was denied relief, the court saying that the agreement for indemnity was merged in the conveyance without covenants.

[56] Wolbert v. Lucas, 10 Pa. St. 73, 49 Am. Dec. 578.

[57] Lukens v. Jones, 4 Phila. (Pa.) 18, distinguishing Wolbert v. Lucas, 10 Pa. St. 73, 49 Am. Dec. 578. This was not a decision of a court of last resort, and possibly may not be recognized in Pennsylvania as of binding authority. The report does not show whether there was a conveyance to the purchaser or not. Presumably there was, for otherwise the case would have been more clearly distinguishable from Wolbert v. Lucas, supra, where there was a conveyance without a covenant embracing the incumbrance.

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[58] Lighty v. Shorb, 3 Pa. St. 447, 34 Am. Dec. 334; Fuhrman v. Lundon, 13 S. & R. (Pa.) 386, 15 Am. Dec. 608; Horbach v. Gray, 8 Watts (Pa.), 497; Ives v. Niles, 5 Watts (Pa.), 323; Smith v. Sillyman, 3 Whart. (Pa.) 589; Bradford v. Potts, 9 Pa. St. 37; Juvenal v. Jackson, 14 Pa. St. 419; Kerr v. Kitchen, 17 Pa. St. 433; Murphy v. Richardson, 27 Pa. St. 293; Wilson v. Cochran, 46 Pa. St. 230, 86 Am. Dec. 574; Youngman v. Linn, 52 Pa. St. 413; Wilson's Appeal, 109 Pa. St. 106. In the case of Eby v. Elder, 122 Pa. St. 342, 15 Atl. Rep. 423, the purchaser, under a conveyance with a covenant against incumbrances, resisted the payment of the purchase money on the ground that the premises were traversed by a private right of way which impaired their value. The court charged the jury that if they found from the evidence that at the time of the purchase the land was openly and plainly subjected to the easement; that the physical condition of the ground was openly and plainly affected thereby, then, since there was no express agreement or covenant relating thereto, the continuance of the easement would not be a breach of the covenant against incumbrances, and the plaintiff would be entitled to recover the purchase money. This decision was affirmed on appeal. The same decision had been previously made in the case of Wilson v. Cochran, 48 Pa. St. 108, 86 Am. Dec. 574. The ground of these decisions was that the purchaser could not detain the purchase money unless there had been an eviction, and that there could be no eviction where he purchased with actual notice of the incumbrance. Mr. Rawle comments upon the latter case as follows: "While the court say expressly that the existence and user of a paramount right of way was a breach of the covenant of warranty, when the purchaser had notice of it, yet, that, nevertheless, this would not constitute an eviction when the purchaser had such notice; but this is hardly the correct manner of stating the proposition, for in both cases he is equally evicted, and none the less so by reason of his knowledge; but in the latter instance he is not allowed to detain the purchase money for the reason that the possible assertion of the paramount right constituted one of the elements of the contract, and was within the intention of both parties when the deed was made." The result of this reasoning is that in some cases the purchaser cannot detain the purchase money even though there has been an eviction. It is to be observed that both of the foregoing cases were those in which relief was claimed on account of a physical incumbrance. There would seem to be no doubt as to the right of the purchaser to protect himself against a known pecuniary incumbrance, and to detain the purchase money in case of an eviction. Rawle Covts. § 347, *et seq.*

A purchaser with general warranty is chargeable with notice of an incumbrance caused by a public highway through the purchased premises, and it will be conclusively presumed that he estimated the disadvantages to the premises thence ensuing in adjusting the purchase price. But if the incumbrance consist of a private right of way the rule is different, and he will be

In respect to the right to recover back the purchase money the rule in Pennsylvania is the same as that which generally exists elsewhere, namely, that if the purchaser has failed to protect himself by taking covenants for title embracing the defect of which he complains he cannot recover back the purchase money by way of damages for breach of the contract.[59] If he has taken such covenants and they have been broken, he cannot recover back the pur-

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entitled to detain the purchase money to the extent of the damages caused him by the road, if he purchased without actual knowledge of the easement. Wilson v. Cochran, 48 Pa. St. 107, 89 Am. Dec. 574; Eby v. Elder, 122 Pa. St. 342, 15 Atl. Rep. 423. The same rule has been observed elsewhere. Butt v. Riffe, 78 Ky. 352. The grounds upon which these decisions rest, so far as they apply to the public highway, is the open, notorious and visible character of the incumbrance. It is not easy to perceive why the same reasoning would not apply in the case of a private right of way sufficiently marked by travel to attract the attention of a purchaser.

[59] Moss v. Hanson, 17 Pa. St. 379; Dorsey v. Jackman, 1 S. & R. (Pa.) 42, 7 Am. Dec. 611; Lighty v. Shorb, 3 Pa. 447, 34 Am. Dec. 334; Kerr v. Kitchen, 7 Pa. St. 486. In Steinhauer v. Witman, 1 S. & R. (Pa.) 438, Judge YEATES admitted that money paid, where there was a conveyance but no covenant, could not be recovered back, and observed that it was a hardship but that such was the law. "To adopt a cant expression, 'the funeral has passed by, the dead cannot be resuscitated.' But in my sense of the Pennsylvania system of law, there is a *locus pœnitentiæ* until the money is paid. Something remains *in fieri*, and the plain dictates of common sense and common honesty point out the correct path to be pursued." It was probably this vigorous language that led to the distinction of Judge YEATES as the early champion and advocate of what is known as "the Pennsylvania equitable doctrine" as to detention of the purchase money.

In a note to the case of Goettel v. Sage, 27 Am. Law Reg. (N. S.) 256, 1888, S. C., 117 Pa. St. 298, 10 Atl. Rep. 889, it is said that the distinction between detention and recovery back of the purchase money seems to have disappeared. The writer cites no authority for this proposition, unless the cases Johnson's Appeal, 114 Pa. St. 132, 6 Atl. Rep. 566; Wilson's Appeal, 109 Pa. St. 606, and Babcock v. Day, 104 Pa. St. 4, referred to in a general way by him, are intended as such. In each of these the contract was rescinded on the ground of mutual mistake of the parties respecting the title, a form of relief to the purchaser referable to entirely different principles from those upon which he is permitted to detain the purchase money in Pennsylvania. See Rawle's Covts. (5th ed., 1887), §§ 335, 351, where the right of the purchaser in that State to recover back the purchase money (as damages where he has failed to take covenants, is denied. Also, Farmers' Bank v. Galbraith, 10 Pa. St. 490; Phillips v. Scott, 2 Watts (Pa.), 318; Cronister v. Cronister, 1 W. & S. (Pa.) 442; Frederick v. Campbell, 13 S. & R. (Pa.) 136; Boar v. McCormick, 1 S. & R. (Pa.) 166.

chase money *eo nomine,* by action of assumpsit, but must resort to his covenants.[60] If the purchase money remains unpaid and the covenants have been actually broken and a present right to recover damages has accrued to the purchaser, he may, to prevent a circuity of action, detain the purchase money to the extent of such damages.[61] It has been held, however, in Pennsylvania, that a stipulation by the vendor, verbal or written, to refund the purchase money and reimburse the purchaser for expenses incurred in case the title should fail, will not be merged in a deed subsequently accepted by the vendee which contains only a covenant of special warranty.[62] The Pennsylvania equitable doctrine will not justify the purchaser in detaining the purchase money where he is disturbed in the possession by a mere wrongdoer.[63] Nor does it apply in a case in which the purchase was made at a sale under a decree of court,[64] or a sale by a sheriff or other officer.[65]

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[60] Rawle Covts. (5th ed.) pp. 554, 576, n.

[61] Christy v. Reynolds. 16 S. & R. (Pa.) 258; Ives v. Niles, 5 Watts (Pa.), 323; Poyntell v. Spencer, 6 Pa. St. 257; Wilson's Appeal, 109 Pa. St. 606.

[62] Close v. Zell, 141 Pa. St. 390, 21 Atl. Rep. 770, citing Drinker v. Byers, 2 Pen. & W. (Pa.) 528; Richardson v. Gosser, 26 Pa. St. 335; Cox v. Henry, 32 Pa. St. 18. The purchaser having been induced to accept the conveyance in consideration of such agreement, the rule against the admission of parol evidence to alter a written contract does not apply in such case. Walker v. France, 112 Pa. St. 203, 5 Atl. Rep. 208.

[63] Spear v. Allison, 20 Pa. St. 200.

[64] Fox v. Mensch, 3 Watts (Pa.), 493; King v. Gunnison, 4 Pa. St. 171. The purchaser may, it seems, object to the title before confirmation of the sale. Kennedy's Appeal, 4 Pa. St. 149. This is unimportant, however, as respects the practical application of the rule stated in the text, since there can be no valid conveyance until the sale has been confirmed. Bashore v. Whisler, 3 Watts (Pa.), 493, where it was said: "It cannot now be questioned that a defendant may allege defect of title in the whole or in part, as a defense in a suit brought by a vendor against a vendee to recover unpaid purchase money. This principle, which was first ruled in Steinhauer v. Witman, 1 S. & R. (Pa.) 438, has been since affirmed in Hart v. Porter, 5 S. & R. (Pa.) 200, and in other cases to which it is unnecessary particularly to refer. Although this principle as applied to private contracts is undoubted, yet it has never been understood, either by the profession or the public, to be applicable to judicial sales. In Friedly v. Scheetz, 9 S. & R. (Pa.) 156, 11 Am. Dec. 691, it was ruled that a sheriff's sale cannot be objected to by the purchaser, merely on the ground of defect of title, but that in all such cases it is binding except where there be fraud or misdescription of the property in some material respect. It was also ruled in the same case, that a purchaser cannot object to a sheriff's sale because of a defect of title of which he had notice. That, therefore, when he has bought after

Rules in respect to the detention of the purchase money, in many respects similar to those which prevail in the State of Pennsylvania, exist in the States of Texas and South Carolina,

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being publicly notified at the sale of such defect, he cannot give evidence of want of title in a suit brought against him for the purchase money. The doctrine of Steinhauer v. Witman does not extend to judicial sales, nor has it been contended by any one that the usage asserted and maintained by Justice YEATES extended to them. At a judicial sale the interest of the debtor and no more is sold. The purchaser acquires the title such as he held it. There is no warranty of title: and if the vendee of the sheriff purchases without a sufficient examination it is his fault, and is a matter with which the debtor has no concern. He agrees to run the risk of the title. The rule is *caveat emptor*."

[65] Friedly v. Scheetz, 9 S. & R. (Pa.) 161; 11 Am. Dec. 691; Weidler v. Bank, 11 S. & R. (Pa.) 134. The Pennsylvania equitable doctrine has resulted in several peculiarities, if not incongruities. For example: (1) Under some circumstances the purchaser has greater rights as a plaintiff than as a defendant; thus, the fact that he was aware of the defect of title at the time he took a conveyance with covenants embracing the defect will not affect his right to recover on the covenant. This is the rule everywhere. But if with knowledge of the defect he took no covenant he cannot, as a general rule, detain the purchase money. (2) Under other circumstances he has greater rights as a defendant than as plaintiff; thus, as we have heretofore seen, if he takes a deed without covenants he may, as defendant, detain the purchase money if he was ignorant of the defect of title when the deed was made, while under the same circumstances he could have no relief whatever as plaintiff. And again, he may in such case exercise his right to detain the purchase money though he has never been evicted, while if he had taken a conveyance with covenants of warranty he could neither detain the purchase money, nor recover it back as damages, unless he had been actually or constructively evicted. (3) In Wilson v. Cochran, 46 Pa. St. 230, it is said that the vendee may detain the purchase money to the extent which he would be entitled to recover damages upon his covenants, and that he is not obliged to *restore possession* to his vendor before or at the time of availing himself of such defense, from which it is to be inferred that he may make such defense though he has not been evicted; and yet in the same opinion it is said that the right to detain the purchase money is in the nature of an action on the covenant, and that the vendee who seeks to detain by virtue of a covenant of warranty is as much bound to prove an eviction as if he were plaintiff in an action of covenant. It will be remembered that there are several decisions supporting both of these propositions. It is difficult to perceive of what benefit to the purchaser is the permission to make a certain defense without restoring the possession, when his right to make such a defense is altogether predicated upon the fact that he has been turned out of

and may be seen in a foregoing part of this work.[66] Some apology is due the student for considering at such length rules relating to the detention of the purchase money applicable only in particular localities. The rules in question mark the greatest innovations and inroads upon the doctrines of the common law in that regard that have been made in America, and it has been deemed expedient to set them forth with considerable particularity.

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the possession, or has never been able to get possession. But these inconsistencies or incongruities are perhaps no more illogical than the universal rule which permits the purchaser to detain the purchase money where he is entitled to recover damages for breach of a covenant, and denies him the right to recover back that which has been already paid. The foregoing observations have been made merely to illustrate the difficulties and perplexities into which a partial departure from the rules of the common law controlling the rights of the grantee has led. The remedy would seem to be either to maintain a strict adherence to those rules, or to cut them up root and branch and supply their place with others framed in the spirit of the civil law which rejects the maxim *caveat emptor*, and decrees the reimbursement of the purchaser wherever he loses the estate through defective title, the risks of which he did not accept, without regard to the existence or non-existence of covenants for title on the part of the vendor.

[66] Ante, §§ 189, 190. In Louisiana it is provided by statute that the grantee, if evicted under a superior title, is entitled to a return of the purchase money, though there was no warranty of the title, unless he knew of the defects in his grantor's title, and purchased at his peril. Ellis v. Crossley, 119 Fed. Rep. 779.

CHAPTER XXVIII.

OF RESTITUTION OF THE PURCHASE MONEY WHERE THERE ARE COVENANTS FOR TITLE.

GENERAL RULE. § 272.
EXCEPTIONS. § 273.

§ 272. **GENERAL RULE.** We have seen that after a contract for the sale of lands has been executed by a conveyance to the purchaser, he may, for the avoidance of circuity of action, detain the purchase money in all cases where there has been such a breach of the covenants for title, as would entitle him to recover substantial damages against the grantor. This, however, is solely for the avoidance of circuity of action, and he can in no case, after the contract has been executed, recover back the purchase money as such. We, therefore, state the following proposition:

Proposition VI. *After a contract for the sale of lands has been executed by a conveyance, with covenants for title, the purchaser cannot though he has been evicted by one claiming under a paramount title, or has discharged an incumbrance on the estate, recover back the purchase money eo nomine, either by suit in equity, or by action against the vendor for money had and received to the plaintiff's use. His remedy is upon the covenants for title.*[1]

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[1] 1 Sugd. Vend. (8th Am. ed.); Rawle Covt. (5th ed.) § 326. Tillotson v. Grapes, 4 N. H. 448; Banks v. Walker, 2 Sandf. Ch. (N. Y.) 348; Hunt v. Arindon, 4 Hill (N. Y.), 345; 40 Am. Dec. 283; Miller v. Watson, 5 Cow. (N. Y.) 195; 4 Wend. (N. Y.) 267; Meyer v. Shoemaker, 5 Barb. (N. Y. S. C.) 319; Wilty v. Hightower, 6 Sm. & M. (Miss.) 345; Maner v. Washington, 3 Strobh. Eq. (S. C.) 171; Major v. Brush, 7 Ind. 232; Davenport v. Whisler, 46 Iowa, 287; Wilson v. Irish, 62 Iowa, 260; 17 N. W. Rep. 511; Templeton v. Jackson, 13 Mo. 78; Smyth v. Boroff, 156 Mo. App. 18; 135 S. W. 973; Reuter v. Lawe, 86 Wis. 106; Earle v. De Witt, 6 Allen (Mass.), 526; Joyce v. Ryan, 4 Greenl. (Me.) 101; Van Riswick v. Wallach, 3 McArth. (D. C.) 388. In Bradley v. Dibrell, 3 Heisk. (Tenn.) 522, where the covenantor included in his conveyance about twenty acres to which he had no title and possession of which was not delivered to the covenantee, compensation for the deficiency was decreed to the covenantee. There was a constructive eviction here and the plaintiff might have recovered at law on

This rule is comparatively of little importance to the purchaser where an actual breach of the covenants has occurred, for, in an action on the covenant, the damages are measured by the purchase money, so that, practically, the purchase money is recovered back in this form.[2]

If the purchaser cannot recover back the purchase money, *eo nomine, after* a breach of the covenant has occurred, *a fortiori* he cannot recover it back *before* the happening of the breach. As respects the covenants of seisin, which is broken as soon as made if the covenantor have no title, we have seen that a purchaser will, in some of the States, be allowed to detain the purchase money, if it clearly appears that the title is worthless, and he tenders a reconveyance to the grantor.[3] But there seems to be no case in which the covenantee has been suffered to recover back the purchase

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his covenants, but relief in equity seems to have been granted on the ground of fraud by the vendor. In Fitzpatrick v. Hoffman, (Mich.) 62 N. W. Rep. 349, it was held that a grantee with warranty who had been compelled to satisfy to an adverse claimant the value of timber cut from the warranted lands, might recover the amount so expended in *assumpsit* against the grantor. In the case of Oliver v. Kneedler, 141 Iowa, 158; 119 N. W. 525, a grantee of vacant lots with warranty was permitted to recover the consideration money on failure of the title, though there had been no breach of the warranty. The court said that the action was for recovery of the consideration, and not for damages for breach of warranty. In Mengel Box Co. v. Ferguson, 124 Tenn. 433; 137 S. W. 101, it was held that a suit *in equity* might be maintained to recover damages for breach of covenants of seisin and of warranty. In Mississippi, it is held that the covenantee may sue either in equity or in assumpsit to recover the purchase money, even though he has not been actually or constructively evicted from the premises. Copwood v. McCandless, 99 Miss. 364; 54 So. 1007. In Oklahoma, the covenantee, when sued for the balance of the purchase money, may by way of counterclaim, recover such of the purchase money as he has already paid. Joiner v. Trust Co., 33 Okl. 266; 124 Pac. 1073.

[2] It is frequently said, as in Kerr v. Kitchen, 7 Pa. St. 486, that a purchaser cannot recover back the consideration money after acceptance of a conveyance, unless there be fraud or warranty. This is an expression likely to mislead unless it is borne in mind that the damages for a breach of warranty are measured by the consideration money. Strictly speaking he recovers damages for the fraud or breach of warranty and not the consideration money *eo nomine.*

[3] Ante, Ch. 26.

money, in an action at law,[4] upon like conditions.[5] A different rule prevails at the civil law. If the purchaser does not get such a title as his contract requires, he can, irrespective of the existence of covenants for title, recover back the purchase money,[6] upon condition only that he restore the premises to the vendor.[7] Nor in such a case can he recover upon a contemporaneous agreement by the vendor to refund the purchase money if the title should fail. All such agreements are merged in the conveyance, and the purchaser must seek his remedy on the covenants therein contained, if any.[8] Neither can the covenantee, upon breach of the covenants for title, maintain a bill in equity to compel the vendor to restore the purchase money paid. His remedy at law upon the covenants is complete.[9]

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[4] In Elliott v. Garvin, 166 Fed. 278; 92 C. C. A. 196, a claim against the estate of a deceased covenantor for the amount of the purchase, the title having failed, was allowed.

[5] Mr. Rawle says in this connection: "It would at first sight seem immaterial whether the position of the purchaser were that of a defendant resisting payment of the purchase money, or that of a plaintiff seeking to recover it back in an action for money had and received, as there would seem to be no reason on principle why, if the purchaser have a right permanently to detain unpaid purchase money on the ground of a defect of title, he should be prevented from recovering back that for which he has received no value. But the position of a purchaser of real estate *as a plaintiff*, must at law necessarily be confined to a suit upon the covenants in his deed, which suit (though the same end be obtained by means of it) depends to some extent upon different principles and machinery from an action which seeks to rescind the contract and recover back its consideration. Hence, it may be safely said that, at law, a purchaser has no right, after the execution of his deed, to recover back his consideration money on the ground of a defect or failure of title. His remedy in such case is by an action of covenant, and not by an action of assumpsit. But when the position of the purchaser is that of a *defendant*, although 'the technical rule remits him back to his covenants in his deed,' yet, as has been said, it is now considered that he should not be compelled to pay over purchase money which he might the next day recover in the shape of damages for a breach of his covenants, and hence, to prevent circuity of action, the defense at law of a failure of title has been in some cases allowed."

[6] Bates v. Delavan, 5 Paige Ch. (N. Y.) 306, where it was said by WALWORTH, Ch.: "By the civil law an action of redhibition, to rescind a sale and to compel the vendor to take back the property and restore the purchase money, could be brought by the vendee, wherever there was error in the essentials of the agreement, although both parties were ignorant of the defect which rendered the property sold unavailable to the purchaser for the purposes for which it was intended. * * * I agree, however, with the learned commentator on American Law (2 Kent Com. [2d ed.] 473), that the weight of authority both in this State and in England is against this principle, so far as a mere failure of title is concerned, and that the vendee who has consummated his agreement by taking a conveyance of the property, must be limited to the rights which he has derived under the covenants therein, if he has taken the precaution to secure himself by covenants." In Louisiana where legislation is cast in the moulds of the civil law, the purchaser may upon a complete failure of the title, recover back the purchase money *eo nomine*, though he has taken a conveyance with warranty. Boyer v. Amet, 41 La. Ann. 725.

If the purchaser accept a conveyance of the premises from a third person instead of the seller, and is afterwards evicted by one holding a better title, he is, in the absence of fraud, without remedy against the seller. His remedy is upon the covenants in the deed which he accepted.[10]

§ 273. **EXCEPTIONS.** The rule that the purchaser cannot recover back the purchase money after the contract has been executed by a conveyance with covenants for title does not apply where by mistake there is no such land as the deed purports to convey,[11] nor where the deed is so defective that it is absolutely inoperative as a conveyance.[12]

In one of the States, at least, and possibly in others, if, after payment of the purchase money and delivery of a deed, it is found that the title conveyed is worthless, a suit in equity for rescission of the contract and return of the purchase money can be maintained by the grantee — this upon the ground that the courts will not remit the grantee to an action on the covenants of title in which the relief would be the same as in equity, that is, return of the purchase money paid with interest.[13]

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[7] Brown v. Reeves, 19 Mart. (La.) 235. 2 Kent Com. (11th ed.) 621 (472).

[8] Earle v. De Witt, 6 Allen (Mass.), 533. The conveyance in this case contained no covenant embracing the defect of title of which the plaintiff complained. The decision is, therefore, with stronger reason, an authority for the proposition stated above.

[9] Ohling v. Luitjens, 32 Ill. 23; Beebe v. Swartwout, 3 Gil. (Ill.) 168.

[10] Baker v. Savidge, 53 Neb. 146; 73 N. W. Rep. 543.

[11] D'Utricht v. Melchor, 1 Dall. (Pa.) 428. In this case it was objected that the covenantee's remedy was by action on the covenant, or by action of deceit, and that judgment against the defendant in the action brought could not be pleaded in bar, if covenant should afterwards be bronght. But the court held that assumpsit would lie.

[12] Tollensen v. Gunderson, 1 Wis. 104 (115). There was no lack of proper words of conveyance in the deed in this case; the trouble lay in the description of the premises, which was "the northeast quarter of the west half, containing twenty-acres," without identifying the "west half."

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[13] Weise v. Grove, 123 Iowa, 589; 99 N. W. 250; Smith v. Bricker, 86 Iowa, 285; 53 N. W. 250; Clapp v. Greenlee, 100 Iowa, 595; 69 N. W. 1049; Campbell v. Spears, 120 Iowa, 673; 94 N. W. 1126; Strother v. Leigh, 151 Iowa, 214; 130 N. W. 1019. In this last case it was held that the grantee did not waive her right to rescind by bringing a suit to try title to the land.

CHAPTER XXIX.

OF DETENTION OR RESTITUTION OF THE PURCHASE-MONEY IN CASES OF FRAUD.

GENERAL RULE. § 274.
EXECUTED CONTRACT. § 275.
WAIVER OF FRAUD. § 276.

§ 274. **GENERAL RULE.** Fraud by the vendor in misrepresenting or concealing facts material to the validity of his title, sweeps away, as a general rule, all distinctions between executory and executed contracts, with respect to the right of the purchaser to recover back or detain the purchase money on failure of the title. What acts and conduct of the vendor constitute such fraud has already been considered.[1]

PROPOSITION VII. *If the vendor fraudulently induced the purchaser to accept a bad title, the latter may, at law, recover back or detain the purchase money as damages, whether the contract is executory or has been executed; and, if executed, whether the conveyance was with or without covenants for title; and, if with covenants for title, whether those covenants have or have not been broken.*[2]

As a general rule, the purchaser cannot maintain an action to recover back the purchase money on the ground that the vendor has been guilty of fraud in respect to the title, unless he shows that he has actually rescinded the contract, notified the vendor of his intent to rescind, and has offered to restore the premises to the vendee.[3] The purchaser, however, is not bound to rescind in order to obtain relief in a case of fraud. He may affirm the contract, keep the premises, and maintain an action of deceit to recover damages from the vendor.[4] In most cases, this is the better course for him to pursue, where the purchase money has been fully paid, because in such an action his recovery is not limited to the consideration money; he may recover damages for the loss of his bargain, though they be greatly in excess of the consideration money and interest, while, it is apprehended, he could not recover less than the purchase money and interest. These observations apply as well where the contract has been executed by a conveyance with covenants for title, as where it is executory,[5] for the measure of damages upon a substantial breach of the covenants for title is the purchase money, with interest. If the purchaser seeks relief in equity, he can have a return of his purchase money, but no damages, because the remedy at law in that respect is complete.[6] There can be no question of the right of the purchaser to recover back [7] or to detain[8] the purchase money where the contract is executory and the vendor has been guilty of fraud respecting the title, for he has that privilege, though there has been no fraud and the title has merely failed, except, of course, in cases where he has waived his objections to the title, or where the vendor has the right to remove them.[9] He waives his right to rescind on the ground of fraudulent representations as to the title, by failing to promptly exercise that right.[10]

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[1] Ante, ch. 11. See, also, post, ch. 34.

[2] 2 Sugd. Vend. (8th Am. ed.) chs. 13 and 15; 2 Warvelle Vend. 917; Rawle Covts. (5th ed.) §§ 167, 322. Post, ch. 35. Ante, ch. 11. Edwards v. McLeay, Coop. 308; Young v. Harris, 2 Ala. 111; Diggs v. Kirby, 40 Ark. 420; Sorrells v. McHenry, 38 Ark. 127; Coffee v. Newsom, 2 Kelly (Ga.), 460; Haight v. Hayt, 19 N. Y. 474; Van Lew v. Parr, 2 Rich. Eq. (S. C.) 338; Lamb v. Smith, 6 Rand. (Va.) 552; Fristoe v. Latham, 18 Ky. Law R. 157; 36 S. W. Rep. 920; Knight v. Schroader, 148 Ky. 610; 147 S. W. 378; Brand v. Odom, (Tex. Civ. App.) 156 S. W. 547.

[3] Pearsoll v. Chapin, 44 Pa. St. 9; Babcock v. Case, 61 Pa. St. 427; 10 Am. Dec. 654; Morrow v. Rees, 69 Pa. St. 368.

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[4] Ante, § 101. Gwinther v. Gerding, 3 Head (Tenn.), 198; White v. Seaver, 25 Barb. (N. Y.) 235, where, however, the purchaser elected to rescind. The converse of this proposition is also true. The purchaser is not bound to resort to his remedy at law for damages, but may proceed in equity to rescind the contract. Bodley v. Bosley, 1 Barb. Ch. (N. Y.) 125. "Courts of equity have generally concurrent jurisdiction with common-law courts in those cases where common-law courts have jurisdiction because of fraud; and though, where the vendor has fraudulently misrepresented the quantity of land, and thus induced the vendee to purchase, a common-law suit for deceit would lie, yet this is concurrent with the right of the vendee to stay the collection in a court of equity till abatement has been made." Kelly v. Riley, 22 W. Va. 250.

[5] Ante, "Merger," ch. 27, § 270.

[6] 2 Warvelle Vend. 955. Robertson v. Hogshead, 3 Leigh (Va.), 723 (667). Bodley v. Bodley, 1 Sandf. (N. Y.) 125.

[7] Rawle Covts. (5th ed.) §§ 319, *et seq.;* Dart's V. & P. 612; 2 Warvelle Vend. 834, 851, 952; Wade v. Thurman, 2 Bibb (Ky.), 583, citing Co. Litt. 384a, Butler's note, and Com. Dig. 236; Lyon v. Anable, 4 Conn. 350; Spoor v. Tilson, 97 Va. 279; 33 S. E. Rep. 609; Norris v. Hay, 87 Pac. 380; 149 Cal. 695; Crane v. Development Co., 164 Cal. 676; 130 Pac. 429; Schechlinger v. Gault, 35 Okl. 416; 130 Pac. 305; Martinez v. Coggin, (Tex. Civ. App.) 135 S. W. 679; Fountain Val. Co. v. Wagoner, 59 Colo. 55; 147 Pac. 333. In such cases the purchaser is entitled to recover back the purchase money by suit at law as well as in equity. O'Neal v. Miller, 9 Ga. App. 180; 70 S. E. 971.

If he gives notice of rescission based solely on the failure of the abstract to show a good title, he cannot afterwards claim a right to rescind on the ground of false representations as to the title.[11]

The remedy by action to recover back the purchase money due upon an executory contract for the sale of lands where the vendor was guilty of fraud respecting the title, is concurrent with his remedy at law for damages in an action of deceit,[12] and in equity, for a rescission of the contract and return of the purchase money.[13]

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[8] Authorities cited, supra. Kerr on Fraud (Am. ed.), 330. Green v. Chandler, 25 Tex. 148; Settle v. Stephens, 18 Tex. Civ. App. 695; 45 S. W. Rep. 969. In such a case, the purchaser must show that the vendor intentionally misrepresented or concealed some fact materially affecting the title. Camp v. Pulver, 5 Barb. (N. Y.) 91.

[9] Ante, § 184. Post, § 329. Webster v. Haworth, 8 Cal. 21; 78 Am. Dec. 287. Here the purchaser had bought at a sale under execution, the execution creditor falsely stating that his judgment was the first lien on the land. The court said that the fact that the purchaser might have discovered the falsity of the statement by examining the public records did not affect his right to relief. Before such an examination could have been had, the sale would have been over and the opportunity to purchase would have been lost. Benedict v. Hunt, 32 Iowa, 27, was a suit by a mortgagee against one who had purchased from the mortgagor and assumed the payment of the mortgage. It was held that the fraudulent representations of the *mortgagor* respecting the title were no reason for denying a foreclosure of the mortgage, but was a defense against the plaintiff's claim for a personal judgment against the purchaser.

[10] Brown v. Gordon, 7c Min. Co., 44 Colo. 311; 97 Pac. 1042, unless his delay was caused by promises of the vendor to settle the matter. Fountain Val. Co. v. Wagoner, 59 Colo. 55; 147 Pac. 333.

[11] Hawes v. Swenzey, 123 Iowa, 51; 98 N. W. 586.

[12] Ante, ch. 2.

[13] As in Smith v. Robertson, 23 Ala. 312.

At common law neither failure of the consideration,[14] nor fraud,[15] in the procurement of a contract to pay money, evidenced by a sealed instrument, could be set up at law in defense of an action on that instrument, the defendant being remitted to equity for relief. But now, by statute in most of our States equitable defenses are fully allowed in actions on contracts, so that if the purchase money of land be secured by bond or other sealed instrument, the defense that the promise to pay was induced by the vendor's fraudulent representations as to the title, may be made at law, as well as in equity.[16]

§ 275. **EXECUTED CONTRACTS.** If the purchaser accepts a conveyance in ignorance of the fraud of his vendor in relation to the title, he may, in an action for money had and received to his use, recover back the purchase money paid, whether the conveyance was with [17] or without covenants[18] for title. And in a like case he may detain the purchase money, if unpaid,[19] though there were no covenants.[20] The law does not require a purchaser to take covenants as a protection against fraud.[21] If facts affecting the title have been concealed from the purchaser, he will be entitled to relief, even though he agreed to take the title such as it is.[22]

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[14] Vrooman v. Phelps, 2 Johns. (N. Y.) 178. 1 Waite's Actions & Defenses, 701.

[15] Wyche v. Macklin, 2 Rand. (Va.) 426; Franchot v. Leach, 3 Cow. (N. Y.) 506; Rogers v. Colt, 1 Zab. (N. J. L.) 704; Holly v. Younge, 27 Ala. 203.

[16] 1 Waite's Actions & Defenses, 701, § 3. Case v Boughton, 11 Wend. (N. Y.) 106. Mr. Warvelle, in his work on Vendors, page 853, says that as a rule the only fraud which can be shown at law to avoid a deed, or the effect of its covenants, is fraud in the execution, as where it was untruly read, or where there has been a substitution of one instrument for another, and matters of that kind, but that misrepresentation of collateral facts, fraud in the consideration, etc., form no defense at law. This was true at common law in an action on a *sealed instrument*, and the authorities cited by Mr. Warvelle consist chiefly of early American decisions in which that rule was applied. But that rule has, as we have seen (ante, p. 494), been very generally relaxed by statute in the American States, so that in an action on a bond or other sealed instrument the defendant is free to plead fraud in the procurement or failure of the consideration, of the contract, and is no longer driven to equity for relief. See, also, Rawle Covts. (5th ed.) §§ 325, 332, n. 4; 1 Waite's Actions & Defenses, 701.

[17] Moreland v. Atchison, 19 Tex. 303. The cases illustrating this rule are comparatively few, because resort is nearly always had to equity to rescind the contract, cancel the conveyance and decree a restitution of the purchase money where the grantor has been guilty of fraud. The same may be said of cases where the consideration remains unpaid. A bill is generally filed to rescind the contract and restrain the grantor from proceeding to collect.

[18] Dart. V. & P. 612, 614; Rawle Covts. (5th ed.) § 322; 2 Warvelle Vend. 917; Kerr on Fraud (Am. ed.), 327; Pearsoll v. Chapin, 44 Pa. St. 9; More-

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land v. Atchinson, 19 Tex. 303; Tucker v. Gordon, 4 Des. (S. C.) 53; Nelson v. Hamilton Co., 102 Iowa, 229; 71 N. W. Rep. 206. A purchaser who stipulates for a perfect title, but is induced by the fraudulent representations of the vendor to accept a quit-claim deed, may recover back the purchase money or detain that which remains unpaid. Rhode v. Alley, 27 Tex. 443, citing Mitchell v. Zimmerman, 4 Tex. 75; 51 Am. Dec. 717; York v. Gregg, 9 Tex. 85; Hays v. Bonner, 14 Tex. 629. The contract, however, was executory in each of these three cases. Foster v. Gillam, 13 Pa. St. 340. In Treat v. Orono, 26 Me. 217, it was held that the purchase money could only be recovered back from a party to the fraud. There the alleged fraudulent representations and the conveyance had been made by a municipal officer, but the purchase money had been paid to the municipality. In Walbridge v. Day, 31 Ill. 379; 83 Am. Dec. 237, it was held that one purchasing from the grantee did not acquire his right to recover back the purchase money from the original grantor who had fraudulently represented the title to be good. See, also, Lejeune v. Herbert, 4 La. Ann. 59.

[19] See authorities cited, supra. Whitney v. Allaire, 1 Comst. (N. Y.) 305; White v. Lowry, 27 Pa. St. 254; Concord Bank v. Gregg, 14 N. H. 331. It is a novel doctrine that a written warranty is a bar to a suit or defense founded on fraud in the same transaction, and the cases are numerous, not only that fraud vitiates all contracts tainted by it, but that it may be set up in contests as to the consideration of the sales, whether a warranty existed or not. Smith v. Babcock, 2 Woodb. & M. (U. S.) 256. A vendor selling land subject to a lien for unpaid purchase money, which he does not disclose to the purchaser, is guilty of fraud, and the purchaser may rescind the contract, though he holds under a conveyance with warranty. East Tenn. Nat. Bank v. First Nat. Bank, 7 Lea (Tenn.), 420. Case may be maintained against a vendor who falsely states that there are no incumbrances on the estate, though the purchaser holds under a covenant against incumbrances. Ward v. Wiman, 17 Wend. (N. Y.) 193; Wardell v. Fosdick, 13 Johns. (N. Y.) 325; 7 Am. Dec. 383. Where the grantor fraudulently concealed the fact that certain persons were in adverse possession of a part of the land, the purchaser was allowed to detain the unpaid purchase money, though the persons in possession disclaimed any interest in the land. Schamberg v. Leslie, 19 Ky. Law R. 599; 41 S. W. Rep. 265.

[20] See authorities cited, supra. 1 Bigelow on Fraud, 415; Rawle Covts. (5th ed.) § 322. Diggs v. Kirby, 40 Ark. 420; Tucker v. Gordon, 4 Des. (S. C.) 53; Rogers v. Norton, 101 Ky. 650; 42 S. W. Rep. 97.

[21] Walsh v. Hall, 66 N. C. 233.

[22] Farrell v. Lloyd, 69 Pa. St. 239, 248; Lloyd v. Farrell, 48 Pa. St. 73.

Fraud by the grantor vitiates the contract so far as he is concerned, and he can claim no rights under it. Hence, it follows that the purchaser may, where the conveyance contains covenants for title, in case of fraud, detain the purchase money, whether the covenants have or have not been broken.[23] He cannot be compelled to remain, during the time in which the rights of an adverse claimant may be asserted, in a state of uncertainty whether, on any day during that period, he may not have his title impeached.[24] Where the contract is rescinded for defect of title concealed by the vendor, the purchaser will be entitled to a decree for the repayment of the purchase money, with costs, and all expenses to which he had been put relative to the sale, and for repairs during the time he had possession.[25]

In some cases it has been held that the covenantee cannot set up fraud as a defense to an action for the purchase money; not, indeed, because there is a remedy over on the covenants if the title fail, but because a court of law cannot do complete justice between the parties by placing them *in statu quo,* and that the remedy of the covenantee in such case is in equity.[26] It may be doubted whether this doctrine exists to any great extent in the United States, in view of generally prevalent legislation admitting equitable defenses in actions founded on contracts. As a general rule there is no doubt that fraud is equally cognizable at law as in equity. The principal reason for going into a court of equity in such cases is to obtain a discovery.[27]

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[23] See authorities cited, supra. This proposition (in the form of an exception to the general rule that a purchaser holding under a deed with covenants cannot detain the purchase money, unless the covenants have been broken) has been reiterated so frequently in the decisions, that a citation of cases to support it seems almost an affectation. Edwards v. McLeay, Coop. 308; 2 Swanst. 287; Stewart v. Insall, 9 Tex. 397. The general rule is that the vendee of land who has not been evicted, must rely upon his covenants in the deed, but a fraudulent sale is always an exception to that rule. Gilpin v. Smith, 11 Sm. & M. (Miss.) 109.

[24] 1 Sugd. Vend. (8th Am. ed.) 375 (246).

[25] 1 Sugd. Vend. (8th Am. ed.) 375 (246).

[26] Cullum v. Branch Bank, 4 Ala. 35; 37 Am. Dec. 725; Stark v. Hill, 6 Ala. 785; Patton v. England, 15 Ala. 71.

[27] Allen v. Hopson, 1 Freem. Ch. (Miss.) 276.

A statement made in good faith, false but not fraudulent, will not entitle the purchaser to recover back the purchase money in a case to which the covenants do not extend. The *scienter* or fraud is the gist of the action where there are no covenants.[28] What conduct or representations on the part of the vendor amount to fraud will be found elsewhere considered in this work.[29] The purchaser has a remedy not only against the grantor in a case of fraud, but against third persons having an interest in the transaction who aid in practicing the deceit. Thus, a note broker was compelled to refund to a mortgagee money loaned on the security of the mortgage, he having falsely represented that there were no prior incumbrances on the property.[30]

§ 276. **WAIVER IN CASES OF FRAUD.** Of course, if the purchaser accept a conveyance with knowledge of the fraud, he waives all right to rescind the contract because of the fraud, and must look to his covenants for redress.[31] And when the fraud comes to his knowledge after the acceptance of a conveyance, he must promptly exercise his right to rescind the contract.[32] It has been held in several cases and there are *dicta* in others, that if the purchaser accept a conveyance of the premises, he cannot afterwards maintain an action to recover damages for deceit of the vendor in respect to the title; all that passed between the parties in the course of the negotiation being regarded as merged in the deed, and that the purchaser's remedy is upon the covenants, if any.[33] The better opinion, however, seems to be that only matters as to which the purchaser was informed can be regarded as merged in the deed, and that if he were ignorant of the fraud which would have avoided the contract, he loses none of his rights by accepting the deed.[34]

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[28] 2 Sugd. Vend. (8th Am. ed.) 553. Early v. Garrett, 4 Man. & Ry. 687.

[29] Ante, § 101.

[30] Turnbull v. Gadsden, 2 Strobh. Eq. (S. C.) 14.

[31] 2 Warvelle Vend. 919. Ante, § 270.

[32] Provident L. & Tr. Co. v. McIntosh, (Kan.) 75 Pac. Rep. 498; Vaughn v. Smith, 34 Oreg. 54; 55 Pac. Rep. 99; Duetzmann v. Kountze, 147 Iowa, 158; 125 N. W. 1007. The case Lockrodge v. Foster, 4 Scam. (Ill.) 570, affords a good illustration of this rule. There the covenantee had taken possession of the premises with knowledge of the fraud, and the court, in denying him relief, said: "Under the circumstances, if the complainant had resorted to equity in proper time, and it had appeared that the vendor or his legal representatives were not in a situation to perfect the title, a rescission of the contract might have been obtained. But on discovering the fraud, he was at liberty to consider the contract at an end, and take the necessary steps to procure its rescission or to confirm it, and rely on his covenants of warranty to make good the failure of title. This was a privilege on his part. The election rested solely with him, but he was bound to make it within a reasonable time. The whole case, in our opinion, shows most conclusively that he elected to confirm the contract. From his own showing, he discovered the fraud in the fall of 1837, at the time he took possession of the land, before he made any improvements on it, and while a great portion of the purchase money was unpaid. After the discovery he proceeded to erect a dwelling house and make valuable improvements on the

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premises. More than four years afterwards, when sued for the balance of the purchase money, he makes no complaint and interposes no defense, but permits judgment to go against him, and not until a partial payment of the judgment does he manifest any disposition towards a rescission of the contract. * * * After all these acts of confirmation and acquiescence, and five years subsequent to the discovery of the fraud, he comes into a court of equity, and asks that the contract may be annulled. We have no hesitation in saying that he is effectually concluded by his own positive acts from attaining this object."

[33] Peabody v. Phelps, 9 Cal. 214; Leonard v. Pitney, 5 Wend. (N. Y.) 30. See, also, Peay v. Wright, 22 Ark. 198. The old English cases of Roswell v. Vaughn, 1 Cro. James, 196, and Lysney v. Selby, 2 Ld. Raym. 1119, have also been cited in support of this view. In the first case, however, there does not appear to have been a conveyance. Relief was denied the purchaser principally upon the ground that the vendor was not in possession, and that he should have looked more carefully to the title. In Whitney v. Allaire, 1 Comst. (N. Y.) 314, the right of a covenantee to maintain an action to recover damages for deceit respecting the title was questioned by BRONSON, J., dissenting, who said, "In the usual course of business men insert covenants in their conveyances of real estate where it is intended that the vendor shall answer for the goodness of the title; and it is easy to see that bad consequences may follow if the vendee shall be allowed to lay aside his deed, and have an action founded upon conversations about the title pending the bargain. * * * I do not intend to express a definite opinion on the point, and have only said enough to show that it is a grave question, which, as it is not necessarily before us, should not be regarded as settled by our decision." It may be doubted whether this query would be made in a case in which the covenantor had studiously concealed an incumbrance or defect in the title, as in Prout v. Roberts, 32 Ala. 427.

[34] Ante, § 269. 2 Warvelle Vend. 957. That author attributes the cases holding the opposite view, to the fact that the grantee has his remedy over for breach of the covenants for title. Those cases, however, seem rather to proceed upon the idea that the fraud is merged in the conveyance, whether with or without covenants for title. As to cases in which there has been

Indeed, it may be doubted whether in such a case the purchaser would be held to have waived his right to recover damages for the fraud. The acceptance of a conveyance is an election to affirm the contract, but it has been held that the purchaser does not waive his right to damages by affirming the contract after discovering the fraud.[35] True, in such a case, the purchaser could not *rescind*

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fraud as to the title and also a breach of the covenants. Mr. Warvelle pertinently observes, "The liability of the offending party is totally distinct in either case. In the one it arises *ex contractu*, in the other *ex delicto;* and the rule upon which damages are awarded is different in each instance. Nor is there any inconsistency in the prosecution of the two remedies, as they both proceed upon the theory of an affirmance of the contract, and although differing in form, one does not allege what the other denies. A recovery in one, therefore, will not preclude a prosecution of, or recovery in, the other, although, of course, there can be but one satisfaction for the damages sustained." Citing Bowen v. Mandeville, 95 N. Y. 237; Allaire v. Whitney, 1 Hill (N. Y.), 484; Kimball v. Saguin, (Iowa) 53 N. W. Rep. 116, criticising Peabody v. Phelps, supra. Lee v. Dean, 3 Whart. (Pa.) 315; Orendorff v. Tallman, (Ala.) 7 So. Rep. 821; Gwinther v. Gerding, 3 Head (Tenn.), 197; Bostwick v. Lewis, 1 Day (Conn.), 250, 2 Am. Dec. 73; Whitney v. Allaire, 1 Comst. (N. Y.) 314, *semble*, BRONSON, J., dissenting; Monell v. Colden, 13 Johns. (N. Y.) 396, 7 Am. Dec. 390; Culver v. Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586, where the false representation was made by a public officer. The court said: "Whatever is said or done *in good faith* in a treaty for a sale and purchase is merged in the purchase itself when consummated (by conveyance), and you cannot overhaul it whether the representations were true or false; but if they were *known to be false* when made, and have produced damage to the opposite party, the subsequent consummation of the agreement cannot shield the defendant." Wardell v. Fosdick, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383, where the vendor sold land which had no existence. That fact, however, was considered immaterial in Ward v. Wiman, 17 Wend. (N. Y.) 192, 196, where it was said that in a case of fraud the purchaser might treat the deed as a nullity. In Wilson v. Breyfogle, 63 Fed. Rep. 329 (Cir. Ct. App.), it was held that a grantee with warranty who had been defrauded by fraudulent representations as to the title, might sue in assumpsit to recover back the purchase money, but must first reconvey, or offer to reconvey, the premises. See, also, Bowden v. Achor (Ga.), 22 S. E. Rep. 254.

[35] Allaire v. Whitney, 1 Hill (N. Y.), 484. Allaire had leased certain premises of Whitney, the term to begin at a future day. Before that day he discovered that the lessor had fraudulently represented that he owned a part of the premises, nevertheless he took possession and obtained a lease from the real owner of the part to which there was no title. The court, deciding that Allaire had not waived his right to damages, observed, "It is not necessary to deny that where a vendee or a lessee takes or holds possession after he has discovered the fraud of his vendor or lessor, he shall not be allowed

the contract, but obviously, the right to rescind, and the right to recover damages for a fraud stand upon different grounds, and the waiver of one is not necessarily a waiver of the other. If the conveyance contained covenants, the practical difference between an action on the covenants, and an action for deceit is, that in the former action he could recover the purchase money only and nothing for the loss of his bargain, and no more than nominal damages unless he had been evicted, while in the latter action his recovery would be measured by the actual damages sustained.

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to rescind the contract, in other words, to say, as he may always do in the first instance, that the whole is void. Certainly the jury might well have been instructed in the present case, that Allaire had made the lease good by election; that he had waived the right to consider it a nullity. That, however, is a very different matter from a waiver of the cause of action or *recoupment*. When a man is drawn into a contract of sale or demise by fraud, a right of action attaches immediately, as much so as if trespass had been committed against him; and though he may affirm the transfer of interest and take the property, yet waiver is no more predicable of the cause of action, than where a man receives a delivery of goods that have been tortiously taken from him. The vendor or lessor was a wrongdoer when he committed the fraud, and no act of the injured party short of a release or satisfaction will bar the remedy, though it may mitigate the amount of damages." See, also, 1 Sugd. Vend. (14th ed.) 251, where it is said: "Although in equity a party may be entitled to get rid of a contract founded on fraudulent representations, still cases might occur where a purchaser might recover damages at law for a false representation, and yet be prevented by his own conduct from rescinding the contract in equity, and the relief in equity can only be to rescind the contract. Damages or compensation must be sought at law."

OF RECISSION BY PROCEEDINGS IN EQUITY.

WHERE THE CONTRACT IS EXECUTORY.

CHAPTER XXX.

OF THE SUIT FOR RESCISSION PROPER.

GENERAL PRINCIPLES. § 277.
DEFENSES TO SUITS FOR SPECIFIC PERFORMANCE. § 278.
PLACING THE VENDOR IN STATU QUO. § 279.
INTEREST, RENTS AND PROFITS. IMPROVEMENTS. § 280.
PLEADING. § 281.
PARTIES. § 282.

§ 277. **GENERAL PRINCIPLES.** On failure of the title the purchaser, instead of taking such steps at law as amount to a recission of the contract, such as bringing an action to recover back the purchase money, or resisting proceedings by the vendor to collect the same, may, while the contract is executory, resort to a court of equity in the first instance and ask that the contract be formally rescinded. In such case the court, having before it all parties in interest, may, if it appear that the complainant is entitled to relief, enter a decree rescinding the contract and adjusting the rights of the parties. We have already seen under what circumstances he may have an injunction against the collection of the purchase money where the contract is executory.[1] And the purchaser may, in any proceeding by the vendor to enforce specific performance of the contract, show that the title has failed or is not such as the law will require him to accept. The fact that the vendor honestly believed his title to be good is no ground for refusing rescission.[2] The jurisdiction of equity for the rescission of executed contracts is limited, as will be seen, chiefly to cases where the contract was procured through fraud or mistake; but where the contract is executory, a complete want of title in the vendor, irrespective of the question of his good faith, seems to be always a ground in equity for rescinding the contract,[3] unless the purchaser has waived or lost his right to require a clear title; or unless he is bound by the terms of his contract to take such title as the vendor can make; or unless he be no longer able to place the vendor *in statu quo.* It has also been held that equity will not rescind the contract at the suit of the purchaser, if the defect of which he complains might with reasonable diligence have been discovered by him before the contract was made. Thus it has been held that a purchaser who fails to make reasonable inquiries as to possible dower rights in the premises, must seek his remedy against the vendor at law and not in equity, if disturbed by the widow.[4] This decision seems not to have been generally followed in America, though there are many cases which decide that the purchaser cannot fix fraud upon the vendor in failing to disclose defects in the title which might have been discovered by the exercise of ordinary diligence.[5]

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[1] Ante, § 250.

[2] Boyce v. Grundy, 3 Pet. (U. S.) 210.

It has been held that the right of the purchaser to rescind an executory contract on failure of the title is not dependent on his right to maintain an action for breach of the contract, and that he may rescind where he cannot maintain that action. Thus, where the purchaser, knowing that the vendor could not convey a clear title, made a sham offer of performance and tender of the balance of the purchase money, it was held that he could not recover damages for a breach of the contract, but that he was entitled to rescind the contract and recover back what he had already paid.[6] In an early American case it seems to have been held that want of title in the vendor was no ground for rescinding an executory contract for the sale of lands, the purchaser having an adequate remedy at law to recover back the purchase money or to recover damages for breach of the contract.[7] This case does not appear to have been followed in America, and its authority may well be doubted. Courts of law have, under the common-law system of procedure, no power to adjust equities between the parties, *e. g.,* to decree a restitution of the premises, to settle claims for interest on the purchase money paid and for improvements on the one side, and for rents and profits on the other. On these grounds, irrespective of any question of fraud or mistake, the jurisdiction of a court of equity in such cases seems clear.

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[3] Musselwhite v. Oleson, 60 Fla. 342, 53 So. 944; Smith v. Robertson, 23 Ala. 317, where it was said that though there may be no actual fraud in making a contract, a total inability in one party to fulfill it discharges the other, and a court of equity will annul a contract which the defendant has failed to perform or cannot perform. Citing Bullock v. Beemiss, 1 A. K. Marsh. (Ky.) 434; Skilleen v. May, 4 Cranch (U. S.), 137. But see Parks v. Brooks, 16 Ala. 529, where rescission was refused a purchaser who had taken a bond for titles and could not show that the obligor was insolvent. As a matter of fact suits in equity by the purchaser for rescission where the contract is executory are comparatively infrequent. Usually the only relief he claims is the return of the purchase money, and this may be obtained, as a general rule, more quickly and with less expense in the action for money had and received to the purchaser's use. See ante, ch. 24.

[4] Greenleaf v. Queen, 1 Pet. (U. S.) 138.

[5] Ante, ch. 11. Contra, Crawford v. Keebler, 5 Lea (Tenn.), 547.

[6] Lewis v. White, 16 Ohio St. 441.

Fraud of the vendor and mistake of the parties in respect to the title are, of course, grounds for rescinding an executory contract for the sale of lands. In such cases the remedy in equity is concurrent with that at law.[8] What constitutes fraud in the vendor has been elsewhere considered.[9] The fact that the agreement has been reduced to writing will not prevent the purchaser from showing that the vendor, at the time the contract was closed, made fraudulent representations as to the state of the title. The rule in this respect is the same, whether the contract be executory or has been executed by a conveyance with or without covenants for title.[10]

If the objection to the title be that the vendor has no power to sell and convey the premises, it has been held that a suit for a rescission of the contract cannot be maintained by the purchaser.[11]

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[7] Hepburn v. Dunlop, 1 Wh. (U. S.); Id. 3 Wh. (U. S.) 231. The failure of the consideration is always a ground for the rescission of a contract for the sale of lands. Hadlock v. Williams, 10 Vt. 570; Greenleaf v. Cook, 2 Wh. (U. S.) 13, 16; Hart v. Handlin, 43 Mo. 171.

[8] Innes v. Willis, 16 Jones & S. (N. Y.) 188; Goodman v. Rust, 4 T. B. Mon. (Ky.) 421; Smith v. Robertson, 23 Ala. 312; Liddell v. Sims, 9 Sm. & M. (Miss.) 596; Davis v. Heard, 44 Miss. 50; Holland v. Anderson, 38 Mo. 55.

[9] Ante, ch. 11.

[10] Sugd. Vend. (11th Eng. ed.) 53, 586; Boyce v. Grundy, 3 Pet. (U. S.) 210.

[11] Bruner v. Meigs, 64 N. Y. 506, per ALLEN, J. The authority of this case may be doubted. The reason given for the decision would apply in most cases

The reason assigned for this decision was that the purchaser had a perfect defense at law and in equity to any proceeding by the vendor to enforce the agreement, and that an action by him would be necessary. We have already seen under what circumstances the purchaser will be deemed to have waived his right to rescind a contract or to resist a suit for specific performance on the ground that the title is defective.[12] Where the purchaser in a suit by him for rescission, offers to complete the contract if the court shall be of opinion that the title is marketable, and the court so decides, he is estopped from urging further any right to rescind.[13]

§ 278. **DEFENSES TO SUIT FOR SPECIFIC PERFORMANCE.** The purchaser, when the vendor seeks to compel specific performance of the contract, may of course show that the title is bad,[14] or doubtful, and such as he cannot be required to accept.[15] It is an elementary rule that the vendor, seeking specific performance of the contract, must show that he is ready, able, and willing to perform all the obligations that rest on him in respect to the exhibition and conveyance of a good title to the premises.[16] As a general rule wherever he has a right to rescind the contract on the ground that the title has failed, he may avail himself of the same facts as a defense to a suit by the vendor for specific performance. The position of the purchaser in such a case is perhaps stronger than if he were plaintiff, for it has been often held that under some circumstances a court of equity may refuse to rescind a con-

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in which the purchaser goes into equity for a rescission of an executory contract. Should the purchaser be compelled to await the motions of the vendor? If the purchase money was paid to the latter he would probably concern himself no further about the agreement.

[12] Ante, "Waiver of Objections," § 80.

[13] Hyde v. Heller, 10 Wash. 586, 39 Pac. Rep. 249.

[14] Ranck v. Wickwire, 255 Mo. 42, 164 S. W. 460. Even though the contract states that the purchaser is satisfied with the title, he will not be required to take the title if it is, in fact, bad. Clark v. Rosario Min. Co., 176 Fed. 180, 99 C. C. A. 534.

[15] What matters are sufficient to render a title doubtful or unmarketable will be hereafter considered. Post, ch. 31.

[16] Cable v. Hoffman, 273 Ill. 272, 112 N. E. 670; Smith v. Johnson, 35 S. D. 563, 153 N. W. 376, a case in which the vendor lost his right to a desert land filing by failure to do the required amount of work on the land.

tract for the sale of lands which it would not specifically enforce,[17] leaving the parties to their remedy at law.[18] If the vendor, in consequence of disputes about the title, turns the purchaser out of possession, he cannot afterwards insist upon a specific performance of the contract.[19] Nor will he be entitled to this relief if, subsequent to the contract, he places a mortgage on the premises.[20] The purchaser cannot of course set up want of title in the vendor as a defense to a suit by the latter for specific performance, where by the terms of the contract, the purchaser was to take merely such title or interest as the vendor had.[21] But specific performance will not be decreed at the instance of the vendor, if he cannot convey a clear title, though no provision was made in the contract for a covenant of warranty to be inserted in the deed, unless the purchaser expressly assumed the risk as to title.[22] If the purchaser defends a suit for specific performance, the mere allegation that the vendor's title is defective, will not suffice. He must set forth and prove the specific defects of which he complains.[23] But, it is apprehended, that the vendor must show in the first instance a record title that is *prima facie* clear and unobjectionable, for by insisting upon specific performance he avers that his title is such as the purchaser can be required to take. In the nature of things, however, he cannot show that there can be no possible objection to his title. Reason and convenience both require that having shown a title apparently good, the burden shifts to the purchaser, and compels him to show in what respect the title is defective or objectionable. If the plaintiff cannot convey the title mentioned in the agreement, his bill will be dismissed, though such objection be not made in the answer, nor taken until a hearing before a master upon a reference.[24] But it has been held that a purchaser who by the exercise of due diligence might have discovered an objection to the title and set up the same as a defense in a suit for specific performance before decree, could not, after decree, avail himself of such defect by additional pleadings, though he might, if the vendor be insolvent, suspend payment of the purchase money until the defect could be investigated.[25]

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[17] 2 Kent Com. (11th ed.) 487; Mortlock v. Buller, 10 Ves. 292; Jackson v. Ashton, 11 Pet. (U. S.) 248; Dunlap v. Hepburn, 1 Wheat. (U. S.) 197; Morgan v. Morgan, 2 Wheat. (U. S.) 290; Beck v. Simmons, 7 Ala. 71; Park v. Brooks, 16 Ala. 529; Seymour v. Delancy, 3 Cow. (N. Y.) 530, 15 Am. Dec. 270; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 23, 7 Am. Dec. 513; Gans v. Renshaw, 2 Pa. St. 34, 44 Am. Dec. 152; Louisville, etc., R. Co. v. Stone Co., (Ind. Sup.) 39 N. E. Rep. 703.

[18] Jackson v Ashton, 11 Pet. (U. S.) 229.

[19] Knatchbull v. Grueber, 3 Mer. 124.

[20] Haber v. Burke, 11 S. & R. (Pa.) 238.

[21] Broyles v. Bell, 18 W. Va. 514; Bailey v. James, 11 Grat. (Va.) 468, 62 Am. Dec. 659.

[22] Bates v. Delavan, 5 Paige Ch. (N. Y.) 299; Chambers v. Tulane, 9 N. J. Eq. 146.

[23] Glasscock v. Robinson, 21 Miss. 85; Heath v. Newman, 11 Sm. & M. (Miss.) 201; Harris v. Bolton, 7 How. (Miss.) 167; Allen v. Adams, 162 Iowa, 300, 143 N. W. 1092.

The sufficiency of the title offered by the vendor is to be determined as of the date fixed for the performance of the contract, and not as of a time subsequent to the filing of the bill for specific performance.[26]

If the purchaser rejects the title the vendor must promptly insist upon performance, otherwise he will be taken to have acquiesced in the purchaser's election to rescind.[27]

It has been held that a vendor claiming specific performance of the contract, and resting the validity of his title upon a particular ground, cannot, after litigation has begun, shift his ground and allege a valid title from other sources, and this upon the principle that a party giving a reason for his conduct and decision touching anything involved in a controversy, cannot, after litigation has begun, change his ground and put his conduct upon another and different construction.[28]

The vendor, by the institution of a suit against a stranger to quiet the title, admits that his title is not such as the purchaser can be required to take.[29]

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[24] Park v. Johnson, 7 Allen (Mass.) 378.

[25] Denny v. Wickliffe, 1 Metc. (Ky. 216.

[26] Smith v. Hunter, 241 Ill. 514, 89 N. E. 686, 132 Am. St. Rep. 231; Baker v. Baker, 284 Ill. 537, 120 N. E. 525; Denny v. Cox, 206 Ill. App. 512.

[27] Scott v. Desire, 175 Ill. App. 215.

[28] Weinstock v. Levison, 26 Abb. N. Cas. (N. Y.) 244, citing Ohio & Miss. R. Co. v. McCarthy, 96 U. S. 258, a case, however, which did not arise between vendor and purchaser. It may be doubted whether the rule thus declared would apply in a case in which the change of position by the vendor did not operate, and could not have operated to the injury of the purchaser.

§ 279. **PLACING THE PARTIES IN STATU QUO.** It is a cardinal rule that in every proceeding in which an abrogation or rescission of a contract for the sale of lands is effected, whether it be the act of the parties or the act of the law, whether it be the result of an action to recover back the purchase money paid, or of an injunction to restrain the collection of the purchase money, or of a direct suit in equity for rescission, either party must be placed in the same position in which he was before he entered into the contract. Unless this can be substantially done, there can be no rescission, and the parties will be left to their remedies at law upon the contract. No rule of law is better settled than that a purchaser of a chattel which proves to be unsound, cannot keep the chattel and refuse to pay the purchase money, and that he cannot detain the purchase money, if he has consumed or destroyed the chattel so that he cannot restore it to the vendor. He may, of course, keep the chattel and recover damages for the breach of the express or implied warranty of its soundness, but that is an election to affirm and not to rescind the contract. There is no difference in the application of these principles to executory contracts for the sale of lands. Hence, it follows that a purchaser seeking a rescission of the contract in equity on the ground that the title has failed, must restore the premises to the vendor before he will be absolved from his obligation to pay the purchase money.[30]

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[29] Munyon v. Hartman, 262 Mo. 449, 171 S. W. 61.

[30] 1 Sugd. Vend. 347. Ante, § 256. Wickham v. Evered, 4 Madd. 53; Tindal v. Cobham, 2 Myl. & K. 385; Fowler v. Ward, 6 Jur. 547; Nicholson v. Wordsworth, 2 Swan. 365; Southcomb v. Bishop, 6 Hare, 213; Gordan v. Mahoney, 13 Ir. Eq. 383; Garner v. Leverett, 32 Ala. 410; Duncan v. Jeter, 5 Ala. 604, 39 Am. Dec. 342; Fitzpatrick v. Featherstone, 3 Ala. 40; Seaburn v. Sutherland, 17 Ark. 603; Wheat v. Dotson, 12 Ark. 698; Lane v. Latimer, 41 Ga. 171; Underwood v. West, 52 Ill. 597; Smith v. Brittenham, 98 Ill. 188; Deal v. Dodge, 26 Ill. 459; Gehr v. Hogerman, 26 Ill. 438; Vining v. Leeman, 45 Ill. 246; Marvin v. Applegate, 18 Ind. 425; Osborn v. Dodd, 8 Blackf. (Ind.) 467; Cain v. Guthrie, 8 Blackf. (Ind.) 409; Brumfield v. Palmer, 7 Blackf. (Ind.) 227; White v. Hardin, 5 Dana (Ky.), 141; Peebles v. Stephens, 3 Bibb (Ky.), 324, 6 Am. Dec. 660; Wickliff v. Lee, 4 Dana (Ky.), 30; Matta v. Henderson, 14 La. Ann. 473; Clark v. Briggs, 5 La. Ann. 624; McDonald v. Vaughan, 14 La. Ann. 716; Shipp v. Wheles, 33 Miss. 646; Williamson v. Ramey, 1 Freem. Ch. (Miss.) 112; Hill v. Samuel, 31

The purchaser will not be permitted to rescind the contract if he has made material alterations in the property, such as to change its nature and character, if they are of a kind which do not admit of a restoration of the property to its former condition, or if he decline or be unable to restore it to that condition.[31] Nor where he has disabled himself from restoring the possession to the vendor by conveying the premises to a stranger.[32] Nor where a portion of the premises have been sold under execution against him.[33] Nor where he has materially impaired the value of the land by cutting down the timber.[34] But in cases in which the purchaser acted in good faith and the injury to the premises is capable of ascertainment and deduction from the purchase money he is seeking to recover back, he may have a rescission of the contract though the

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Miss. 307; Smith v. Busby, 15 Mo. 387, 57 Am. Dec. 207; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202; Sandford v. Travers, 7 Bosw. (N. Y.) 498; More v. Smedburgh, 8 Paige Ch. (N. Y.) 600; Tompkins v. Hyatt, 28 N. Y. 347; Goelth v. White, 35 Barb. (N. Y.) 76; Schroeppel v. Hopper, 40 Barb. (N. Y.) 425; Van Epps v. Harrison, 5 Hill (N. Y.), 63, 40 Am. Dec. 314; Tallmadge v. Wallis, 25 Wend. (N. Y.) 107; Masson v. Bovet, 1 Den. (N. Y.) 73, 43 Am. Dec. 651; Nicoll v. Carr, 35 Pa. St. 381; Congregation v. Miles, 4 Watts (Pa.), 146; Clarke v. Locke, 11 Humph. (Tenn.) 300; Officer v. Murphy, 8 Yerg. (Tenn.) 502; Lynch v. Baxter, 4 Tex. 431, 51 Am. Dec. 735; Hyslip v. French, 52 Wis. 513; Grant v. Law, 29 Wis. 99; Hendricks v. Goodrich, 15 Wis. 679. In Perry v. Boyd, 126 Ala. 162, 28 So. Rep. 711, it was held that the grantee may maintain his bill for rescission without having restored or having offered to restore, the premises to the grantor. It seems, however, that the property to which the title failed in that case consisted principally of an easement the right to excavate a tunnel through lands of the grantor. The bill averred a willingness to reconvey.

[31] Dart V. & P. (5th ed.) 440; Donovan v. Frisker, Jac. 165. In this case the purchaser was required to reinstate a private dwelling which he had converted into a shop. Where the purchaser retained possession for a number of years, received the rents, changed the condition of the estate, and made lasting improvements, it was held that he could not put the vendor *in statu quo*, and, therefore, could not rescind the contract. Patten v. Stewart, 24 Ind. 332.

[32] McKeen v. Beaupland, 35 Pa. St. 488; Rogers v. Olshoffsky, 110 Pa. St. 147, 2 Atl. Rep. 44; Colyer v. Thompson, 2 T. B. Mon. (Ky.) 16. Where the vendor by agreement with the vendee, conveys portions of the premises in lots to third persons, as they are sold off by the vendee, he (the vendor) cannot in an action for rescission, the title being bad, object that the entire premises cannot be restored to him. Wilcox v. Lattin, 93 Cal. 588, 29 Pac. Rep. 226.

[33] Clark v. Briggs, 5 La. Ann. 624.

[34] Gehr v. Hagerman, 26 Ill. 459.

property cannot be restored *in specie.*[35] If the purchaser be unable to put the vendor *in statu quo,* he has his remedy over by action on the case if the vendor was guilty of fraud.[36]

It has frequently been held that a contract for the sale of lands cannot be partially rescinded, that it must be rescinded *in toto,* if at all,[37] by which appears to be meant that upon rescission neither party will be permitted to retain anything which he has received by virtue of the contract. If the purchaser refuse to complete the contract on the ground that the title to a portion of the premises has failed, and insist upon retaining possession of the other part, the vendor may maintain a bill to compel him to elect whether he will accept the title, or abandon the contract and restore the possession.[38]

If on rescission the purchaser refuse to restore the premises the vendor may recover them in ejectment.[39] In such an action the purchaser cannot set up paramount title in the third person as a defense.[40] The purchaser is estopped to deny the title of his vendor.[41] Even where he buys in an adverse claim to the premises, he must surrender possession before he can claim rescission against his vendor. He must take his chances of recovering the land on the title thus acquired.[42] If, however, he purchases in ignorance of the fact that the paramount title already exists in himself he cannot be required to surrender the possession before asserting his better title.[43]

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[35] Wright v. Dickinson, 67 Mich. 580; Calhoun v. Belden, 3 Bush (Ky.), 674, where the residence on the purchased premises had been destroyed by fire. In Alabama the rule that the purchaser must restore the premises before he can have a rescission of the contract, has been held not to apply where retention of the property is necessary for the indemnity or reimbursement of the purchaser, as where the vendor is insolvent and cannot return the purchase money. Garner v. Leveritt, 32 Ala. 413; Young v. Harris, 2 Ala. 108; Elliott v. Boaz, 9 Ala. 772; Greenlee v. Gaines, 13 Ala. 198, 47 Am. Dec 49; Parks v. Brooks, 16 Ala. 529; Read v. Walker, 18 Ala. 323; Foster v. Gressett, 29 Ala. 393; Gallagher v. Witherington, 29 Ala. 420; Duncan v. Jeter, 5 Ala. 604, 39 Am. Dec. 342.

[36] Hogan v. Weyer, 5 Hill (N. Y.), 389.

[37] 2 Kent Com. 408; 2 Warvelle Vend. 878. Cases cited supra, this section. Benjamin v. Hobbs, 31 Ark. 151; Lovingston v. Short, 77 Ill. 587; Porter v. Titcomb, 22 Me. 300; Hogan v. Weyer, 5 Hill (N. Y.), 389.

[38] Davison v. Perrine, 22 N. J. Eq. 87.

[39] 1 Sugd. Vend. (8th Am. ed.) 276 (179). Nicoll v. Carr, 31 Pa. St. 381; Fowler v. Cravens, 3 J. J. M. (Ky.) 3; 20 Am. Dec. 153.

[40] Fowler v. Cravens, 3 J. J. M. (Ky.) 3, 20 Am. Dec. 153.

[41] Ante, § 259a; Wolter v. Dixon, 29 Idaho, 26, 157 Pac. 250.

The rule which requires the restoration of the parties to their former condition is satisfied by substantial compliance therewith, since it is obviously impossible for the parties to be placed in the precise condition in which they were before the contract was entered into. Accordingly, it is generally considered that the rule is satisfied by restoring the premises unimpaired, together with the rents and profits, to the vendor, and the purchase money, with interest, costs and expenses for improvement, to the purchaser.[44] In some cases it has been held that the restoration of the premises to the vendor on failure of the title is a *condition precedent* to the right to maintain a suit for rescission.[45] It may be doubted whether such a rule would apply where the court has power to enter a judgment or decree conditioned to be inoperative unless the premises be restored to the vendor.[46]

The cases in which the purchaser may have a rescission of the contract without restoring the premises to the vendor have been elsewhere considered in this work.[47] The court, in decreeing a rescission of the contract on the ground of failure of title, will direct outstanding purchase-money notes to be delivered up and canceled, and will also direct that any bond for title or other obligation to convey executed by the vendor, be surrendered by the purchaser and canceled.[48]

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[42] Grundy v. Jackson, 1 Litt. (Ky.) 11; Officer v. Murphy, 8 Yerg. (Tenn.) 502. Ante, § 259a.

[43] Southcomb v. Bishop, 6 Hare, 213.

[44] Masson v. Bovet, 1 Den. (N. Y.) 74, 43 Am. Dec. 651; Bank v. Ettinge, 40 N. Y. 391. In this case it was held that the vendor could not require the purchaser to indemnify him for expenditures which he had made upon the expectation of receiving money under the contract. As to the contention that each party must be restored to the precise condition in which he was before the contract was made, the court said: "The application of this principle to the present case would substantially destroy the rule that money paid under a mistake of fact may be recovered back. If the facts could be so arranged that there should be no loss to either party there would be nothing to contend about, and so no such actions would be brought. * * * It is an ordinary result of the transaction that the party receiving has incurred liabilities or paid money which he would not have done except for the receipt of the money."

[45] Ante, § 258. Eames v. Der Germania Turn Verein, 8 Ill. App. 663, citing Hunt v. Silk, 5 East, 449, and Norton v. Young, 3 Greenl. (Me.) 30.

[46] In Pennsylvania a condition requiring the purchaser to reconvey the premises to the vendor may be inserted in the verdict. Babcock v. Case, 61 Pa. St. 427.

§ 280. **INTEREST. RENTS AND PROFITS. IMPROVEMENTS.** On rescission of an executory contract for the sale of lands for want of title in the vendor, whether by suit in equity or action at law to recover back the purchase money, the purchaser, if he has never been in possession, will be entitled to interest on the purchase money he has paid.[49] If he has been in possession the general rule is that the vendor may set off the rents and profits against interest on the purchase money,[50] taking into consideration, of course, any material inequality between the two items.[51] Even where the vendor fraudulently concealed a defect in his title he has been allowed the value of the rents and profits enjoyed by the purchaser.[52] But it has been held that he will not be entitled to an account of the rents and profits where by his fraudulent conduct the purchaser has been induced to remain in possession a long time in expectation that a good title will be made.[53] Nor where the purchaser, not yet having surrendered possession of the premises, will probably be compelled to account to the true owner for the mesne profits, or is entitled to retain them as a security for the return of the purchase money paid by him.[54] In England it is said to be usual and proper to specify in every case the day on which the purchase is to be completed, when the purchaser is to have possession, and when he is to receive the rents and profits and pay interest on the purchase money.[55] The purchaser cannot, however, in equity avail himself of a breach of these conditions unless time be of the essence of the contract.[56]

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[47] Ante, § 261.

[48] McKay v. Carrington, 1 McLean (U. S.), 50; Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634. In Williams v. Carter, 3 Dana (Ky.), 198, the purchase-money notes could not be delivered up because they had been destroyed by the vendor, and a decree was entered rescinding the contract. McGee v. Carrico, 6 Litt. (Ky.) 393.

[49] 2 Warvelle Vend. 885.

[50] 2 Warvelle Vend. 885; Watts v. Waddle, 6 Pet. (U. S.) 389; McIndoe v. Morman, 26 Wis. 588, 7 Am. Rep. 96; White v. Tucker, 52 Miss. 145; Axtel v. Chase, 77 Ind. 74; Baston v. Clifford, 68 Ill. 67; Bitzer v. Orban, 88 Ill. 130; McManus v. Cook, 59 Ga. 485; Todd v. McLaughlin, 125 Mich. 268, 84 N. W. Rep. 146; Griffith v. Depew, 3 A. K. Marsh. (Ky.) 177, 13 Am. Dec. 141, where held that interest should run only from date of suit for rescission, and that rents and profits should be charged against the purchaser from the same period. Morton v. Ridgway, 3 J. J. Marsh. (Ky.) 258; Wickliff v. Clay, 1 Dana (Ky.), 535; Taylor v. Porter, 1 Dana (Ky.), 421, 25 Am. Dec. 155; Williams v. Rogers, 2 Dana (Ky.), 374; Buchanan v. Lorman, 3 Gill (Md.), 51; Outlaw v. Morris, 7 Humph. (Tenn.) 262; Patrick v. Roach, 21 Tex. 261, 27 Tex. 579; Littlefield v. Tinsley, 26 Tex. 353, 359; Tennell v. Dewitt, 20 Tex. 256; Fitzhugh v. Land Company, 81 Tex. 306, 16 S. W. Rep. 1078. In Tennell v. Roberts, 2 J. J. Marsh. (Ky.) 577, a court of equity on rescinding a contract for the sale of lands refused to decree in favor of the vendor for rents and profits on the ground that he had been guilty of fraud respecting the title, and further, that the real owner was proceeding in ejectment against the purchaser. As to the right of the vendor to set off the rents and profits against the purchaser's claim for damages, see ante, § 95.

[51] 2 Warv. Vend. 885. Doggett v. Emerson, 1 Woodb. & M. (U. S.) 195,

It is not necessary that a purchaser, seeking a decree rescind-

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204. Shields v. Bogliolo, 7 Mo. 134, where it was said that if the land were wild and wholly unproductive the rule that the use of the money and the use of the land are equivalent would not apply. A head note to the case of Williams v. Wilson, 4 Dana (Ky.), 507, fairly digests the opinion of the court as follows: "There never has been any universal rule for adjusting and setting off rents against interest upon the rescission of a sale of land. As cases vary, the equity of allowing rents and interest on the purchase money must vary — the object being in every case to place the parties as nearly as possible *in statu quo*." In the absence of evidence to the contrary, the use of the premises and interest on the purchase money will be held to balance each other. Talbot v. Sebree, 1 Dana (Ky.), 56.

[52] Bryant v. Booth, 30 Ala. 311, 68 Am. Dec. 117, which, however, was a case in which the contract had been executed. Richardson v. McKinson, Litt. Sel. Cas. (Ky.) 320, 12 Am. Dec. 308; Peebles v Stephens, 3 Bibb. (Ky.), 324, 6 Am. Dec. 660. The same rule has been applied where the contract was rescinded on the ground that the vendor had fraudulently represented the quality of the land. Thompson v. Lee, 31 Ala. 292. In Walker v. Ogden, 1 Dana (Ky.), 247, the purchaser had bought in a paramount title to the premises, and a bill by the vendors for an account of the rents and profits was dismissed on the ground that the question of title being undetermined the remedy of the plaintiff was at law by action of ejectment.

[53] Seamore v. Harlan, 3 Dana (Ky.), 410.

[54] McLaren v. Irvin, 63 Ga. 275.

[55] Dart V. & P. (5th ed.) 127.

[56] Id. 417.

ing the contract when the title has failed, shall have previously tendered the reasonable value of the use and occupation of the premises; the vendor's demand in that respect can be adjusted in the action.[57] If the contract be rescinded at the suit of the purchaser, for want of title in the vendor, and no provision be made for redelivery of the land to the vendor, he, or his heirs, may maintain a bill against the purchaser for an account of the rents and profits.[58] If the purchaser committed waste while in the occupation of the premises, the damages thence accruing may be set off against his claim for purchase money, interest and improvements.[59] But he cannot be charged with ordinary deterioration or wear and tear of the premises.[60] We have seen that if the purchaser elect to keep the premises notwithstanding the defective title, and to maintain an action to recover damages for breach of the contract to make a good title, thereby affirming the contract, he will not be accountable to the vendor for the mesne profits.[61]

It has been held that the purchaser can only be charged with the profits actually received, and that the question how much the premises would have been worth to a man of ordinary industry and diligence is irrelevant and immaterial.[62] But this rule, it is apprehended, will not relieve the purchaser from his liability to pay a fair rent for the premises where he has derived benefits from the possession.[63] And in some cases the right of the vendor to an allowance for rents and profits on rescission of the contract has been denied altogether on the ground that the liability, if any, is for use and occupation; that an action for use and occupation cannot be supported, unless there was an implied contract to pay rent, and that no such contract on the part of the purchaser can be implied from his mere occupancy of the premises.[64] The vendor may always provide in the contract that in case of an inability to make title the purchaser shall pay a rent for the property.[65]

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[57] Dotson v. Bailey, 76 Ind. 434.

[58] Officer v. Murphy, 8 Yerg. (Tenn.) 502. In this case the purchaser, after obtaining a decree rescinding the contract, and enjoining the collection of the purchase money, remained in possession a number of years.

[59] Wickliffe v. Clay, 1 Dana (Ky.), 585, where the purchaser removed a building from the premises. This building was an improvement made by the vendor, for which he would have been entitled to recover against the real owner. Buchanan v. Lorman, 3 Gill (Md.), 51; Bitzer v. Orban, 88 Ill. 130.

[60] Williams v. Rogers, 2 Dana (Ky.), 374; Buchanan v. Lorman, 3 Gill (Md.), 51.

[61] Ante, § 95. Greene v. Allen, 32 Ala. 221, where it was said: "We have some decisions which hold that where a purchaser proceeds in equity for a rescission of a contract for a sale of land on account of defective title, he must account for rents and profits if any have accrued to him. See Walton v. Bonham, 24 Ala. 513; Young v. Harris, 2 Ala. 108, 114; Williams v. Mitchell, 30 Ala. 299. But we know of no case in which this doctrine has been applied to a suit at law on a bond for title where the breach alleged is the failure of the vendor's title. If a vendor in such a case could recoup, his vendee might be liable to a double recovery; first, to his vendor, and, secondly, to the true owner of the land. Moreover, such recoupment might operate direct pecuniary benefit to a fraudulent vendor, who would thus speculate on his own tortious acts."

We have seen that at law a purchaser makes improvements on the premises at his own risk.[66] But in equity, as a general rule, wherever the vendor would receive the benefit of permanent improvements made by the purchaser he must account for them either by paying the value of them to the purchaser, or by allowing them as a set-off against any demands which he may have against the purchaser.[67] But even in equity the purchaser will not be entitled to an allowance for his improvements if they were made when he knew there was a defect in the title.[68] Nor where he participates in a fraudulent intent of the vendor in selling the property.[69] The vendor will of course be entitled to set off against the improvements, the fair rental value of the land,[70] without the improvements.[71] If the purchaser has had the use and benefit of the improvements which he has made, he will be entitled only to their present value, and not their value at the time they were made.[72] It has been held that if the purchaser recover the value of his improvements against an adverse claimant, he must refund the amount so recovered if the vendor afterwards establishes his title.[73]

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[62] Richardson v. McKinson, Litt. Sel. Cac. (Ky.) 320, 12 Am. Dec. 308, reversing the judgment below. The court said: "An estate may be made more or less productive, according to the skill and care with which it may be managed; but the possessor cannot be said to be enriched in any case beyond the actual profits he has received; and a purchaser, in a case of this sort, ought not to be responsible for more. It has accordingly been held, where a purchaser has been let into possession and the purchase cannot be completed on account of defects in the title, that he is not bound to pay rents beyond the actual profits he has made. Sugden, 10."

[63] In Murray v. Palmer, 2 Sch. & Lef. 474, 489, on rescission of an executory contract on the ground of fraud in the purchaser in procuring a conveyance from a woman who was ignorant of her rights, the purchaser was held liable for rent which, but for his willful default, he might have received from the premises.

[64] Ankeny v. Clark, 148 U. S. 345. No question as to interest seems to have been raised in this case. Bardsley's Appeal, 10 Atl. Rep. 39. In Kirkpatrick v. Downing, 58 Mo. 32, 17 Am. Rep. 678, it was held that the purchaser could not be held liable as a tenant for rent, *co nomine*, but that he was chargeable to the extent of the benefit actually derived from the use of the land.

[65] As was done in Andrews v. Babcock (Conn.), 26 Atl. Rep. 715.

[66] Ante, § 96.

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[67] 2 Sugd. (8th Am. ed.) 514 (747); 2 Story Eq. Jur. 1234; King v. Thompson, 9 Pet. (U. S.) 204; Kirkpatrick v. Downing, 58 Mo. 32, 17 Am. Rep. 678; Martin v. Anderson, 7 Ga. 228; Peebles v. Stephens, 3 Bibb (Ky.), 324; 6 Am. Dec. 660; Ewing v. Handley, 4 Litt. (Ky.) 346, 371, 14 Am. Dec. 140; Richardson v. McKinson, Litt. Sel. Cas. (Ky.) 320, 12 Am. Dec. 308; Griffith v. Depew, 3 A. K. Marsh. (Ky.) 177, 13 Am. Dec. 141; Morton v. Ridgway, 3 J. J. Marsh. (Ky.) 258; Strike's Case, 1 Bland Ch. (Md.) 57, 77; Lancoure v. Dupre (Minn.), 55 N. W. Rep. 129, which was a case in which the purchaser rescinded the contract and abandoned the premises. Gilbert v. Peteler, 38 N. Y. 165, 92 Am. Dec. 785, where held, also, that the purchaser's claim for improvements will be a lien on the premises until paid. Perkins v. Hadley, 4 Hayw. (Tenn.) 148; Smithson v. Inman, 2 Baxt. (Tenn.) 88; Patrick v. Roach, 21 Tex. 251, 27 Tex. 579; Erwin v. Myers, 46 Pa. St. 96. See, contra, Wilhelm v. Fimple, 31 Iowa, 131, 7 Am. Rep. 117. The extraordinary statement is made in this case that a purchaser is not entitled to an allowance for his improvements where he sues to rescind the contract, but that he would be if he sued to recover damages for breach of the contract. If this be true, the purchaser electing to affirm the contract, may recover damages for the breach, including the value of his improvements, retain possession of the land, and by getting in the rights of the adverse claimant, practically receive compensation for his improvements without having incurred a loss on their account. On the other hand, if he elected to rescind the contract, he could have nothing for his improvements; their entire benefit would pass to the vendor upon a return of the premises to him; or he (the vendor) would be allowed their value when sued in ejectment by the adverse claimant. These results necessarily follow from the rule that upon rescission of the contract the premises must be restored to the vendor, and that upon affirmance of the contract by action for damages the purchaser is not obliged to surrender the possession. The only case cited to sustain the foregoing decision was that of Gillett v. Maynard, 5 Johns. (N. Y.) 85, 4 Am. Dec. 329, which was a suit to recover back the purchase money and value of improvements, the contract being void because not in writing, and the vendor having refused to perform. See, contra, the latter case Mason v. Swan, 6 Heisk. (Tenn.) 450; Rhea v. Allison, 3 Head (Tenn.), 176.

[68] 2 Sugd. Vend. (8th Am. ed.) 515; Scott v. Battle, 85 N. C. 184, 39 Am. Rep. 694. But see Ewing v. Handley, 4 Litt. (Ky.) 371, 14 Am. Dec. 140, where the purchaser was permitted to set off improvements against rent, though made when he knew the title was defective. But he was denied an allowance for improvements made after he had recovered judgment against the vendor in an action for breach of the contract. In Witherspoon v. McCalla, 3 Des. (S. C.) 245, the rule stated in the text seems to have been restricted to cases in which the defect was notorious, and the purchaser, buying on a speculation, had been, on account of the defect, able to get the property much below its real value.

The right of the purchaser to a decree for interest on the purchase money paid by him and for the value of his improvements, and the right of the vendor to an account of the rents and profits, and an allowance for waste beyond ordinary wear and tear, obviously depend in a great measure upon the circumstances of each particular case, and cannot be made the subjects of unbending rules. A court of equity will be chiefly concerned to see that each party is placed as nearly as possible *in statu quo*, without regard to arbitrary restrictions.[74]

§ 281. **PLEADING.** In some cases it has been held that it is incumbent on the purchaser seeking to rescind an executory contract for the sale of lands, to aver and prove facts showing that the title is bad, and that he cannot require the vendor to show title.[75] It is true that the vendor may be in possession of many facts respecting the title which it would be exceedingly difficult for the purchaser to ascertain, such as the happening of contingencies, on which the validity of the title depends, *e. g.*, the death of life tenants, or the births of persons in remainder, and other facts of like kind which cannot be discovered by examining the public records; and cases might occur in which the purchaser would be involved in great hardship, if required to prove facts lying peculiarly within the knowledge of the vendor. At the same time it is clear that it would be inequitable to permit the purchaser, when tired of his bargain, to come into a court of equity, and upon the bare allegation that the title is bad, put the vendor to the vexation and expense of proving it to be sufficient. He should, at least, be required to point out the defect of which he complains, and to prove it as alleged.[76] But there are cases which decide that if the vendor sues for specific performance, as a general rule the burden will be upon him to show that he has such a title as the purchaser can be required to take.[77]

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[69] Strike's Case, 1 Bland (Md.), 57.

[70] Cases cited supra throughout this section. Winters v. Elliott, 1 Lea (Tenn.), 676; Mason v. Lawing, 10 Lea (Tenn.), 264.

[71] Lamourse v. Dupre (Minn.), 55 N. W. Rep. 129.

[72] Williams v. Rogers, 2 Dana (Ky.), 374; Seamore v. Harlan, 3 Dana (Ky.), 411.

[73] Morton v. Ridgway, 3 J. J. Marsh. (Ky.) 258.

[74] Littlefield v. Tinsley, 26 Tex. 353, 358.

[75] See ante, § 117, as to burden of proof in actions for breach of covenant of seisin. 2 Rob. Pr. 190; Riddell v. Blake, 4 Cal. 264; Thayer v. White, 3 Cal. 228; Moss v. Davidson, 1 Sm. & M. (Miss.) 112; Grantland v. Wight, 5 Munf. (Va.) 295. In both these cases the contract had been executed.

If the vendor sue for specific performance, it is not necessary that the purchaser's objections to the title be taken in his answer; they may be made at any time before the hearing.[78]

§ 282. **PARTIES.** All parties in interest must, of course, be made parties to the suit for rescission.[79] An assignee of one of the purchase-money notes has been held a necessary party.[80] So, also, one who had purchased from the complainant.[81] If the purchaser should die pending the suit, his heirs must be made parties. By a rescission their interests would be directly affected, and to authorize a decree it is indispensable that they should be before the court.[82]

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[76] Ante, § 244.

[77] Griffin v. Cunningham, 19 Grat. (Va.) 571; Grantland v. Wight, 5 Munf. (Va.) 295; Walsh v. Barton, 24 Ohio St. 28; Jarman v. Davis, 4 T. B. Mon. (Ky.) 115; Daily v. Litchfield, 10 Mich. 38; Dwight v. Cutler, 3 Mich. 566, 64 Am. Dec. 105; Cornell v. Andrus, 36 N. J. Eq. 321; Allen v. Adams, 162 Iowa 300, 143 N. W. 1092. See ante, § 244. It is suggested with diffidence, that the sufficiency of the title of the vendor often depends upon one or more questions of fact alleged upon the one side and denied upon the other, and that whenever the pleadings have reached this stage in any suit or proceeding in which the sufficiency of the title is involved, it would seem that the burden of proof should be devolved upon him who has the affirmative of the issue, whether vendor or purchaser, unless the fact is of a kind lying peculiarly within the knowledge of the party having the negative. The parties should so plead that it may be determined whether the title depends upon a question of law or a question of fact; so that, in the latter event, they may arrive at an issue, and the burden of proof be intelligently and not arbitrarily disposed.

[78] Park v. Johnson, 7 Allen (Mass.), 378. In Harding v. Olsen, 177 Ill. 298, 52 N. E. Rep. 482, it was said that the only necessary party to the bill is the party against whom the decree for repayment will operate.

[79] Cummins v. Boyle, 1 J. J. Marsh. (Ky.) 480.

[80] Pollock v. Wilson, 3 Dana (Ky.) 25.

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[81] Yoder v. Swearingen, 6 J. J. Marsh. (Ky.) 518.

[82] Huston v. Noble, 4 J. J. Marsh. (Ky.) 130.

CHAPTER XXXI.

OF DOUBTFUL TITLES.

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§ 283. **GENERAL RULES.** Unless the contract contains a stipulation to the contrary, there is always an implied agreement that the title offered by the vendor shall be marketable,[1] and that it shall be fairly deducible of record.[2] A purchaser of lands can never be required to accept a doubtful or unmarketable title,[3] even though the fullest indemnity be offered by way of a general warranty from a solvent vendor.[4] Specific performance is a matter of grace and not of right, and will never be decreed when the title is open to reasonable doubt.[5] All titles absolutely bad are, of course, unmarketable, but the expression "marketable title" as originally employed by courts of equity, was not the equivalent of "good title" or "perfect title," nor the opposite of "bad title" or "defective title," but was technical in its character, and meant a title concerning which there were no fair and reasonable doubts; such a title as a court of equity would compel a purchaser to accept on a bill by the vendor for specific performance.[6] It is possible that a perfect title may be unmarketable;[7] for example, suppose the validity of A's title depends upon the question whether or not he is the next of kin to B. If he is indeed the next of kin his title is perfect. But if it cannot appear to the court beyond a reasonable doubt that he is such, then the title, though really good if all the facts could be known, will be deemed unmarketable.[8] This doctrine of "marketable titles" was originally cognizable only in the courts of equity, but in several of the American States in which the distinction between legal and equitable procedure has been abolished, the same doctrine has been applied in courts of law, *e. g.,* in actions to recover back the purchase money. To this fact is probably due the tendency of the courts in those States to apply the term "unmarketable" to such titles as are absolutely bad, as well as those which are merely doubtful.

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[1] Scudder v. Watt, 90 N. Y. Supp. 605; 98 App. Div. 40; Brady v. Bank of Com., 41 Okl. 473, 138 Pac. 1020. Obviously, a marketable or merchantable title is one to which no objection of a kind that would interfere with a sale of the property can be raised; for this is implied in the term itself. But there is no implied agreement that the title shall be satisfactory to the purchaser or his attorney. Green v. Ditsch, 143 Mo. 1; 44 S. W. Rep. 749.

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[2] Ante, § 6.

[3] Dart. Vend. 734; Sugd. Vend. (8th Am. ed.) 577 (386); 2 Warvelle Vend. 843; Adams Eq., m. p. 84; Story's Eq. Jur. 693; Pomeroy's Eq. Jur. § 1405. Beach Mod. Eq. Jur., § 607; Bispham Eq. Jur., § 378; Atkinson Marketable Title, ch. 1; Diamond State Iron Co. v. Husbands, 8 Del. Ch. 205, 68 Atl. 240.

[4] Batchelder v. Macon, 67 N. C. 181.

[5] Mitchell v. Stinemetz, 97 Pa. St. 253; Maltby v. Thews, 171 Ill. 264; 49 N. E. Rep. 486; Wesley v. Eells, 177 U. S. 370; Dyker M. L. & I. Co. v. Cook, 159 N. Y. 6; 53 N. E. Rep. 690; Sherman v. Beam, 27 S. D. 218; 130 N. W. 442.

[6] Adams Eq., m. p. 84; Beach Mod. Eq. Jur. § 606. Stapylton v. Scott, 16 Ves. 272; Jervoise v. Duke of Northumberland, 1 J. & W. 539. If, after the vendor has produced all the proof he can, a reasonable doubt still remains, the title is not marketable, and the purchaser is not obliged to take it. Shriver v. Shriver, 86 N. Y. 575. The rule in New Jersey has been declared to be that the purchaser will not be required to take a title which is reasonably doubtful even though at law the title might be declared to be good. Van Riper v. Wickersham, 76 N. J. Eq. 232; 76 Atl. 1020, Ann. Cas. 1912 A. 319.

[7] Reynolds v. Strong, 82 Hun (N. Y.), 202; 31 N. Y. Supp. 329, where it was said that a title may be valid, and yet not marketable. A material defect in the title to land is such a defect as will cause a reasonable doubt and just apprehension in the mind of a reasonable, prudent and intelligent person, acting upon competent legal advice, and prompt him to refuse to take the land at a fair value. Eggers v. Busch, 154 Ill. 604; 39 N. E. Rep. 619.

It is impossible in the nature of things that there should be a mathematical certainty of a good title.[9] Such a thing as absolute security in the purchase of real estate is unknown.[10] But a bare possibility that a title may be affected from certain causes, when the highest possible evidence of which the nature of the case admits, amounting to a moral certainty, is given that no such cause exists, does not render the title doubtful.[11] The purchaser cannot demand a title absolutely free from all suspicion or possible defect;[12] nor that he be guaranteed against any trouble on account of the title.[13] He can simply require a title such as prudent men, well advised as to the facts and their legal bearings, would be willing to accept. The doubts must be such as will affect the market value of the estate.[14] They must not be made up for the occasion, based on captious, frivolous and astute niceties; they must be such as would induce a prudent man to hesitate in accepting a title affected by them.[15] What matters of law or what matters of fact are sufficient to make a title so doubtful as to be unmarketable, cannot be indicated by positive rules. Facts or questions which present no difficulties to one judicial mind may, in the opinion of another, raise insuperable objections to the title.[16] It is obvious that the existence of a "fair and reasonable doubt" as to the title must depend upon the capacities of the judge to whom the question is addressed. "Practically the judge acts upon his own doubts."[17] It has been said that the title which a purchaser will be required to take should be, like Caesar's wife, free from suspicion, but that the purchaser will not be relieved on account of possibilities of defects, or mere suspicions of faults ending only in suspicion.[18] The doubt must be "grave and reasonable."[19] If there is such doubt as to make it probable that the purchaser's right may become a matter of investigation, he will not be compelled to complete the purchase.[20] If the doubt arise upon a question of fact of such nature as not to admit of proof, such as a statement that a certain act, which would make void the vendor's title, had not been committed;[21] or, if a defect appear and the title depends upon facts removing it, which facts the purchaser can only establish by parol testimony should his title be afterwards attacked,[22] the purchaser will be relieved. An often-cited English case establishes the rule that a title is doubtful when it is such as other persons may question, though the court regards it favorably, and that if the doubt arise upon a question connected with the general law, the court is to judge whether the law is settled; if not settled, or if extrinsic circumstances affecting the title, appear, which neither the court nor the purchaser can satisfactorily investigate, the purchaser will be relieved.[23]

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[8] Post, this ch. § 289. It is possible that facts not appearing upon the records may overthrow a title apparently good, but in such a case it devolves on the purchaser to point out the defect. Hillyard v. Banchor, 85 Kan. 516; 118 Pac. 65.

[9] Language of Lord HARDWICKE in Lyddall v. Weston, 2 Atk. 20. First African Soc. v. Brown, 147 Mass. 196, 298; 17 N. E. Rep. 549.

[10] Rawle Covts. for Title (5th ed.), 259.

[11] Moser v. Cochran, 107 N. Y. 35; 13 N. E. Rep. 442; Schermerhorn v. Niblo, 2 Bosw. (N. Y.) 161; Hedderley v. Johnson, 42 Minn. 443; 44 N. W. Rep. 527; Webb v. Chisolm, 24 S. C. 487; Grasser v. Blank, 110 La. 493; 34 So. Rep. 648; Tripp v. Sieler, 38 S. D. 321; 161 N. W. 337; Kenefick v. Shumaker, 64 Ind. App. 552; 116 N. E. 319.

[12] Todd v. Union Dime Sav. Inst., 128 N. Y. 636; 28 N. E. Rep. 504; Jackson v. Creek, 47 Ind. App. 541; 94 N. E. 416; Milton v. Crawford, 65 Wash. 145; 118 Pac. 32.

[13] Close v. Martin, 208 Mass. 236; 94 N. E. 388.

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[14] Vreeland v. Blauvelt, 23 N. J. Eq. 485. A marketable title is one that will bring as high a price in the market with the purchaser's objection to its sufficiency as without. Parmly v. Head, 33 Ill. App. 134.

[15] Nicol v. Carr, 35 Pa. St. 38; Kimball v. Tooke, 70 Ill. 553; Summy v. Ramsey, 53 Wash. 93; 101 Pac. 506.

[16] Atk. Marketable Title (Law Lib.), ch. 1; 1 Sugd. Vend. (8th Am. ed.) 579 (387).

[17] Sedgwick v. Hargrave, 2 Ves. 59.

[18] Gordon v. Champneys, Turn. & Russ. 88; Laurens v. Lucas, 6 Rich. (S. C.) Eq. 217; Monagan v. Small, 6 Rich. N. S. (S. C.) 177; Carroll v. McKahary, 55 N. Y. Supp. 113; 35 App. Div. 528. While the court will give the purchaser reasonable assurance of security, it will not countenance the idle scruples of one interested in withholding the purchase money. Brown v. Witter, 10 Ohio, 143. The doubts about the title must be such as would probably interfere with a resale of the premises by the purchaser. Billick v. Davenport, 164 Iowa, 105; 145 N. W. 470; Horowitz v. Mendel R. E. Co., 145 Ga. 866; 90 S. E. 57. The title should be such as not only to enable the purchaser to hold the land, but to sell it without difficulty if he desires. Lindsey v. Hambrecht, 162 Fed. 548. If the alleged outstanding right is a very improbable or remote contingency, which, according to experience, has no probable basis, the court may in the exercise of a sound discretion, compel the purchaser to take the title. Cambrelleng v. Purton, 125 N. Y. 610; 26 N. E. 907; Ferry v. Sampson, 112 N. Y. 415; 20 N. E. 387; Bardes v. Herman, 129 N. Y. Supp. 723; 144 App. Div. 772. To be marketable, a title need not be absolutely free from any possible suspicion of defect. Hagan v. Drucker, 85 N. Y. Supp. 601; 90 App. Div. 28; Johnston v. Garvey, 124 N. Y. Supp. 278; 130 App. Div. 650.

The defect of title of which the purchaser complains must be of a substantial character; one from which he may suffer injury. Mere immaterial defects which do not diminish in quantity, quality, or value the property contracted for, constitute no ground upon which he may reject the title.[24] Facts must be known at the time which fairly raise a reasonable doubt as to the title; a mere possibility or conjecture that such a state of facts may be developed at some future time is not sufficient.[25]

The purchaser is entitled to rescind the contract where the title is doubtful, as well as where it is absolutely bad, but it has been frequently said that equity will, in many cases, deny the vendor's application for specific performance, when it would not entertain a bill by the purchaser to rescind, in other words, that it requires a stronger case to induce a chancellor to rescind a contract, than to withhold his assistance in causing it to be executed.[26] This is doubtless true as to contracts which have been partly executed, as by payment of the purchase money on the one part, and delivery of possession on the other, because in such cases more or less difficulty will always be encountered in placing the parties *in statu quo.* But where neither party has taken any step towards performance, no reason is perceived why the same want of doubtfulness of title in the vendor which takes away his right to specific performance, would not sustain the purchaser's bill for rescission.[27]

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[19] Moore v. Appleby, 108 N. Y. 237; 15 N. E. Rep. 377; 1 Coll. 102; Dobson v. Zimmerman, 55 Tex. Civ. App. 394; 118 S. W. 236.

[20] Per TINDAL, C. J., in Curling v. Shuttleworth, 6 Taunt. 121.

[21] 1 Sugd. Vend. (8th Am. ed.) 609. Lowe v. Lush, 14 Ves. Jr. 547.

[22] Moore v. Williams, 115 N. Y. 586; 22 N. E. Rep. 233.

[23] Pyrke v. Waddingham, 17 Eng. L. & Eq. 534; 10 Hare, 1; Reynolds v. White, 128 N. Y. Supp. 529; 143 App. Div. 595.

[24] Riggs v. Pursell, 66 N. Y. 193; Mead v. Martens, 47 N. Y. Supp. 299; 21 App. Div. 134.

[25] Gates v. Parmly, 93 Wis. 294; 66 N. W. 253; 67 N. W. 739.

The doubt whether a title is or is not such as a purchaser can be required to take, depends, sometimes, upon a question of law, sometimes upon a question of fact, and sometimes upon both.[28] If the doubt that is raised depends upon the application of general principles of law, the court will, ordinarily, decide it in any proceeding in which the sufficiency of the title offered by the vendor is involved.[29] In theory the court must know whether the title is good or bad, if all the facts respecting it are known and undisputed, for the court is presumed to know the law applicable to those facts.[30] But no court can be certain that, upon a doubtful question of law, *e. g.*, whether a certain limitation, after a life estate, was a contingent remainder or an executory devise,[31] another court of co-ordinate jurisdiction in which the purchaser's title may be attacked, will pronounce the same judgment. If it be necessary to declare a particular statute unconstitutional before the vendor's title can be held good, the purchaser cannot be required to take the title.[32]

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[26] Dart Vend. (5th ed.) 734; Story Eq. Jur. §§ 206. 693; Gans v. Renshaw, 2 Pa. St. 34; 44 Am. Dec. 152. Doubts as to the title may be sufficient to justify the court in refusing to compel specific performance by the purchaser, yet insufficient to sustain an application by the purchaser for rescission, especially if he is in undisturbed possession of the premises. Duvall v. Parker, 2 Duv. (Ky.) 182.

[27] The question, if any, is of little practical moment, except in cases where the contract has been partly performed, for the purchaser accomplishes, as a general rule, all that he desires by abandoning the contract and resisting the vendor's demand for specific performance.

[28] 1 Sugd. Vend. (8th Am. ed.) 580; 2 Beach Mod. Eq. Jur. § 608.

[29] Wilson v. Vogel, 87 N. J. Eq. 584; 101 Atl. 173; 88 N. J. Eq. 598; 103 Atl. 1055.

[30] If the court is fully informed of the facts, it must know whether the title is good or bad. If the facts are not fully disclosed, it may with propriety doubt. O'Reilly v. King, 28 How. Pr. (N. Y.) 408; Matthews v. Lightner, 85 Minn. 333; 88 N. W. 992; 89 Am. St. Rep. 958; Buchan v. Land Co., 180 Iowa, 911; 164 N. W. 119; Ann. Cas. 1918 A. 84. In a case in which the doubt turned upon the application of the law of a foreign country, the title was held unmarketable. Flood v. Von Marcard, 102 Wash. 140; 172 Pac. 884.

It is not customary to examine the title of a lessor, and no other covenant for title from him can be required than that the lessee shall quietly enjoy the estate.[33] Hence, it is not customary to raise the objection that the title of the lessor is merely doubtful or unmarketable, though it has been held that the title to a ground rent may be rejected, if the title to the land out of which the rent issued is unmarketable.[34] But a purchaser of a leasehold estate may compel the seller to produce the lessor's title, and may reject it if it proves to be bad, unless he purchased with notice of the defect.[35]

Whether or not a title is marketable is a question of law for the court and not for the jury. The jury must find the facts, and the court determine their effect.[36] The opinions of conveyancing counsel, or lawyers in general, will not be received upon the question whether a certain title is or is not marketable.[37] But a judgment will not be reversed because of the admission of such testimony when it appears that the entire title upon which such witness' opinion was founded, was before the court.[38] If a purchaser sues to recover damages against his vendor for breach of the contract, it is not enough to show that the title has been deemed insufficient by conveyancers; he must prove the title to be bad.[39] He is not exonerated, in refusing to perform the contract, by the advice of competent counsel that the title is doubtful, if it be in fact good. He takes the risk of the soundness of the advice given.[40] As a general rule the vendor may remove doubts about the title at any time before decree, unless time is of the essence of the contract.[41]

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[31] Roake v. Kidd, 5 Ves. 647.

[32] Daniel v. Shaw, 116 Mass. 582; 44 N. E. Rep. 791.

[33] Rawle Covts. for Title (5th ed.), § 20, par. 5.

[34] Mitchell v. Stinemetz, 97 Pa. St. 251.

[35] 1 Sugd. Vend. (8th Am. ed.) 554 (368). Purvis v. Rayer, 9 Pri. 488.

[36] Parmly v. Head, 33 Ill. App. 134; 17 Wash. Law Rep. 332; Moser v. Tucker, (Tex. Civ. App.) 195; S. W. 259.

[37] Post, § 295a. Evans v. Gerry, 174 Ill. 595; 51 N. E. Rep. 615; Moser v. Cochrane, 107 N. Y. 35; 13 N. E. Rep. 442; Montgomery v. Pac. L. Co. Bureau, 94 Cal. 284; 29 Pac. Rep. 640; Winter v. Stock, 29 Cal. 413; 89 Am. Dec. 57; Reed v. Sefton, 11 Cal. App. 88; 103 Pac. 1095; Cunningham v. Friendly, 70 Oreg. 222; 139 Pac. 928; Mead v. Atgeld, 33 Ill. App. 373; S. C. on app., 26 N. E. Rep. 388; Leahy v. Hair, 33 Ill. App. 461; Atkinson v. Taylor, 34 Mo. App. 442; Murray v. Ellis, 112 Pa. St. 485; 3 Atl. Rep. 845; Dalzell v. Crawford, 1 Pars. Sel. Cas. (Pa.) 37. But see Adams Eq. 198, and Hymers v. Branch, 6 Mo. App. 511, where it was held that if the opinion of the court regarding a title might be fairly questioned by competent persons, the title must be considered doubtful.

§ 284. **CLASSIFICATION OF CASES IN WHICH THE TITLE WILL BE HELD DOUBTFUL.** The following classification of cases in which the title will be considered doubtful, has been made by an able text writer,[42] and is perhaps as logical and accurate as the nature of the subject will admit:

(1) *Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable; or, as it was put by Alderson, B., where there is a "reasonable decent probability of litigation."*[43] *The court, to use a favorite expression, will not compel the purchaser to buy a law suit.*[44] If

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[38] Mead v. Atgeld, supra. Buswell v. Kerr Co., 112 Minn. 388; 128 N. W. 459.

[39] 1 Sugd. Vend. (8th Am. ed.) 537. Canfield v. Gilbert, 4 Esp. 221; Meyer v. Madreperla, 68 N. J. L. 258; 53 Atl. 477; 96 Am. St. Rep. 536; Mesa Market Co. v. Crosby, 174 Fed. 96; 98 C. C. A. 70.

[40] Montgomery v. Pacific L. Co. Bureau, 94 Cal. 284; 29 Pac. Rep. 640.

[41] Post, ch. 32. Longworth v. Taylor, 1 McLean (U. S.), 395.

[42] Fry Spec. Perf. § 870.

[43] Cattell v. Corrall, 4 Y. & C. Ex. 237.

[44] Price v. Strange, 6 Madd. 159, 165; Sharp v. Adcock, 4 Russ. 374; Haseltine v. Simmons, 6 W. R. 268; Pegler v. White, 33 Beav. 403. See, also, Potter v. Parry, 7 W. R. 182; Burnell v. Firth, 15 W. R. 546; Barnett v. Telephone Co., 201 Mass. 41; 87 N. E. 562; Williams v. Bricker, 83 Kan. 53; 109 Pac. 998; Bodcaw Lumber Co. v. White, 121 La. 715; 46 So. 782. A purchaser will not be compelled to accept a conveyance from a trustee under a will when a suit is pending to test the validity of the will. Hale v. Cravener, 128 Ill. 408; 21 N. E. Rep. 534. A title dependent on questions as to the right of an executor to sell under the will, and as to whether certain devisees had not elected to take under the will, both of which questions are in litigation, is not marketable. Warren v. Banning, 21 N. Y. Supp. 883. A title suggestive of future litigation is unmarketable. Beer v. Leonard,

there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the title will be deemed unmarketable.[45]

(II) *Where there has been a decision by a court of co-ordinate jurisdiction adverse to the title, or to the principle on which the title rests, though the court thinks that decision wrong.*[46]

(III) *Where there has been a decision in favor of the title, which the court thinks wrong.*[47]

(IV) *Where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the court holds the conclusion it arrives at to be open to reasonable doubt in some other court.*[48] Generally, it may be said that the opinion of the court upon any question of law on which the title depends, will not render the title marketable if the court thinks that another judge[49] or other competent person[50] might entertain a different opinion upon the same question. The test as to whether a title is doubtful or not upon a question of law, has been held to

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40 La. Ann. 845; 5 So. Rep. 257; James v. Meyer, 41 La. Ann. 1100; 7 So. Rep. 618. *Quære,* whether a purchaser can be compelled to accept a tax title? The court intimated that such a title might be as free from objection as any other. Lesley v. Morris, 9 Phila. (Pa.) 110; 30 Leg. Int. 108.

[45] Seaman v. Vawdrey, 16 Ves. 390; McNutt v. Nellans, 82 Kan. 424; 108 Pac. 834. A title is doubtful if it exposes the purchaser to litigation. Freetly v. Barnhart, 51 Pa. St. 279; Speakman v. Forepaugh, 44 Pa. St. 363. "If the purchaser would be exposed to a lawsuit with the least chance of losing it, he ought not to be held to the bargain." GIBSON, C. J., in Gans v. Renshaw, 2 Pa. St. 34; 44 Am. Dec. 152. A title dependent upon the question whether certain acts, conduct or admissions amount to an estoppel *in pais* is unmarketable. McGrane v. Kennedy, 10 N. Y. Supp. 119.

[46] Per ROMILLY, M. R., in Mullings v. Trinder, L. R., 10 Eq. 454; Ferris v. Plummer, 42 Hun (N. Y.), 440; Wesley v. Eells, 177 U. S. 370.

[47] Per ROMILLY, M. R., in Mullings v. Trinder, L. R., 10 Eq. 454.

[48] Alexander v. Mills, L. R., 6 Ch. 132; Pyrke v. Waddingham, 10 Hare, 1; 17 Eng. L. & Eq. 534; Richards v. Knight, 64 N. J. Eq. 196; 53 Atl. 452; McCaffery v. Little, 20 App. D. C. 116. A doubtful title cannot be made marketable by an opinion of a court upon a case stated between the vendor and purchaser. Pratt v. Eby, 67 Pa. St. 396.

[49] Vreeland v. Blauvelt, 23 N. J. Eq. 483. The fact that a court is divided in opinion as to the construction of a statute affecting the validity of a title is of itself sufficient ground for refusing to compel the purchaser to complete the contract. Pratt v. Eby, 67 Pa. St. 396.

[50] 2 Beach Mod. Eq. Jur. § 606.

be the certain conviction of the court, in deciding the point, that no other judge would take a different view.[51]

(V) *Where the title rests upon a presumption of fact of such a kind that if the question of fact were before a jury it would be the duty of the judge not to give a clear direction in favor of the fact, but to leave the jury to draw their own conclusions from the evidence.*[52]

(VI) *Where the circumstances amount to presumptive (though not necessarily conclusive) evidence of a fact fatal to the title, as, e. g., that the exercise of a power under which the vendor claimed was a fraud upon the power.*[53]

§ 285. **CLASSIFICATION OF CASES IN WHICH THE TITLE WILL NOT BE HELD DOUBTFUL.** The same author makes the following classification of cases in which the court would not, as he conceives, consider the title to be doubtful.[54]

(I) *Where the probability of litigation ensuing against the purchaser in respect of the doubt is not great; the court, to use Lord Hardwicke's language in one case, " must govern itself by a moral certainty, for it is impossible in the nature of things there should be a mathematical certainty of a good title.*[55]

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[51] 2 Dart Vend. 1102. Rogers v. Waterhouse, 4 Drew. 32; Pegler v. White, 33 Beav. 403; Howe v. Hunt, 31 Beav. 420. But set Beioley v. Carter, L. R. 4 Ch. App. 230, and cases cited. 2 Dart Vend. 1103, n.

[52] Emery v. Grocock, 6 Madd. 54; Shriver v. Shriver, 86 N. Y. 575; Doutney v. Lambie, 78 N. J. Eq. 277, 78 Atl. 746. To this class, Mr. Fry says, may be referred many of those cases where a doubt as to a fact has prevailed; as where the title depended upon proof that there was no creditor who could take advantage of an act of bankruptcy committed by the vendor (Lower v. Lush, 14 Ves. 547), or where the title depended upon the absence of notice of an incumbrance, of which absence the vendor produced some evidence (Freer v. Hesse, 4 De G., M. & G. 495), or upon the presumption arising from mere possession. Eyton v. Dicken, 4 Pri. 303.

[53] Warde v. Dixon, 28 L. J. Ch. 315, S. C., 7 W. R. 148.

[54] Fry Sp. Perf. (3d Am. ed.) § 871.

[55] Lyddall v. Weston, 2 Atk. 19. In this case specific performance by the purchaser was enforced, though there was a reservation of mines by the crown, the court being satisfied that there was no subject-matter for the reservation to act upon or that all legal right to exercise it had ceased. See, also, Seaman v. Vawdrey, 16 Ves. 393; Martin v. Cotter, 3 Jon. & L. 496; Reed v. Sefton, 11 Cal. App. 88, 103 Pac. 1095. In Spencer v. Topham, 22 Beav. 573, an unwilling purchaser was compelled to take a title depending

(II) *Where there has been a decision adverse to the title by an inferior court, which decision the superior court holds to be clearly wrong.*[56]

(III) *Where the question depends on the general law of the land; "as a general and almost universal rule the court is bound as much between vendor and purchaser, as in every other case, to ascertain and so determine as best it may, what the law is, and to take that to be the law which it has so ascertained and determined."*[57] An illustration of this rule, as applied in America, will be found in the case of Fairchild v. Marshall.[58] In that case the

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on the validity of a purchase by a solicitor from his client, on proof of the validity of the transaction, though given in the absence of the client, who, it was urged, might possess other evidence and ultimately set aside the sale. See, also, Falkner v. Equitable Reversionary Society, 4 Drew. 352. The mere fact that the purchaser is to take under an assignment for the benefit of creditors, which may be attacked as invalid, does not render the title doubtful or unmarketable in the absence of anything to show that the title will probably be attacked. Bayliss v. Stinson, 110 N. Y. 621, 17 N. E. Rep. 144. The bare possibility that minor heirs may attack the probate of their ancestor's will within the time allowed them by statute after attaining their majority, with nothing to show even a suspicion of the existence of probable grounds for such an attack, does not render a title under the will unmarketable. McCaffrey v. Little, 20 App. D. C. 116.

[56] Beioley v. Carter, L. R., 4 Ch. 230; Alexander v. Mills, L. R., 6 Ch. 124; Radford v. Willis, L. R., 7 Ch. 7; Holly v. Hirsh, 135 N. Y. 590, 32 N. E. Rep. 709.

[57] Per JAMES, L. J., in Alexander v. Mills L. R., 6 Ch. 131, 132; Forster v. Abraham, L. R. 17 Eq. 351; Osborne v. Rowlett, 13 Ch. D. 774; Pyrke v. Waddingham, 10 Hare, 1; Palmer v. Locke, 18 Ch. Div. 381; In re Thackeray, 40 Ch. Div. 34; Barrette v. Whitney, 36 Utah 574, 106 Pac. 522, 37 L. R. A. (N. S.) 368. Where there is a doubt about the validity of a title arising from a construction of an act of parliament, or the language of an instrument or will, it is the duty of the court to remove the doubt by deciding it. The decision removes the doubt, and specific performance will be adjudged. Bell v. Holtby, L. R., 15 Eq. 178. See Fairchild v. Marshall, 42 Minn. 14, 43 N. W. Rep. 563; Ebling v. Dwyer, 149 N. Y. 460, 44 N. E. 155; Williams v. Marx, 124 Cal. 22, 56 Pac. Rep. 603; Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. Rep. 99; Lippincott v. Wikoff, 54 N. J. Eq. 107, 33 Atl. 305; Hatt v. Rich, 59 N. J. Eq. 492, 45 Atl. 969. A doubt precluding specific performance exists if the seller's title depends on a legal question not settled by previous decisions, or concerning which there are *dicta* of weight indicating that courts might differ as to its determination. Richards v. Knight, 64 N. J. Eq. 196, 53 Atl. 452.

[58] 42 Minn. 14, 43 N. W. Rep. 563.

purchaser objected to the title on the ground that the land was subject to a claim of dower in favor of the widow of a former owner, but the vendor showed that the widow had elected to take a provision in her husband's will in lieu of dower, and the Supreme Court in that State having decided that such election constituted a bar to dower, it was held that the question of law whether such election barred the widow's claim to dower could no longer be considered doubtful, and that the purchaser must complete the contract.

(IV) *Where the question, though one of construction, turns on a general rule of construction, unaffected by any special context in the instrument and the court is in favor of the title.*[59]

(V) *Where the title depends on a presumption, provided it be such that if the question were before a jury, it would be the duty of the judge to give a clear direction in favor of the fact, and not to leave the evidence generally to the consideration of the jury.*[60]

(VI) *Where the doubt rests not on proof or presumption but on a suspicion of mala fides.*[61] But a purchaser cannot be compelled to take a title which is open to attack on the ground of fraud, bad faith, or breach of trust on the part of one through whom the title is derived.[62] Thus, where a conveyance of land

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[59] Radford v. Willis, L. R., 7 Ch. 7.

[60] Emery v. Grocock, 6 Madd. 54; Barnwell v. Harris, 1 Taunt. 430. Thus, where the recital of deeds raised the presumption that they contained nothing adverse to the title, the mere loss of the deed, where the title was fortified by sixty years' undisputed possession, was held not to create a reasonable doubt. Prosser v. Watts, 6 Madd. 59; Maginnes v. Fallon, 2 Moll. 561. So, where the validity of a title depended on no execution having been taken out between certain specified times, and nothing was shown to have been done which could be referred to such an execution, the title was held good. Causton v. Macklew, 2 Sim. 242. So, where the question was whether a deed from executors must be presumed in a case in which the proceeds of sale were received by them and distributed among those entitled. Wills v. Fisher, 257 Pa. 487, 101 Atl. 818. So, also, a prior voluntary conveyance by the purchaser's grantor is no sufficient objection to the title, the court acting upon the presumption that the voluntary conveyance had not been validated by subsequent dealings. Butterfield v. Heath, 15 Beav. 408; Buckle v. Mitchell, 18 Ves. 100.

[61] This point, the author says, has given rise to some diversity of opinion. In Hartley v. Smith, 6 Buck Bankr. C. 368, the title depended on a grant of chattels, possession of which was conditionally reserved by the grantor in fraud, it was alleged, of creditors. The purchaser was relieved from the bargain on the ground that he had no adequate means of ascertaining the *bona fides* of the transaction. See, also, Boswell v. Mendham, 6 Mad. 373. But the mere possibility of fraud in extrinsic facts cannot always be held a sufficient objection to the title. Cattell v. Corrall, 4 Y. & C. Ex. 228; Green

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v. Pulsford, 2 Beav. 71; McQueen v. Farquhar, 11 Ves. 467; Alexander v. Mills, L. R., 6 Ch. 124. See, also, Grove v. Bastard, 1 De G., M. & G. 69; Re Huish's Charity, L. R., 10 Eq. 5; Colton v. Wilson, 3 P. Wms. 190; Morrison v. Arnold, 19 Ves. 670; Weddall v. Nixon, 17 Beav. 160; McCulloch v. Gregory, 3 K. & J. 12; Jacobs v. Morrison, 136 N. Y. 101, 32 N. E. Rep. 552. Whether a title derived through one who purchased in his own right forty years before at a sale made by himself as trustee, was valid, there being nothing to show that the trustee did not properly account to the *cestui que trust*, and the property having been frequently transferred in the meanwhile. Held, marketable. Herbert v. Smith, 6 Lans. (N. Y.) 493. Where, by order of court, trustees were permitted to purchase the trust subject, the beneficiaries being parties to the suit, it was held that such a purchase formed no ground of objection to the title. Webster v. Kings Co. Trust Co., 145 N. Y. 275, 39 N. E. Rep. 964. If the trustee purchase the trust subject himself he cannot rescind the contract on the ground that the sale was invalid. Peay v. Capps, 27 Ark. 160; Richardson v. Jones, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293. There is no presumption of law that property acquired by a married woman by conveyance from a third person, was paid for out of the husband's means, nor that the conveyance was made to the wife for the purpose of defeating the husband's creditors. Hence, the mere fact that a title is derived through such a conveyance will not render it unmarketable. Nicholson v. Condon, 71 Md. 620, 18 Atl. Rep. 812. As to the effect of payment by the husband for property conveyed to the wife, see Seldner v. McCreery, 75 Md. 287, 23 Atl. Rep. 641.

[62] Preissenger v. Sharp, 39 St. Rep. (N. Y.) 260, 14 N. Y. Supp. 372, where the question was whether a certain sale was no more than a purchase of the trust subject by the trustee himself. Gardner v. Dembinsky, 65 N. Y. Supp. 183, 52 App. Div. 473, in which case the trustee purchased the premises at a sale made by himself. See, also, People v. Globe Ins. Co., 33 Hun (N. Y.), 393; Close v. Stuyvesant, 132 Ill. 607, 23 N. E. Rep. 868. Where the question was whether a certain entry of public lands would probably be canceled as fraudulent: McPherson v. Smith, 49 Hun (N. Y.), 254, 2 N. Y. Supp. 60. Titles dependent upon the following questions involving *mala fides*, have been held *unmarketable:* Whether a purchase of the premises in partition by one suing as next friend to an infant was valid: Collins v. Smith, 1 Head (Tenn.), 251. Whether a conveyance voluntary on its face could be sustained against a subsequent judgment creditor of the grantor: Tillotson v. Gesner, 6 Stew. Eq. (N. J.) 313. Whether a purchaser of an estate from trustees under a will had acted in collusion with the trustees to defeat the purposes of the testator by the sale: McPherson v. Smith, 49 Hun (N. Y.), 254, 2 N. Y. Supp. 60. Whether a sale and conveyance by an executor to A., and a reconveyance within four days by A. to the executor, was in fact no more than a sale by the executor to himself: People v. Open Board, etc., 92 N. Y. 98. Whether a purchase by a wife at a sale made by her husband as assignee

was made by the defendant in a suit just before judgment for a large sum was rendered against him, which judgment would have bound the land if the conveyance had not been made, and the evidence failed to show that the purchase was made in good faith, without notice and for valuable consideration, it was held that a purchaser could not be compelled to accept a title dependent upon such conveyance.[63]

§ 286. **DOCTRINE OF DOUBTFUL TITLES AT LAW.** Relief to a purchaser in respect to a title *absolutely bad* and not merely doubtful, may be administered in several ways. Thus, at law he may maintain an action for breach of the contract, express or implied, to convey a good title; or he may rescind the contract and maintain assumpsit to recover back so much of the purchase

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for the benefit of creditors, was in substance a purchase by the assignee himself: Wohlfarth v. Chamberlain, 6 N. Y. St. Rep. 207. Whether a sale under an execution, creating an apparent cloud on the vendor's title, was fraudulent, irregular and void: Morgan v. Morgan, 2 Wh. (U. S.) 290. Whether a purchase of part of the estate of a decedent by his executor, in good faith, was valid. Weil v. Radley, 52 N. Y. Supp. 398. In Gans v. Renshaw, 2 Pa. St. 34; 44 Am. Dec. 152, it being questionable whether the conveyance under which the vendor held, was fraudulent and void, the purchaser was relieved. Where the vendor claimed title through a sheriff's deed, and affidavits had been filed in the proceedings in which such sale had been made, showing that the sale had been procured to defeat the rights of third persons who had recovered judgment in ejectment for the land, the title was held unmarketable. Herman v. Sommers, 158 Pa. St. 424. *Titles held marketable.* Whether title dependent on a sale, under decree, to the wife of a special guardian, was questionable, the sale having been confirmed and 26 years having elapsed without attack by parties interested. Strauss v. Benheim, 59 N. Y. Supp. 1054, 28 Misc. Rep. 660. Whether the court may ratify a sale by executors to the wife of one of the executors, none of the parties in interest having elected to exercise their right to have the sale declared void. Rhodes v. Caswell, 58 N. Y. Supp. 470, 41 App. Div. 229. Whether a purchase by the wife of an executor and daughter of the testator, at the executor's sale, after extensive advertising and spirited bidding, and for full value, was valid. Miller v. Weinstein, 65 N. Y. Supp. 387, 52 App. Div. 533. Where a guardian failed to pay the interest on a mortgage of the lands of his wards, who were his children, and the lands were sold on foreclosure to one who afterwards conveyed them to the guardian at the foreclosure price, it was held, in the absence of evidence of bad faith or of injury to the wards, that the purchase was valid and the title of the guardian marketable. Kullman v. Cox, 167 N. Y. 411, 60 N. E. Rep. 744.

[63] Tillotson v. Gesner, 33 N. J. Eq. 313.

money as may have been paid; or to an action against him for damages in failing to perform the contract on his part, or to recover the purchase money, he may set up the vendor's want of title as a defense.[64] In equity in case of a defective title he may file his bill demanding a rescission of the contract, or specific performance of the agreement to convey good title, or damages in lieu thereof, if it appear that the vendor cannot perform the contract; or to a bill against him for specific performance he may show as a defense the plaintiff's want of title.[65] But in respect to a merely doubtful title, one which might upon protracted and expensive litigation with third parties, prove valid, the purchaser had under the common-law procedure no relief; all titles being considered at law either good or bad.[66] Thus, if in an action at law against the purchaser for breach of the contract, he was not able to demonstrate that the plaintiff's title was absolutely bad, and could only suggest doubts arising upon points of law or upon facts affecting the title, judgment for the plaintiff followed, and the purchaser was left to his remedy, if any, in equity.[67] Such was formerly the state of the law in England, and it is perhaps the same in some of the American States to-day. But now, by virtue of express statutory provision in England,[68] and in consequence of statutes in many of the States abolishing all distinctions between legal and equitable procedure, the purchaser may have the full benefit of the doctrine of doubtful titles in any action at law by or against him to enforce any right founded on the contract of sale.[69] In some of the States which retain the separate legal and equitable jurisdiction, a statutory provision exists allowing the *defendant* in an action on the contract to avail himself of any matter which would enable him to relief in equity as a defense to the action.[70] Under such provisions it is presumed that the purchaser, when sued for the price of the property or for breach of contract in refusing to accept the title, may set up as a defense, the fact that the title is so doubtful that a court of equity would not compel him to accept it upon a bill for specific performance. In such of the States as have no statute admitting equitable defenses at law, it is presumed that the common law is in full force, and that a purchaser must seek his relief in equity by suit for rescission, or injunction against the vendor's action at law, in a case where the title is doubtful.

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[64] Ante, p. 3, Dart. Vend. 975; Stevens v. Austin, 7 Jur. (N. S.) 873.

[65] Ante, p. 3, Dart Vend. 982.

[66] 1 Sugd. Vend. 596. Romilly v. James, 6 Taunt. 263; Camfield v. Gilbert, 4 Esp. 221. But see Simmons v. Haseltine, 5 C. B. (N. S.) 554. "There can be no such thing as a doubtful title in a court of justice; it must be either right or wrong, and the thickness of the medium through which the point is to be seen, makes no difference in the end." Baron EYRE in Gale v. Gale, 2 Coxe, 145. But a purchaser has been permitted at law to show that the vendor's title, apparently good, is liable to be defeated; as where a right to re-enter upon a grantee or lessee for covenants or conditions broken exists. 1 Sugd. Vend. (8th Am. ed.) 597.

[67] Moore v. Williams, 115 N. Y. 586, 22 N. E. Rep. 233; Reed v. Sefton, 11 Cal. App. 88, 103 Pac. 1095.

[68] 1 Sugd. Vend. (8th ed.) 597, 17 & 18 Vict. c. 125, § 83.

While, as we have seen, under modern systems of procedure, the purchaser may avail himself at law of the objection or defense that the title is doubtful or unmarketable though not absolutely bad, the better opinion seems to be that he cannot, in an action for breach of the contract, recover damages for the loss of his bargain, that is, damages beyond the consideration money, interest, costs and expenses, unless he can show that the title is absolutely bad.[71]

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[69] 2 Beach Mod. Eq. Jur. § 607. M. E. Church Home v. Thompson, 108 N. Y. 618, 15 N. E. Rep. 193; Moore v. Williams, 115 N. Y. 586, 22 N. E. Rep. 233, disapproving Romilly v. James, 6 Taunt. 263; O'Reilly v. King, 2 Rob. (N. Y.) 587; M. E. Church Home v. Thompson, 52 N. Y. Super. Ct. 321, and Bayliss v. Stimson, 53 N. Y. Super. Ct. 225. Other New York cases which follow O'Reilly v. King, supra, or maintain the same doctrine, and which must be regarded as overruled or disapproved by Moore v. Williams, supra, so far as the right to recover back the purchase money where the title is merely doubtful is concerned, are Walton v. Meeks, 41 Hun (N. Y.), 311, and Murray v. Harway, 56 N. Y. 337. The equitable rules applicable to a suit to compel a vendee to perform his contract, are applicable to an action at law by him to recover back the purchase money on the ground that the title is insufficient. Moore v. Williams, 115 N. Y. 586, 22 N. E. Rep. 233; Methodist E. C. Home v. Thompson, 108 N. Y. 618, 15 N. E. Rep. 193; Burwell v. Jackson, 9 N. Y. 335; Warren v. Banning, 21 N. Y. Supp. 883. A suit to recover purchase money on articles of agreement is in the nature of a bill for specific performance; hence, where the title to the land is doubtful or not marketable, the plaintiff cannot be allowed to recover. Murray v. Ellis, 112 Pa. St. 492, 3 Atl. Rep. 845; Hertzberg v. Irwin, 11 Norris (Pa.), 48. The defense of doubtful title is as available in an action by the vendor to recover the purchase money, as it would be in a suit by him for specific performance. Reynolds v. Strong, 82 Hun (N. Y.), 202, 31 N. Y. Supp. 329; Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. Rep. 99. Whatever absolves a purchaser in equity from his obligation to complete the contract, will discharge him at law. Taylor v. Williams, (Colo.) 31 Pac. Rep. 505; Schroeder v. Witham, 66 Cal. 636, 6 Pac. Rep. 737.

[70] It is so provided in Virginia. Code, 1887, § 3299.

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[71] Ingalls v. Hahn, 47 Hun (N. Y.), 104, which was an action to recover back purchase money paid, and also to recover a certain sum as liquidated damages provided for in the contract. The court said: "The nature of this action should be kept in mind lest the principles governing it be confounded with those relating to actions of a different character. This is not an action to require the vendee to specifically perform his contract by accepting the title offered. Nor is it an action by the vendee asking that a court of equity relieve him from his contract upon the ground that the title offered is not free from reasonable doubt. This is an action at law to recover damages for a breach of the covenants set forth. In such an action the party bringing it must satisfy the court that the title offered is absolutely bad. It will not be sufficient to show that it is doubtful. Romilly v. James, 6 Taunt. 263; Boyman v. Gutch, 7 Bing. 379; Camfield v. Gilbert, 4 Esp. 221; O'Reilly v. King, 2 Rob. (N. Y.) 587; M. E. Church Home v. Thompson, 20 J. & S. (N. Y.) 321; Bayliss v. Stinson, 21 J. & S. (N. Y.) 225; Roberts v. McFadden, (Tex. Civ. App.) 74 S. W. Rep. 105, ciitng the text. To enable the plaintiff to maintain this action the law requires that the defendant should be proved to have been in default in the performance of his agreement. That could only be done by proof that the defendant did not own the property; that there were liens or incumbrances upon it, or that he had refused or neglected to convey after a tender of the purchase price and request by the plaintiff. Proof of one or the other of these facts was necessary to entitle the plaintiff to recover the damages awarded. Walton v. Meeks, 41 Hun (N. Y.), 311, 314, and cases cited; Murray v. Harway, 56 N. Y. 337, 344. The cases cited by the respondent (purchaser) are not in conflict with this doctrine. In an action in equity to compel a specific performance, or for relief from a contract on the ground of the uncertainty of the title offered, another and different rule applies." Of the cases cited in the foregoing opinion, in but two, it seems, Bayliss v. Stinson, 21 J. & S. (N. Y.) 225, and Walton v. Meeks, 41 Hun (N. Y.), 311, did the plaintiff seek to recover anything more than the purchase money, interest and expenses. In so far as they tend to establish the proposition that the purchaser cannot *recover back* his deposit unless the title is shown to be absolutely bad, and not merely doubtful, they are disapproved in the more recent cases of M. E. Church v. Thompson, 108 N. Y. 618, 15 N. E. Rep. 193, and Moore v. Williams, 115 N. Y. 586, 22 N. E. Rep. 233. It is to be observed, however, that these two last-mentioned cases do not in terms disapprove the proposition that a purchaser cannot recover liquidated damages, or damages for the loss of his bargain, when the title is merely doubtful and not absolutely bad, which is the main point decided in Ingalls v. Hahn, supra. And in this case, the right of the purchaser to recover back his deposit, where the title is doubtful only, seems to be

Practically the distinction is of little value, except in cases in which the contract fixes a sum as liquidated damages, and except in those jurisdictions in which the purchaser is allowed damages for the loss of his bargain; for the generally prevailing rule is that in an action for breach of the contract upon a failure of the title, the purchaser cannot, in the absence of fraud, recover damages for the loss of his bargain.

Where the title depends upon a fact which is left in doubt, it has been said that a court of law will act upon the doubt as well as a court of equity.[72] Such a title, however, it seems would be regarded at law as absolutely bad and not merely doubtful.[73]

§ 287. **INCONCLUSIVENESS OF JUDGMENT OR DECREE.** One of the principal reasons for the rule that a purchaser cannot be compelled to take a doubtful title, is that the decree of the court is not binding upon those whose rights in the premises give rise to the doubts of which the purchaser complains, they not being parties to the suit for specific performance. They might raise the same question in a new proceeding, and a different court with different lights upon the subject might pronounce a judgment subversive

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recognized. In Kraemer v. Adelsberger, 55 N. Y. Super. Ct. 345, which was an action to recover back purchase money paid, the title was held absolutely bad and not merely doubtful. Relief *at law* on the ground that the title was doubtful or unmarketable, has been administered in the following cases: Hayes v. Nourse, 8 N. Y. State Rep. 397; Droge v. Cree, 39 N. Y. State Rep. 324, 14 N. Y. Supp. 241; Hemmer v. Hustace, 51 Hun (N. Y.), 457, 3 N. Y. Supp. 850, which was an action by the purchaser to recover damages for a breach of contract. Moore v. Appleby, 108 N. Y. 237, 15 N. E. Rep. 377; Porterfield v. Payne, 11 N. Y. Supp. 31; Warren v. Banning, 21 N. Y. Supp. 883. In Pennsylvania, the question whether the doctrine of marketable title can be enforced at law, cannot arise, because in that State there is no distinction between legal and equitable relief, and an action to recover the purchase money is treated as a suit for specific performance. See Nicoll v. Carr, 35 Pa. St. 381. The common- law rule that the doctrine of doubtful titles cannot be enforced at law, was approved in Kent v. Allen, 24 Mo. 98. But in Hymers v. Branch, 6 Mo. App. 511, a purchaser was allowed to recover back the purchase money in an action at law, upon the ground that the title was doubtful. The decision in Kent v. Allen, supra, was not adverted to.

[72] 1 Sugd. Vend. (8th Am. ed.) 602, citing Gibson v. Spurrier, Peake Ad. Cas. 49.

[73] 1 Sugd. Vend. (8th Am. ed.) 597 (400). Simmons v. Haseltine, 5 C. B. 554.

of the title which the purchaser was compelled to take.[74] The same observations apply with equal force where the doubt hinges upon a question of fact. It would be unjust to compel a purchaser to take a title dependent upon a doubtful question of fact, when the facts presented might be changed upon a new inquiry.[75]

It has been said that it is only necessary, in determining whether a title is marketable, to ascertain whether or not there is some practical and serious question affecting the title, upon which persons not parties to the suit, and who cannot be estopped by the judgment, have a right to be heard in some future litigation.[76] On questions of title depending on the possibility of future rights arising, the court must consider the course which should be taken if those rights had actually arisen, and were in course of litigation.[77] But if all parties in interest are before the court the objection that the title is doubtful, if dependent upon a question of law, cannot be made, because the court is bound to decide the question, and its decision when made will be conclusive upon the parties.[78] It is to be observed in this connection, that the rule which forbids the adjudication of a question of title, where all the parties in interest are not before the court, does not apply as between vendor and purchaser, when the objection is made that the title is defective,[79] though, of course, the rights of persons not before the court cannot be concluded by such an adjudication. The uncertainty as to what judgment another court may render upon the same state of facts or question of law is that which makes the title doubtful.

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[74] Post, § 299. Pyrke v. Waddingham, 10 Hare, 1; Morgan v. Morgan, 2 Wh. (U. S.) 290; Irving v. Campbell, 121 N. Y. 353, 24 N. E. Rep. 821; Abbott v. James, 111 N. Y. 673, 19 N. E. Rep. 434; Kilpatrick v. Barron, 125 N. Y. 751, 26 N. E. Rep. 925; Fisher v. Wilcox, 77 Hun (N. Y.), 208; Felix v. Devlin, 86 N. Y. Supp. 12, 90 App. Div. 103; Downey v. Seib, 92 N. Y. Supp. 431, 102 App. Div. 317; Boylan v. Townley, 62 N. J. Eq. 591, 51 Atl. 116; Wollenberg v. Rose, (Oreg.) 78 Pac. Rep. 751; Zimmerman v. Owen, (Tex. Civ. App.) 77 S. W. Rep. 971; Lockhart v. Smith, 47 La. Ann. 121, 16 So. Rep. 660; Williams v. Bricker, 83 Kan. 53, 109 Pac. 948; N. Highlands Co. v. Holt, 144 Ga. 43, 85 S. E. 1039; Kohlrep v. Ram, 79 N. J. Eq. 386, 81 Atl. 1103; Barrette v. Whitney, 36 Utah 574, 106 Pac. 522, 37 L. R. A. (N. S.) 368. In Doebler's Appeal, 14 P. F. Smith (Pa.), 9, the vendor contended that he took a fee under the will; the purchaser insisted that the vendor took a life estate; the court at *nisi prius* was of the opinion that he took an estate tail, while the appellate court decided that he took a fee. But this last court refused to compel the purchaser to accept the title, since its decision was in no way binding upon those who might set up a claim in tail or in remainder. In Sohier v. Williams, 1 Curt. C. C. (U. S.) 479, a testatrix empowered a trustee to sell lands devised "when the major part of my children shall recommend and advise the same." The court was of the opinion that the consent of the major part of the children *living when the power was to be exercised* was sufficient to authorize a sale, but considered the question so doubtful, that, but for the fact that all parties in interest were before the court and would be bound by its decree, the purchaser would have been excused the performance of the contract.

[75] Flemming v. Burnham, 100 N. Y. 10, 2 N. E. Rep. 905; Vought v. Williams, 120 N. Y. 253, 24 N. E. Rep. 195, 8 L. R. A. 59, 17 Am. St. Rep. 634; Robinson v. Steele, 95 Wash. 154, 163 Pac. 486; Deseumuer v. Rondel, 76 N. J. Eq. 394, 74 Atl. 703. Where no fact is in dispute and no doubtful question of law is presented, the purchaser must take the title. Mygatt v. Maslen, 126 N. Y. Supp. 405, 141 App. Div. 468.

[76] Argall v. Raynor, 20 Hun (N. Y.), 267.

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[77] Pyrke v. Waddingham, 10 Hare. 1. Sohier v. Williams, 1 Curt. C. C. (U. S.) 479; Ebling v. Dwyer, 149 N. Y. 460, 44 N. E. Rep. 155. Mr. Fry in his learned treatise on Specific Performance (§ 862), speaking of the doctrine of marketable titles in suits for specific performance, and defending it, says: "It must be remembered that the judgment of the court in such an action is *in personam* and not *in rem;* that it binds only those who are parties to the action and those claiming through them, and in no way decides the question in issue as against the rest of the world (Osborne v. Rowlett, 13 Ch. D. 781), and that doubts on the title of an estate are often questions liable to be discussed between the owner of the estate and some third person not before the court, and, therefore, not bound by its decision. Glass v. Richardson, 9 Ha. 701. If, therefore, there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the court may consider this to be a circumstance which renders the bargain a hard one for the purchaser, and one which in the exercise of its discretion, it will not compel him to execute. Though every title must in itself be either good or bad, there must be many titles which the courts cannot pronounce with certainty to belong to either of these categories in the absence of the parties interested in supporting both alternatives, and without having heard the evidence they might have to produce, and the arguments they might be able to urge; and it is in the absence of these parties that the question is generally agitated in proceedings for specific performance. The court when fully informed must know whether a title be good or bad; when partially informed, it often may and ought to doubt." The reasoning of the learned author is satisfactory so far as it applies to a case where the doubt as to the title turns upon facts as to which the court is not informed, but does not appear to reach cases where the doubt turns upon a mere question of law, the court being at all times presumed to know the law.

[78] Chesman v. Cummings, 142 Mass. 65, 7 N. E. Rep. 13, citing Sohier v. Williams, 1 Curt. (C. C.) 479; Butts v. Andrews, 136 Mass. 221; Cornell v. Andrews, 8 Stew. (N. J. Eq.) 7, 9 id. 321; Gills v. Wells, 59 Md. 492; People v. Stock Brokers' Building Co., 92 N. Y. 98; Going v. Oakland, etc., Soc., 17 Mich. 230, 75 N. W. Rep. 462; Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. Rep. 99; Matthews v. Lightner, 85 Minn. 333, 88 N. W. Rep. 992.

In some of the American States, under modern systems of civil procedure in which legal and equitable relief are administered in one and the same form of action, the purchaser, when sued for the purchase money, or the vendor, when the purchaser objects that the title is doubtful, is permitted to bring in, as parties, all persons who could, if such objection be well founded, assert an adverse interest in the premises, so that the court may pronounce a judgment or decree in respect to the matter in controversy, which will be final and conclusive upon all parties in interest,[80] except, of course, such as are not *sui juris*. In those States in which the separate equitable jurisdiction is maintained, no reason is perceived why the vendor should not be permitted to adopt such a course in any case in which he might maintain a bill to quiet his title as against an adverse claimant.

In a case in which the vendor, claiming under a tax deed, had obtained a judgment quieting his title against certain persons having vested interests under a deed by which contingent interests in others were created, it was held that such judgment was binding not only upon the defendants, having vested interests in the estate, but upon persons not then in being who might afterwards become entitled in remainder; and, hence, that the existence of such contingent interests did not render the title of the vendor unmarketable.[81]

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[79] Lockman v. Reilly, 10 Abb. N. Cas. (N. Y.) 351.

[80] Cooper v. Singleton, 19 Tex. 267, 70 Am. Dec. 333, *dict.;* Estell v. Cole, 52 Tex. 170. See the case of Batchelder v. Macon, 67 N. C. 181, where, in an action for the purchase money, the court, under a provision of the Code of Civil Procedure authorizing it to direct new parties to be brought in when necessary to a complete determination of any question in controversy, ordered that persons out of whose alleged interest in the premises the doubts as to the title arose, be made parties to the suit. Simpson v. Hawkins, 1 Dana (Ky.), 303; Harris v. Smith, 2 Dana (Ky.), 11, 12; Denny v. Wickliff, 1 Met. (Ky.) 216. See, also, Story Eq. Pl. § 72, for general principles applicable to this point. The purchoser, it seems, may bring in third parties in order to clear up the title, but it is not incumbent on him to do so; that is the vendor's duty. Prewitt v. Graves, 5 J. J. Marsh. (Ky.) 114, 126.

§ 288. **SPECIAL AGREEMENTS RESPECTING THE TITLE.** The right of a purchaser to reject a doubtful title depends, of course, upon the terms of his contract.[82] He will have no such right if he has agreed to accept the title such as it is.[83] On the other hand, the vendor cannot resort to parol evidence to remove doubts about the title, if, by the contract, he is to furnish a "good title of record," [84] nor if he obliges himself to deliver an abstract showing a good title,[85] nor if he contracts in express terms that the title shall be free from incumbrances.[86] If the contract provides that the abstract shall show a *marketable* title, the vendor will not be permitted to show by evidence *aliunde* that the title is good,[87] nor will the purchaser be required to go outside of the abstract in examining the title.[88]

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[81] Matthews v. Lightner, 85 Minn. 333, 89 N. W. Rep. 992.

[82] Ante, § 6. A stipulation that the title shall be "first class," means simply that it shall be marketable. Vought v. Williams, 120 N. Y. 253, 24 N. E. Rep. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634. "If title on examination be found insufficient," in a contract of sale, means if title be found unsatisfactory, and not absolutely bad. Per ROBINSON, C. J. O'Reilly v. King, 28 How. Pr. (N. Y.) 408, 415.

[83] Ante, § 11; Hume v. Pocock, L. R., 1 Eq. 423, 662; Brown v. Haff, 5 Paige (N. Y.), 234, 241; Crawley v. Timberlake, 2 Ired. Eq. (N. C.) 460, *dictum*. Powell v. Conant, 33 Mich. 396; Price v. Immel, 48 Colo. 163, 109 Pac. 941. An agreement by assignees in bankruptcy, who had a defective title, that the purchaser should have an assignment of the bankrupt's interest under such title as he lately held the same, was held to be sale of only such title as the assignees had. Freme v. Wright, 4 Madd. 364; Molloy v. Sterne, 1 Dru. & Wal. 585; Lethbridge v. Kirkman, 25 L. J. (N. S.) 89; Phipps v. Child, 9 Drew. 709; Taylor v. Martindale, 1 Y. & Coll. C. C. 658; Nouaille v. Flight, 7 Beav. 521. An agreement to sell two leases and the trade, as the seller held the same, for the term, and that the purchaser should accept the assignment without requiring the lessor's title, held to prevent the purchaser from objecting to the lessor's title.

[84] Coray v. Matthewson, 7 Lans. (N. Y.) 80; Page v. Greely, 75 Ill. 400; Sheehy v. Miles, 93 Cal. 288, 28 Pac. Rep. 1046; Benson v. Shotwell, 87 Cal. 49, 25 Pac. Rep. 249. Post, § 289. If, by the express terms of the cointract, the vendor be required to show a "good record title," the purchaser may rescind if, by reason of the destruction of the public records by fire, the vendor be unable to show a record title. Born v. Castle, 22 Cal. App. 282, 134 Pac. 347; McDermott v. Chatfield, 18 Cal. App. 499, 123 Pac. 539. In Jones v. Hanna, (Tex. Civ. App.) 60 S. W. Rep. 279, it was held that a purchaser, who had merely contracted for a good title "of record," could not object to the title on the ground of facts disqualifying a notary to take an acknowledgment of a deed in the vendor's chain of title, inasmuch as the *record* itself showed a good title, and the objection was founded on matter *dehors* the record. The decision seems questionable; the same reasoning would prevent an objection to a deed in the chain of title on the ground of lunacy, infancy, or other disqualification of the grantor.

An agreement to "give a good and sufficient warranty deed and "abstract" intends a merchantable title clear upon the record and not requiring litigation to complete it.[89]

The purchaser cannot require a "perfect record title" unless the contract so provides. The title may be perfect though not shown to be so by the public records.[90]

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[85] Ante, § 6. In Smith v. Taylor, 82 Cal. 534, 23 Pac. Rep. 217, it was held that the only fair interpretation of a contract providing that an abstract of title should be delivered by the vendor, the title to prove good, or no sale, and purchase money paid to be refunded, was, that a full abstract should be furnished showing a good title on its face, and that if such abstract did not show a good record title, the purchaser should not be bound to make any investigation outside of the abstract or to take the chances of any litigation which the abstract showed to be either pending or probable, and that evidence *aliunde* was not admissible, in an action to recover back the purchase money paid, to show that the claims of persons who appeared, by the abstract of title, to be asserting adverse title to the land, and who had suits pending in respect thereto, were groundless. Taylor v. Williams, 2 Colo. App. 559, 31 Pac. Rep. 504. In Oregon an agreement by the vendor to furnish an abstract of title requires him to furnish an abstract showing a marketable title based on a patent from the United States. McCarty v. Helbling, 73 Oreg. 356, 144 Pac. 499.

[86] Evans v. Taylor, 177 Pa. St. 286, 35 Atl. Rep. 635. An agreement to convey, in the absence of any reservation or exception therein, requires the vendor to convey a marketable title free from incumbrances. Ante, §§ 5, 6. Arentson v. Moreland, 122 Wis. 167, 99 N. W. 790, 65 L. R. A. 973, 106 Am. St. Rep. 951; Curtis Land Co. v. Interior Land Co., 137 Wis. 341, 118 N. W. 853; Dwight v. Cutler, 3 Mich. 566, 64 Am. Dec. 105; Dearth v. Williamson, 2 Serg. & R. (Pa.) 498, 7 Am. Dec. 652.

[87] Parker v. Porter, 11 Ill. App. 602; Grow v. Taylor, 23 N. D. 469, 137 N. W. 451; Collins v. Delashmutt, 6 Oreg. 51; Kane v. Rippey, 24 Oreg. 338, 33 Pac. 936; Lockhart v. Ferrey, 59 Oreg. 179, 115 Pac. 431; Arnaud v. Austin, 86 Oreg. 403, 167 Pac. 1017. In Hughes v. Adams, 55 Tex. Civ. App. 249, 119 S. W. 134, the purchaser was permitted to show that he was induced to sign the contract by the vendor's explanation of what was meant by the provision that the title should be merchantable.

[88] Horn v. Butler, 39 Minn. 515, 40 N. W. Rep. 833, *dictum*. Coonrod v. Studebaker, 53 Wash. 32, 101 Pac. 489.

[89] Raddatz v. Christian, (Neb.) 173 N. W. 677.

If the conditions of sale provide that the purchaser shall have time to examine the title, and that if he be not satisfied with it, he shall not be required to complete the purchase, the purchaser may abandon the contract if he be in good faith dissatisfied with the title, and specific performance will not be decreed against him, though the court be of the opinion that the title was good.[91] An agreement that the title shall be satisfactory to the purchaser's attorney will justify the purchaser in rescinding the contract if the attorney in good faith, and not capriciously, declare himself dissatisfied with the title.[92] The objections of the attorney must be reasonable and substantial, and not merely capricious or fanciful.[93] If the parties agree that the contract shall be void and the purchase money returned if the purchaser's counsel shall be of opinion that the title is bad, and the counsel pronounce against the title, the purchaser may reject it,[94] even though the vendor be able to remove the objections.[95] But such an opinion will not sustain an action by the purchaser for breach of the contract; he must show the title to be bad.[96]

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[90] Mundy v. Garland, 116 Va. 922, 83 S. E. 491.

[91] Swain v. Burnette, 89 Cal. 564, 26 Pac. Rep. 1093; Averett v. Lipscombe, 76 Va. 404. In this case the auctioneer had announced at the sale that any purchaser should have the right to examine the title, and if he was not satisfied with it he should not be required to comply with the terms of the sale. BURKS, J., delivering the opinion of the court, said: "It is immaterial that this court now considers that the vendors were and are able to make good title. That is not the question. The contract left it to the purchaser to determine for himself the matter of title. If, on examination, he was not in good faith satisfied with the title he was not to be bound. The bargain was at an end." Citing Williams v. Edwards, 2 Sim. 78. See, also, Watts v. Holland, 86 Va. 909, 11 S. E. Rep. 1015; Gish v. Moomaw, (Va.) 17 S. E. Rep. 324; Giles v. Paxson, 40 Fed. Rep. 283, where the subject is considered at length. Meyers v. Coal Co., 219 Pa. 1, 67 Atl. 904; Hollinsworth v. Colthurst, 78 Kan. 455, 96 Pac. 851, 130 Am. St. Rep. 382. Where the contract provides "title on investigation to be satisfactory" the purchaser must investigate for himself, and in due time declare his determination. Taylor v. Williams, 45 Mo. 80. When the vendor refuses to perfect the title, insisting that he sold only such title as he had, but the contract provided that the title should be satisfactory to the purchaser, the court will not undertake to determine whether his objection to the title were well-founded; he may declare the title unsatisfactory and refuse to complete the contract. Boyd v. Woodbury Co., 122 Iowa, 455, 98 N. W. Rep. 274.

[92] Church v. Shanklin, 95 Cal. 626, 30 Pac. Rep. 789; Leach v. Rowley, 138 Cal. 709, 72 Pac. Rep. 403; Pac. Tel. Co. v. Tel. Co., 236 Fed. 877, 150 C. C. A. 139; McDennis v. Finch, 197 Ala. 76, 72 So. 352; Karahdian v. Lockett (Colo. App.); Farm Land Mtge. Co. v. Wilde, 41 Okl. 45, 136 Pac. 1078; Giles v. Union L. Co., (Tex. Civ. App.) 196 S. W. 312; Alwood v. Fagan, (Tex. Civ. App.) 134 S. W. 765; Leroy v. Harwood, 119 Ark. 418, 178 S. W. 427; Whitener Realty Co. v. Ritter, 94 Ark. 263, 126 S. W. 856. Parol evidence is not admissible to add to a written contract for the sale of land a provision that the purchaser should accept the title if pronounced

On the other hand, an agreement that the title shall be satisfactory to the purchaser has been construed, in effect, to mean that the title shall be such as he should be satisfied with, and that such

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good by a named attorney. Ives v. Bank, (Mo. App.) 124 S. W. 23; Parsons v. Kelso, 141 Mo. App. 369, 125 S. W. 227. If the title is in fact good, the purchaser will not be justified in rejecting it on the advice of his attorney, in the absence of any provision on the subject in the contract. Bodine v. Taylor, (Ark.) 218 S. W. 374. A contract provided that the vendor's title should be satisfactory to the purchaser's attorneys. After the abstract was furnished the attorneys made certain requisitions which were promptly honored at a considerable expense to the vendor, and the attorneys, by implication, expressed themselves as satisfied with the title. Held, that the attorneys could not thereafter arbitrarily and abruptly declare the title unsatisfactory and the contract at an end. Boyd v. Hallowell, (Minn.) 62 N. W. Rep. 125. Where the agreement was that the title should be satisfactory to a certain title insurance company it was said that if the title insurance company reported the title imperfect the purchaser could recover his deposit. Presbrey v. Kline, 20 D. C. 513, 529. But, contra, in a case in which the report of the title company was founded on a mistake of fact. Hoffman v. Colgan, 25 Ky. Law R. 98, 74 S. W. Rep. 724. It is competent for the parties to contract that the title shall be such as would be pronounced good and merchantable by any reputable attorney in a named city. Ellis v. Lockett, 100 Ga. 719, 28 S. E. Rep. 452.

[93] Griffith v. Bradford, (Tex. Civ. App.) 138 S. W. 1072.

[94] Parkside Realty Co. v. McDonald, 166 Cal. 426, 137 Pac. 21; Allen v. McKeon, 111 N. Y. Supp. 328, 127 App. Div. 277. A provision that the title shall be approved by a named title company imposes no condition on the vendor unless the purchaser has the title examined by that company. Eastman v. Horne, 125 N. Y. Supp. 553, 141 App. Div. 12.

[95] Delafield v. James, 18 Abb. Pr. (N. Y.) 221, 27 How. Pr. 357, citing Williams v. Edwards, 3 Sim. 78, 2 Eng. Ch. Rep. 79. See Thompson v. Avery, (Utah) 39 Pac. Rep. 829; Ives v. Bank (Mo. App.) 124 S. W. 23. If the vendor agrees to furnish the certificate of a particular title company showing title in him, and the company refuses to make the certificate on grounds not involving the sufficiency of the title, the purchaser is nevertheless entitled to rescind. Taggart v. Graham, (Cal. App.) 179 Pac. 688.

[96] 1 Sugd. Vend. (8th Am. ed.) 537. Canfield v. Gilbert, 4 Esp. 221.

an agreement does not authorize him to make capricious or unreasonable objections,[97] nor constitute him the sole judge of the sufficiency of the title,[98] nor deprive the vendor of the right to perfect the title where time is not of the essence of the contract,[99] nor justify the purchaser in rejecting the title by a simple expression of dissatisfaction.[1] The dissatisfaction of the purchaser must be founded upon a valid and legal objection.[2] Of course the parties may contract if they choose, that the purchaser may abandon the sale arbitrarily and without assigning reasons therefor, but such a construction will not be given to the agreement that the title shall be satisfactory to the purchaser, agreeably to the maxim *ut res magis valeat quam pereat.*

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[97] Dart's Vend. (5th ed.) 158, where it is said that such an agreement means that the title shall be marketable. Lord v. Stevens, 1 Yo. & Coll. Ex. 222; Folliard v. Wallace, 2 Johns. (N. Y.) 395; Moot v. Business Men's Asso., 157 N. Y. 201, 52 N. E. Rep. 1; Fagan v. Davison, 2 Duer (N. Y.), 153; Kirkland v. Little, 41 Tex. 456; Taylor v. Williams, 45 Mo. 80. Where the contract provides that the vendor shall give and the purchaser accept such title as a certain title company should approve, and the company disapproves the title offered, the vendor will not be permitted to show that the title is marketable unless approval by the company was prevented by the vendee. Flannigan v. Fox, 26 N. Y. Supp. 48, 6 Misc. Rep. 132. See, generally, upon the proposition that a contract to do a thing to the satisfaction of another must be given a reasonable construction, and that such person cannot arbitrarily declare himself dissatisfied with the performance. Thomas v. Fleming, 26 N. Y. 33; Brooklyn City v. Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Bowery Nat. Bank v. Mayor, 63 N. Y. 336; Miesell v. Ins. Co., 76 N. Y. 115; Boiler Co. v. Gorden, 101 N. Y. 387, 4 N. E. Rep. 749; Dill v. Noble, 116 N. Y. 230, 22 N. E. Rep. 406.

Recent Cases. Dillinger v. Ogden, 244 Pa. 20, 90 Atl. 446, Ann. Cas. 1915 C. 533; Allen v. McKeon, 111 N. Y. Supp. 328, 127 App. Div. 277; Canaday v. Miller, 102 Kan. 577, 171 Pac. 651; Singleton v. Cuttino, 105 S. C. 44, 89 S. E. 385; Dean v. Williams, 56 Wash. 614, 106 Pac. 130; Knisely v. Leath, (Mo.) 178 S. W. 453. The question of the good faith of the attorney in giving his opinion, is for the jury. Clark v. Asbury, (Tex. Civ. App.) 134 S. W. 286.

[98] Folliard v. Wallace, 2 Johns. (N. Y.) 395, per KENT, Ch.; Regney v. Coles, 6 Bosw. (N. Y.) 479; Wright v. Suydam, 72 Wash. 587, 131 Pac. 239. An agreement to furnish a marketable title free from defects, does not imply that the title shall be satisfactory to the purchaser or his attorney. Wieman v. Steffen, 186 Mo. App. 584, 172 N. W. 472.

[99] Anderson v. Strasberger, 92 Cal. 38, 27 Pac. Rep. 1095.

[1] Beardslee v. Underhill, 37 N. J. L. 309; Curtis v. Hawley, 85 Ill. App. 429.

[2] Kirkland v. Little, 41 Tex. 456.

An agreement to furnish a correct and satisfactory abstract does not mean merely an abstract which correctly and satisfactorily shows the state of the record title. Hence, the abstract is insufficient if it shows the title to be outstanding in a stranger.[3] Nor is the purchaser bound by an abstract which shows a perfect title in the vendor if, in fact, the title be bad. He cannot be required to take the title if facts outside of the record show it to be bad.[4] In a case in which the parties placed the vendor's deed and the purchaser's notes in the hands of a custodian to be delivered when the vendor furnished evidence of title satisfactory to the custodian, and the vendor failed to inform the custodian of the existence of an attachment lien on the property, it was held that the vendor could not compel specific performance on the ground that the custodian had expressed himself as satisfied with the title.[5] Where the vendor agreed to give, and the vendee to accept, such a title as would be satisfactory to a certain title insurance company, and the company expressed a willingness to insure the title, it was held that the vendee could not thereafter insist on an objection to the title.[6]

Where the contract provided that the purchaser should be the exclusive judge of the sufficiency of the title, it was held the right thereunder to pass upon and reject the title, in good faith, passed to an assignee of the purchaser.[7]

Stipulations which exclude the right of the vendee to call for a good title, must be clear and explicit. Where no title whatever can be given, a court of equity will not compel specific performance by the vendee merely because of a stipulation by him that there should be no objection to the title.[8]

The fact that the vendor is to convey by quit-claim does not relieve him from the obligation to show that his title is free from defects.[9]

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[3] Curtis v. Hawley, 85 Ill. App. 429.

[4] Jaeger v. Harr, 62 Oreg. 16, 123 Pac. 61.

[5] Wolcott v. Johns, 7 Colo. App. 360, 44 Pac. 675.

[6] Pope v. Thrall, 68 N. Y. Supp. 137, 33 Misc. Rep. 44.

[7] N. Y. Life Ins. Co. v. Gilhooly, 61 N. J. Eq. 118, 47 Atl. 494.

[8] Simmons v. Zimmerman, 144 Cal. 256, 79 Pac. Rep. 451.

[9] Wallach v. Riverside Bank, 206 N. Y. 434, 100 N. E. 50.

§ 289. **PAROL EVIDENCE TO REMOVE DOUBTS.** It has been frequently held that if parol evidence should be necessary to remove a doubt as to the validity and sufficiency of the vendor's title, the purchaser cannot be compelled to complete the contract.[10] He cannot be required to take a doubtful title which he must fortify, if impugned, by resorting to evidence perishable in its nature, and possibly unavailable to him when the necessity for it occurs.[11] Accordingly there are many decisions to the effect that the vendor will not be permitted to supplement the abstract of title with affidavits stating facts necessary to complete his title in a case which, by the express terms of the contract, he is required to furnish an abstract showing a good record title.[12] It must be observed, however, that a title is not necessarily doubtful simply because it requires to be supported by parol testimony. As a general rule, for example, title by inheritance depends principally upon matters *in pais,* or facts resting in the knowledge of witnesses.[13] If those facts be clearly sufficient to establish the right of the vendor as heir, it is apprehended that the purchaser could not object to the title simply because it could not be established by record evidence.[14] Therefore, if the contract does not call for a title perfect upon the record, the title may be shown by oral

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[10] 2 Beach Mod. Eq. Jur. § 608. Seymour v. Delancey, 1 Hopk. (N. Y.) 436, 14 Am. Dec. 552; Moore v. Williams, 115 N. Y. 586, 22 N. E. Rep. 233, 5 L. R. A. 654, 12 Am. St. Rep. 844; Irving v. Campbell, 121 N. Y. 353, 24 N. E. Rep. 821; McPherson v. Schade, 149 N. Y. 16, 43 N. E. Rep. 527; Holly v. Hirsch, 135 N. Y. 590, 32 N. E. Rep. 709; Blanck v. Sadlier, 153 N. Y. 556, 47 N. E. Rep. 921; Watson v. Boyle, 55 Wash. 141, 104 Pac. 147; Becker v. Erickson, 142 Ill. App. 133; Wilson v. Korte, 91 Wash. 30, 157 Pac. 47; Tausk v. Siry, 180 N. Y. Supp. 439, 110 Misc. Rep. 514. A purchaser cannot be compelled to accept a title dependent upon an estoppel *in pais*. Mullins v. Aiken, 2 Heisk. (Tenn.) 535; Topp v. White, 12 Heisk. (Tenn.) 165. Where the question was whether certain testimony sufficiently established the execution of a deed which would supply a missing link in the chain of title, the title was held unmarketable. Griffin v. Cunningham, 19 Grat. (Va.) 571. So, also, where parol proof of a waiver of a covenant not to assign a lease was necessary. Murray v. Harway, 56 N. Y. 337. A title that is imperfect of record and can be completed only by judicial decree founded upon parol evidence of extrinsic facts which may or may not be disputed, is not a clear title and a vendee, who is entitled by his contract to a marketable record title, is not bound to accept the same. Geray v. Mahnomen Land Co. (Minn.) 173 N. W. 871.

[11] 2 Beach Mod. Eq. Jur. § 608. Campbell v. Harsh, 31 Okla. 436, 122 Pac. 127; Desemneur v. Rondel, 76 N. J. Eq. 394, 74 Atl. 703. In the case of Fahy v. Cavanagh, 59 N. J. Eq. 278, 44 Atl. Rep. 154, the question was whether a will had been properly executed—a fact which could be proven only by the testimony of the two subscribing witnesses. The title depended entirely and exclusively upon what their testimony might be, and this was held to render the title unmarketable.

[12] Ante, § 288; Lake Erie L. Co. v. Chilinski, 197 Mich. 214, 163 N. W. 929; Upton v. Smith, 183 Iowa 588, 166 N. W. 268; Kling v. Realty Co., 166 Mo. App. 190, 148 S. W. 203; Knox v. Desplain, 156 Ill. App. 134; Nicholson v. Lieber, (Tex. Civ. App.) 153 S. W. 641. In Campbell v. Harsh, 31 Okl. 436, 122 Pac. 127, it was held that the vendor could not supplement

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the abstract with affidavits showing who were the heirs of a party through whom he claimed. A provision for a "good title free from incumbrances as shown by a complete abstract of title," requires a title disclosed by the records and not based on ex parte affidavits. Colpe v. Lindblom, (Wash.) 106 Pac. 634; Crosby v. Wynkoop, 56 Wash. 475, 106 Pac. 175. Where the abstract is to show a merchantable title, it cannot be supplemented with affidavits, oral proof, or writings not recordable. Moser v. Tucker, (Tex. Civ. App.) 195 S. W. 259. The vendor cannot supplement the abstract with ex parte affidavits showing the facts necessary to support title by adverse possession. Adkins v. Gillespie, (Tex. Civ. App.) 189 S. W. 275. The abstract cannot be supplemented with an affidavit that "Krups," a grantee in the chain of title, was the same person as "Krepps," by whom the next grant was executed. Harris v. Van Vranken, 32 N. D. 238, 155 N. W. 65. Affidavits are not admissible to supplement the abstract, though admitted to record under a statute which made them prima facie evidence of facts stated therein. Bradway v. Miller, 200 Mich. 648, 167 N. W. 15.

[13] Barrette v. Whitney, 36 Utah 574, 106 Pac. 522, 37 L. R. A. (N. S.) 368.

[14] See 2 Sugd. Vend. (8th Am. ed.) 24 (425), where it is said: "If, on the face of the abstract, the vendor has shown a sixty years' title, and if, for the purpose of supporting that title, it is necessary to show that such a person died intestate, or any other fact,— if the facts are alleged with sufficient specification on the abstract — then that abstract *shows* a good title, although the proof of the matters shown may be the subject of ulterior investigation." While it may not appear that a vendor claiming as sole heir is not in fact such, yet, if it cannot be made to appear beyond a reasonable doubt that there is in fact no other heir to the property, the title will be held unmarketable. Walton v. Meeks, 120 N. Y. 79, 82, 23 N. E. Rep. 115; Vognild v. Voltz, 141 Ill. App. 45. In Van Gundy v. Shewey, 90 Kan. 253, 133 Pac. 720, 47 L. R. A. (N. S.) 645, it was held that the abstract might be supplemented with the affidavits of credible persons, showing such facts as heirship, intestacy, and capacity to convey. This case was distinguished in Beeler v. Sims, 91 Kan. 757, 139 Pac. 371, where held that the objection of an outstanding title in fee could not be removed by affidavits.

or other evidence outside the record to be marketable beyond any reasonable doubt.[15]

It has been frequently held that a sale of lands implies a contract on the part of the vendor that the title shall be fairly deducible of record.[16] It has also been held that a purchaser cannot be required to accept a title which he cannot, by the record, show to be valid if attacked.[17] Both of these statements are to be qualified, it is apprehended, to this extent, namely, that, in those States in which the registration of deeds is necessary to their validity, the vendor need only show a *prima facie* valid record title.[18] The record title may be apparently perfect, though in fact worthless, for some conveyance in the vendor's chain of title may have been inoperative to pass the title by reason of the infancy, coverture or lunacy of the grantor, or for some other reason which the record would not disclose; yet it would hardly be contended that the vendor must show affirmatively the competency of every grantor in his chain of title, or the non-existence of any other matter *in pais* which would invalidate the title. Of course, an unexplained break in the record chain of title would render the title doubtful and such as the purchaser could not be required to accept.[19] But it is obvious that such a break may be satisfactorily explained so as to leave no imputation upon the title, as where the estate passed by descent, instead of purchase, from one of the vendor's predecessors in title to another; and that the title will not be rendered unmarketable by the fact that parol evidence must be resorted to for that purpose. If the fact or facts upon which the title depends be of a nature not susceptible of proof, the title will be deemed unmarketable.[20] This rule was applied in a case where the purchaser, to sustain his title, would be required to prove a negative, namely, that the vendor had not committed an act of bankruptcy,[21] or that a certain deed was not fraudulent.[22]

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[15] Lamotte v. Steidinger, 266 Ill. 600, 107 N. E. 850; Attebury v. Blair, 244 Ill. 363, 91 N. E. 475, 135 Am. St. Rep. 342; Morse v. Stober (Mass.) 123 N. E. 780; Bachman v. Ennis R. E. Co., 199 Mo. App. 674, 204 S. W. 1115; Barrette v. Whitney, 36 Utah 574, 106 Pac. 522, 37 L. R. A. (N. S.) 368.

[16] Ante, § 5. Turner v. McDonald, 76 Cal. 180, 18 Pac. Rep. 262; Reynolds v. Borel, 86 Cal. 538, 25 Pac. Rep. 67; Meeks v. Garner, 93 Ala. 17, 8 So. Rep. 378; Allen v. Globe Milling Co., 156 Cal. 286, 104 Pac. 305.

[17] Calhoun v. Belden, 3 Bush (Ky.), 674, a case in which all the vendor's record evidences of title had been destroyed in a fire which consumed the register's office.

[18] Hollifield v. Landrum, (Tex. Civ. App.) 71 S. W. Rep. 979, citing the text.

[19] Wilson v. Jeffries, 4 J. J. M. (Ky.) 494.

A title dependent on a fact must be regarded as marketable where the fact is so conclusively proved in a suit by the vendor for specific performance, that a verdict against the existence of the fact would not be allowed to stand in a court of law, and where there is no reasonable ground for apprehending that the same fact cannot be in like manner proved, if necessary, at any time thereafter for the protection of the purchaser.[23]

When the purchaser objects to specific performance on the ground that the title is doubtful, the court may of course inquire into the facts upon which the objection is rested, for the purpose of determining whether the title is so doubtful that the purchaser will not be required to take it.[24] If satisfactory means are at hand for investigating and removing the doubt, the court will decree specific performance.[25] Defects in the record or paper title may be cured or removed by parol evidence, and the purchaser compelled to take the title.[26] The vendor's bill for specific performance will be retained until the doubts about the title are either removed or confirmed.[27] But it is conceived that such evidence must convince the court that there is no probability that the title of the purchaser will ever be attacked by a stranger having color of title, or that, if attacked, the purchaser must, of necessity, have at hand the means of showing that the attack cannot be sustained.

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[20] 1 Sugd. Vend. (8th Am. ed.) 594. Smith v. Death, 5 Madd. 371, where the question was whether a certain devisee had been brought up as a member of the Church of England and had been a constant frequenter thereof. Shriver v. Shriver, 86 N. Y. 575.

[21] Lowe v. Lush, 14 Ves. 547.

[22] Hartly v. Smith, Buck Bank. Cas. 360.

[23] Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. Rep. 483.

[24] 1 Sugd. Vend. (8th Am. ed.) 589. Osbaldiston v. Askew, 1 Russ. 160; Bentley v. Craven, 17 Beav. 204; Seymour v. Delancey, 1 Hopk. (N. Y.) 436, 14 Am. Dec. 552, where the court directed an issue at law to ascertain certain facts from which it might be determined whether or not the title was marketable. Hedderley v. Johnson, 42 Minn. 443, 44 N. W. Rep. 527.

[25] Kostenbader v. Spotts, 80 Pa. St. 430; Hedderley v. Johnson, 42 Minn. 443, 44 N. W. 527; Vognild v. Voltz, 141 Ill. App. 45.

[26] Hellreigel v. Manning, 97 N. Y. 56, citing Seymour v. Delancey, Hopk. (N. Y.) 436, 14 Am. Dec. 552; Miller v. Macomb, 26 Wend. (N. Y.) 229; Fagen v. Davison, 2 Duer (N. Y.), 153; Brooklyn Park Com. v. Armstrong, 45 N. Y. 234; Murray v. Harway, 56 N. Y. 337; Shriver v. Shriver, 86 N. Y. 575; Talifer v. Falk, 173 N. Y. Supp. 251, 105 Misc. Rep. 6. Parol

§ 290. **EQUITABLE TITLE. ADVERSE CLAIMS.** To the principle that a purchaser cannot be required to complete the contract when there are doubts about the title which can only be removed by parol proof, has been referred those decisions which establish the rule that a purchaser cannot be compelled to take an equitable title,[28] or a title which is controverted in good faith by an adverse

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evidence is admissible, on behalf of the vendor, to correct a mistake in the name of a grantee in the chain of title. Lynch v. Rogers, 134 N. Y. Supp. 1071, 150 App. Div. 311. Under a statute providing that affidavits explaining defects in a chain of title may be recorded, the purchaser may be required to take a title the objections to which are satisfactorily removed by affidavits put on record by the vendor. Hantz v. May, 137 Iowa 267, 114 N. W. 1042.

[27] Seymour v. Delancey, Hopk. Ch. (N. Y.) 436 (495); 14 Am. Dec. 552.

[28] 1 Sugd. Vend. (8th Am. ed.) 579. Abel v. Hethcote, 2 Ves. Jr. 100; Cooper v. Denne, 1 Ves. Jr. 565; Freeland v. Pearson, L. R., 7 Eq. 246; Morris v. Mowatt, 2 Paige Ch. (N. Y.) 586, 22 Am. Dec. 661; Waggoner v. Waggoner, 3 T. B. Mon. (Ky.) 556; Jones v. Taylor, 7 Tex. 240, 56 Am. Dec. 48; Littlefield v. Tinsley, 26 Tex. 353; Ragan v. Gaither, 11 Gill & J. (Md.) 472; Hendricks v. Gillespie, 31 Grat. (Va.) 181, 194; Newberry v. French, 98 Va. 479, 57 N. E. Rep. 381; Reed v. Noe, 9 Yerg. (Tenn.) 282, especially where the equity is controverted. Ankeny v. Clark, 148 U. S. 345, a case in which the vendor, a railroad company, had not received a conveyance from the government by reason of its failure to pay the costs of surveying the land. Coburn v. Haley, 57 Me. 347. A purchaser cannot be required to take an equitable title when the facts constituting the equity rest only in parol and are liable to be shortly incapable of proof. Owings v. Baldwin, 8 Gill (Md.), 337. While the purchaser cannot be compelled to take an equitable title, it is to be remembered that the vendor will, if time is not material, be allowed time in which to get in the legal title. Post, ch. 32. Andrew v. Babcock, (Conn.) 26 Atl. Rep. 715. In Jones v. Haff, 36 Tex. 678, it would seem at the first glance that the court held that the purchaser could be compelled to take an equitable title, but a careful examination of the case shows that the vendor's title was really legal. The title of a remote predecessor of the vendor had been equitable only, consisting of a "bond for title," but there had been mesne conveyances down to the vendor, and he was in possession under a conveyance. Nothing more seems to have been decided

claimant.[29] It would seem, however, that such titles are not merely "doubtful" in the technical sense of that term, but absolutely defective. It is obvious that a title cannot be rendered unmarketable by a mere naked adverse claim to the premises without color of title; otherwise a purchaser might always avoid performance of his contract by procuring a stranger to set up such a claim.[30] But if there be color of outstanding title which may

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in the case than that a legal title could not be rejected on the ground that it had been equitable only in its inception, assuming that the original equitable title was such as a court of equity would enforce.

[29] 1 Sugd. Vend. (7th Am. ed.) 592 (520); Osbaldiston v. Askew, 1 Russ. 160; Scott v. Simpson, 11 Heisk. (Tenn.) 310; Owings v. Baldwin, 8 Gill (Md.), 337; Linn v. McLean, 80 Ala. 360; Estell v. Cole, 62 Tex. 695; Morrison v. Waggy, 43 W. Va. 405, 27 S. E. Rep. 214; Boyd v. Boley, 25 Idaho, 584, 139 Pac. 139. A *lis pendens* renders the title of the vendor unmarketable. Earl v. Campbell, 14 How. Pr. (N. Y.) 330. But see Wilsey v. Dennis, 44 Barb. (N. Y.) 354, and cases cited post, § 306. But the mere acceptance of a conveyance *pendente lite* will not affect the title of the grantee if the contract of sale was made before the suit was commenced. Parks v. Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656. A sale of land for delinquent taxes puts a cloud on the title and renders it unmarketable. Wilson v. Tappan, 6 Ohio, 172. So, also, a suit attacking the validity of a will under which the vendor holds. Hale v. Cravener, 128 Ill. 408, affirming 27 Ill. App. 275. But if the person in whom is the alleged adverse title acquiesces in the vendor's claim to the title, the purchaser cannot refuse to perform the contract. Laverty v. Moore, 33 N. Y. 658. In Greenleaf v. Queen, 1 Pet. (U. S.) 138, it was held that a prior sale of the premises under a deed of trust, the purchaser never having complied with the terms of the sale, nor during twelve years laid any claim to the property, constituted no such objection to the title as would justify a rescission at the suit of the second purchaser. If any person has an interest in or claim to the estate which he may enforce, the purchaser cannot be compelled to take the estate, no matter how improbable it is that the claim will be enforced. Cunningham v. Sharp, 11 Humph. (Tenn.) 116; Dobbs v. Norcross, 24 N. J. Eq. 327; King v. Knapp, 59 N. Y. 462. The purchaser cannot be compelled to complete the contract if the boundaries of the premises be involved in doubt or dispute. Voorhees v. De Myer, 3 Sandf. Ch. (N. Y.) 614.

[30] Young v. Lillard, 1 A. K. Marsh. (Ky.) 482. But see Hall v. McKee, 147 Ky. 841, 145 S. W. 1129, where it was held that the suit of an adverse claimant, whether maintainable or not, made the title unmarketable. An alleged adverse claim unsustained by record evidence does not make a title doubtful. Allen v. Phillip, 2 Litt. (Ky.) 1. A purchaser may be compelled to take the title if it appears that the adverse claim has been decided, barred or released. Jackson v. Murray, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec. 53. It is not a conclusive objection to the title that a third party has filed a bill

prove substantial, though there are not sufficient facts in evidence to enable the court to say that the title is in another, a purchaser will not be held to take it and encounter the hazard of litigation.[31] Of course the title will be held unmarketable where there are two conflicting record titles to the property,[32] or where a record title to the property is outstanding in another.[33] An exception to the rule that a purchaser will not be compelled to take an equitable title has been held to exist when the purchase was under a decree, the purchaser in such a case being compelled to take just such title as the court can give.[34] But such purchaser cannot require

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against the seller, claiming a right to the estate, but the nature of the adverse claim will be looked into. 1 Sugd. Vend. (8th Am. ed.) 589, citing Osbaldiston v. Askew, 1 Russ. 160. Bentley v. Craven, 17 Beav. 204, where the purchase money was detained in court until the rights of an adverse claimant could be determined in a suit which was pending. See also Whitaker v. Willis, (Tex. Civ. App.) 146 S. W. 1004. In Francis v. Hazelrig, 1 A. K. Marsh. (Ky.) 93, the contract provided that the vendor should convey "a clear and indisputable title." The purchaser contended that the interference of a junior patent with a senior patent rendered the title under the senior patent disputable and cloudy, but the court said: "An indisputable title is one which, according to the literal import of the term, cannot be disputed. It may, perhaps, be said, without a violation of propriety in language, that a title may be disputed wrongfully as well as rightfully, but the latter is, without doubt, the true sense of the contract. A different construction would render it impossible to perform the contract, for there can be no title which may not be wrongfully disputed. It follows, therefore, as the junior title confers no legal right to dispute the title derived under an elder patent, that the latter, notwithstanding the interference, will be, in the true sense of the term, indisputable." The contract had been executed by a conveyance with warranty in this case, but the foregoing observations would apply with equal force where the contract is executory. In Edwards v. Van Bibber, 1 Leigh (Va.), 183, a vendor was permitted to show that an escheat of the estate in controversy to the Commonwealth for default of heirs of a former owner who had sold the estate but died before conveying it, was unsustained by the facts, and not enforcible by the Commonwealth; and the purchaser was compelled to take the title.

[31] Speakman v. Forepaugh, 44 Pa. St. 373; Herman v. Somers, 158 Pa. St. 424. The mere fact that a third person held title to the premises under a sheriff's deed, fair on its face, rendered the title unmarketable. Stack v. Hickey, 151 Wisc. 347, 138 N. W. 1011.

[32] Reydell v. Reydell, 31 N. Y. Supp. 1.

[33] Darrow v. Cornell, 51 N. Y. Supp. 828.

[34] 1 Sugd. Vend. (8th Am. ed.) 593 (338). Carter v. Morris B. & L. Asso., 108 La. 143, 32 So. Rep. 473; Wollenberg v. Rose, (Oreg.) 78 Pac. Rep. 751.

his vendee to take from him the same title; the reason being that in the latter case the rule *caveat emptor,* as enforced in judicial sales, does not apply.[35]

The purchaser cannot be compelled to take a title which is already in litigation or which will probably involve him in litigation; he cannot be required to purchase a law suit.[36] It has been held that a pending action, and *lis pendens* filed, justify the rejection of the title by the purchaser, where the complaint states a good cause of action affecting the land. The purchaser is not required to go outside the complaint and look up the evidence to determine whether the action is maintainable.[37] Upon the same principle, the purchaser cannot be compelled to accept the title, if the premises are in the possession of an adverse claimant.[38] Nor can he be required to accept the title where the vendor has made a second sale of the premises before default on the part of the first purchaser, even though the purchaser at the second sale had notice of the first sale and took subject to the rights of the first purchaser.[39] It has been said that the probability of a law suit is no objection to the title if the suit must inevitably terminate in the purchaser's favor. Thus it has been held that a purchaser may be compelled to accept a conveyance from one who had executed a prior *voluntary* conveyance of the premises, even though the purchase was made with notice of such prior conveyance.[40] If there be a reasonable doubt, however, as to whether the prior conveyance was in fact without valuable consideration, it is apprehended that the subsequent purchaser could not be compelled to take the title. Besides the vexation and expense of the suit, the purchaser would run the risk of being unable to show that the conveyance was voluntary. The probability or possibility of a law suit is of course no objection to the title where the purchaser is or may be let into the possession, and the suit must inevitably terminate in his favor; for there is no title however good that may not be attacked by ill-advised claimants. But it may be doubted whether in any case the purchaser could be compelled to complete the contract if the premises were held by an adverse claimant and a suit by the purchaser to get possession should be necessary. In ejectment the plaintiff must show title in himself, a proceeding which often involves much expense and delay, and there seems to be no reason why this burden should be imposed upon the purchaser. Besides possession is one of the principal elements of a good title, and a vendor who is unable to give it, is unable to perform his contract.

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[35] Powell v. Powell, 6 Madd. 63.

[36] Ante, § 284. James v. Mayer, 41 La. Ann. 1110, 7 So. Rep. 618; Lyman v. Stroudbaugh, 47 La. Ann. 71, 16 So. Rep. 662; Schwartz v. Woodruff, 132 Mich. 513, 93 N. W. Rep. 1067; Bartlett v. Magee, (Cal.) 45 Pac. Rep. 1029; Bullard v. Bicknell, 49 N. Y. Supp. 666, 26 App. Div. 319; Kopp v. Kopp, 1 N. Y. Supp. 261, 48 Hun, 532. Janulewyez v. Quagliano, 88 Conn. 60, 89 Atl. 897; Sorge v. Dickie, 199 Mich. 251, 165 N. W. 781, where there was a suit for specific performance pending against the vendor. The purchaser will not be required to take a title dependent upon the question whether a State was estopped from asserting title to the premises. Bodcaw Lumber Co. v. White, 121 La. 715, 46 So. 782.

[37] Post, § 306. Simon v. Vendeveer, 155 N. Y. 377, 49 N. E. Rep. 1043; Murphy v. Fox, 112 N. Y. Supp. 819, 128 App. Div. 534; Whalen v. Stewart, 108 N. Y. Supp. 355, 123 App. Div. 446. But the complaint must show a good cause of action. Weissbee v. Wallace, 108 N. Y. Supp. 887, 124 App. Div. 382. The *lis pendens* is no objection to the title if the cause has been settled, or disposed of adversely to the plaintiff. Alpern v. Farrell, 117 N. Y. Supp. 706, 133 App. Div. 278.

[38] Williams v. Carter, 3 Dana (Ky.), 198; Eisler v. Halperin, 89 N. J. L. 278, 98 Atl. 245; Cords v. Goodwin, 173 Cal. 61, 159 Pac. 138; Wilson v. Seybold, 216 Fed. 975; Black v. International Corpn., 264 Pa. 260, 107 Atl. 737. Inability to enter the premises except over the land of another, makes the title unmarketable. Thomas v. Larz, (Iowa) 166 N. W. 287. The purchaser cannot be put in default for refusing to close before a tenant in possession removes. Engel v. Tate, 203 Mich. 67, 170 N. W. 105.

The rule that the purchaser cannot be compelled to take an equitable title has been extended to a case in which the legal title was outstanding in a trustee, though the trustee might be compelled to convey at any time.[41]

We have seen that if the purchaser enter into the contract knowing that the title is in litigation, he cannot make that fact a ground for rescission.[42] *A fortiori* he cannot rescind where he has agreed to postpone the execution of the contract until a suit involving the title is determined.[43] Nor can he object that the vendor has only an equitable title, if he buys with knowledge of that fact and the contract does not provide that he shall have the legal title before the time to convey arrives.[44]

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[39] Birch v. Cooper, 136 Cal. 636, 69 Pac. Rep. 420. But see Hoock v. Bowman, 42 Neb. 87, and Kreibich v. Martz, 119 Mich. 343, where the contrary appears to have been held.

[40] 1 Sugd. Vend. (8th Am. ed.) 586; Id. ch. 22. Butterfield v. Heath, 15 Beav. 408; Humphreys v. Moses, 2 W. Bl. 1019; Currie v. Nind, 1 Myl. & Cr. 17.

[41] Murray v. Ellis, 112 Pa. St. 485, 3 Atl. Rep. 845.

Where the contract contains no provision as to the kind of title which the purchaser is to receive, and he buys with knowledge of the fact that a squatter is in possession of a part of the premises, it has been held that there is no implied contract to furnish a good marketable title, and that the vendor may compel specific performance. In such case parol evidence is admissible to show notice of the squatter's possession at the time of the contract.[45]

An objection to the title that an interest in the property is outstanding in others disappears if such others be estopped by their deed from claiming the interest.[46]. The purchaser cannot refuse to complete if the owner of an outstanding interest will join in the deed to him.[47]

§ 291. **DEFEASIBLE ESTATES. CONTINGENCIES.** A purchaser who, under his contract, is entitled to demand a conveyance of an indefeasible estate in fee simple, cannot be required to take an estate defeasible upon the happening of a certain event or upon a certain contingency;[48] for example, a devise to a woman providing that title should remain in her only so long as she should live separate from her husband.[49] This is not so much upon the ground that it is doubtful whether the estate will ever become absolute, as for the reason that the purchaser cannot be compelled to take an estate less in value and extent than that for which he bargained. If, however, it be alleged that it is physically impossible that the event defeating the estate should ever transpire, and it is doubtful whether such allegation can be sustained, the title becomes doubtful or unmarketable in the technical sense of the term. If it can be shown beyond a doubt that the happening of the event which will defeat the estate is a physical impossibility, no reason is perceived why the purchaser should not be compelled to take the title.[50]

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[42] Ante, § 85.

[43] Hale v. Cravener, 128 Ill. 408, 21 N. E. Rep. 534; Holmes v. Richards, 67 Ala. 577.

[44] Gray v. Hill, (Mich.) 63 N. W. Rep. 77.

[45] Leonard v. Woodruff, (Utah) 65 Pac. Rep. 199.

[46] Jacobs v. Fowler, 119 N. Y. Supp. 647, 135 App. Div. 713.

[47] Ochs v. Kramer, 32 Ky. L. R. 762, 107 S. W. 260; Furst v. Bohl, 118 N. Y. Supp. 125, 133 App. Div. 627.

[48] Van Schaick v. Lese, 66 N. Y. Supp. 64, 31 Misc. 610; Lamprey v. Whitehead, 64 N. J. Eq. 408, 54 Atl. Rep. 803; Richards v. Knight, 64 N. J. Eq. 196, 53 Atl. Rep. 452; Hess v. Bowen, 241 Fed. 659, 154 C. C. A. 217; Lovitt v. Wilson, 114 Me. 143, 95 Atl. 778; Weymouth v. Howe, 167 Wisc. 218, 167 N. W. 270; Fullenlove v. Vaughn, 151 Ky. 513, 152 S. W. 570. See Mr. Austin Abbot's note to Moore v. Williams, 23 App. N. Cas. (N. Y.) 416. The liability of an estate to defeat by the birth of issue capable of taking in remainder renders the title doubtful. McPherson v. Smith, 49 Hun (N. Y.), 254, 2 N. Y. Supp. 60; Dole v. Shaw, 282 Ill. 642, 118 N. E. 1044. The fol-

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lowing illustration of this principle is from the opinion of Chancellor WALWORTH in Seaman v. Hicks, 8 Paige (N. Y.), 655: "In the ordinary case a base fee, determinable only upon the contingency of a single gentleman, far-advanced in life, afterwards marrying and having issue, most persons might consider the happening of the event which was to divest the estate so improbable as to render such determinable fee substantially the same as an absolute indefeasible estate of inheritance in fee simple. For it might be considered as wholly improbable that a bachelor of seventy, who in the prime of life had so far disregarded the teachings of wisdom as well as of nature as to continue in a state of celibacy, would at that advanced age not only be guilty of the extreme folly of contracting matrimony for the first time, but would also procreate heirs to divest the estate determinable upon that event. But certainly no lawyer could for a moment suppose that a vendee, who had contracted for a good title, was bound to accept an estate which depended upon a contingency of that nature; unless the fact was satisfactorily established that it was physically impossible that the event which was to determine the estate should ever happen."

[49] Wright v. Mayer, 62 N. Y. Supp. 410; 47 App. Div. 604.

[50] Seaman v. Hicks, 8 Paige (N. Y.), 655, 658, *dictum*. A title derived through a sale in proceedings for a partition, is not rendered unmarketable by the fact that persons not *in esse* at the time of the sale may come into existence and be entitled to share in the property; as where lands are devised to the testator's grandchildren, and at the time of a partition of the property, there is a possibility that grandchildren may be born thereafter who would be entitled to come into partition. Wills v. Slade, 6 Ves. 498. The possibility that a woman 70 years old would have issue is too remote to make the title unmarketable. Bacot v. Fessenden, 115 N. Y. Supp. 698; 130 App. Div. 819; Whitney v. Groo, 40 App. D. C. 496. Especially is this true under statutes which provide that those entitled to a reversion, remainder or inheritance, shall be bond by a judgment in partition. Cheesman v. Thorne, 1 Edw. Ch. (N. Y.) 629.

If the estate of the vendor could only have arisen upon the happening of a contingency provided for in a deed or will, such as the death of a particular person without lawful issue, the purchaser cannot be required to take the title in the absence of evidence which satisfactorily establishes the happening of the contingency.[51]

The purchaser cannot reject the title if the vendor tenders a deed, or if he claims under a deed, in which are joined as grantors all persons who would take in the event of the happening of the contingency by which the estate would be defeated.[52]

§ 292. **TITLE DEPENDENT UPON ADVERSE POSSESSION.** A purchaser may be compelled to take a title resting upon a hostile, adverse and uninterrupted possession, under color of title which has continued for a length of time sufficient to bar the rights of any possible adverse claimant.[53] There are cases which apparently

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[51] Chew v. Tome, 93 Md. 244; 48 Atl. 701.

[52] Williams v. Briggs, 176 N. C. 48; 96 S. E. 643; Heisey v. Hartman, 253 Pa. 359; 98 Atl. 606; Elkins v. Thompson, 155 Ky. 91; 159 S. W. 617.

[53] 1 Sugd. Vend. (8th Am. ed.) 41, 584; 2 id. 101; Atk. Marketable Titles, 396, 403. See, generally, the cases cited throughout this subdivision. Games v. Bonner, 54 L. J. (N. S.) Ch. 517; Prosser v. Watts, 6 Madd. 59; Cottrell v. Watkins, 1 Beav. 361; Parr v. Lovegrove, 4 Drew. 170; Scott v. Nixon, 3 Dru. & War. 388; Kirkwood v. Lloyd, 12 Ir. Eq. 585; Stewart v. Conyngham, 1 Ir. Ch. C. 534; Hyde v. Dallaway, 6 Jur. 119. See, also, Emery v. Grocock, 6 Madd. 54; Barnwall v. Harris, 1 Taunt. 430; Causton v. Macklew, 2 Sim. 242; Martin v. Cotter, 3 Jon. & La. T. 496; Maginnis v. Fallon, 2 Moll. 566; Bolton v. School Board, L. R., 7 Ch. Div. 766; Hilary v. Waller, 12 Ves. 239; Thompson v. Milliken, 9 Grant Ch. (Can.) 359; Wieland v. Renner, 65 How. Pr. (N. Y.) 245; Meyer v. Boyd, 51 Hun (N. Y.), 291; 4 N. Y. Supp. 328; Ford v. Schlosser, 34 N. Y. Supp. 12; Weil v. Radley, 52 N. Y. Supp. 398; Simis v. McElroy, 160 N. Y. 156; 54 N. E. Rep. 674; Kahn v. Mount, 61 N. Y. Supp. 358; 46 App. Div. 84; Hammerschlag v. Duryea, 66 N. Y. Supp. 87; 31 Misc. Rep. 678; Ruff v. Gerhartt, 76 N. Y. Supp. 743; 73 App. Div. 245; Forsyth v. Leslie, 77 N. Y. Supp. 826; 74 App. Div. 517; Core v. Wigner, 32 W. Va. 277; 9 S. E. Rep. 36; Hall v. Scott, 90 Ky. 340; 13 S. W. Rep. 249; Woodhead v. Foulds, (Ky.) 12 S. W. Rep. 129; Thacker v. Booth, (Ky.) 6 S. W. Rep. 460; Williams v. Porter, (Ky.) 21 S. W. Rep. 643; Bryan v. Osborne, 61 Ga. 51, *dictum.* Lurman v. Hubner, 75 Md. 269; 23 Atl. Rep. 646; Foreman v. Wolf, (Md.) 29 Atl. Rep. 837; Erdman v. Corse, 87 Md. 506; 40 Atl. Rep. 107; Gump v. Sibley, 79 Md. 165; 28 Atl. Rep. 977. Upon the general proposition that the Statute of Limitations vests a perfect title in the occupant, see Bicknell v. Comstock, 113 U. S. 149; Leffingwell v. Warren, 2 Black (U. S.), 599; Croxall v. Sherrard, 5 Wall. (U. S.) 289;

Dickerson v. Colgrove, 100 U. S. 578; Harpening v. Dutch Church, 16 Pet. (U. S.) 455; Elder v. McCloskey, 70 Fed. Rep. 529; Cox v. Cox, 18 D. C. 1; Conley v. Finn, 171 Mass. 20; 50 N. E. Rep. 460; McNeill v. Fuller, 121 N. C. 209; 28 S. E. Rep. 299. Barnard v. Brown, 112 Mich. 452; 70 N. W. Rep. 1038; Tewksbury v. Howard, 138 Ind. 103; 37 N. E. Rep. 355. Nelson v. Jacobs, 99 Wis. 547; 75 N. W. Rep. 406; Ballou v. Sherwood, 32 Neb. 666; 49 N. W. Rep. 790; Scannell v. Am. Soda F. Co., 161 Mo. 606; 61 S. W. Rep. 889; Fant v. Wright, (Tex. Civ. App.) 61 S. W. Rep. 514; Dallmeyer v. Ferguson, 198 Pa. St. 288; 47 Atl. Rep. 962; Westfall v. Washlagel, 200 Pa. St. 181; 49 Atl. Rep. 941; Miller v. Cramer, 48 S. C. 282; 26 S. E. Rep. 657; Maccaw v. Crawley, 59 S. C. 342; 37 S. E. Rep. 934; Revol v. Stroudback, 107 La. 295; 31 So. Rep. 665; Abraham v. Mieding, 108 La. 510; 32 So. Rep. 329. In Edwards v. Morris, 1 Ohio, 524, it appeared that a deed in the vendor's chain of title had not been acknowledged or proven, but the court held that possession under the deed having been had for twenty-nine years, the contract should not be rescinded. A defect in the acknowledgment of a deed which has been recorded for forty years, and no title hostile to that derived thereunder has been asserted, does not render the title unmarketable. Bucklen v. Hasterlik, 155 Ill. 423; 40 N. E. Rep. 561; Kennedy v. Gramling, 33 So. Car. 367; 11 S. E. Rep. 1081. In Gaines v. Jones, 86 Ky. 527; 7 S. W. Rep. 25, the premises had been bought and paid for by a prior purchaser, but by mistake had been omitted from a deed to him. Possession had been held by and under such purchaser for more than the statutory period, and the title was held such as a subsequent purchaser must accept *Titles marketable.* In the following cases the vendor's title by adverse possession was held free from doubt, and such as the purchaser was bound to accept: Grant v. Wasson, 6 J. J. Marsh. (Ky.) 618, where the vendor had had thirty years' uninterrupted possession. Abrams v. Rhoner, 44 Hun (N. Y.), 507, ninety years. Lyles v. Kirkpatrick, 9 S. C. 265, where it was held that possession under a deed for more than ten years, the statutory period of limitation, cured the objection that a deed, under which the vendor held, was invalid for want of a subscribing witness. Edwards v. Morris, 1 Ohio, 524, forty years. Vance v. House, 5 B. Mon. (Ky.) 537, thirty years. An adverse, uninterrupted possession for more than twenty years, without evidence that the case was within any of the exceptions of the Statute of Limitations, makes the title marketable. Allen v. Phillips, 2 Litt. (Ky.) 1; McCann v. Edwards, 6 B. Mon. (Ky.) 208, thirty years. A minute on the books of town trustees, showing a prior sale of a lot, is no objection, after the lapse of many years, to the title, in the absence of anything to show that the trustees had ever conveyed the lot to their vendee. Morris v. McMillen, 3 A. K. Marsh. (Ky.) 565. Possession for many years under a deed, accidentally destroyed, creates such a title as a purchaser will be required to take. Wade v. Greenwood, 2 Rob. (Va.) 474; 40 Am. Dec. 759. *Per curiam.* "It has been objected that a purchaser should not be required to take a title which has been made good by the statute. We can see no force in the objection. So that the title be good, it matters not how it has been made so." Tomlinson v. Savage, 6 Ired. Eq. (N. C.) 430, 435. In Bohm v. Fay, 17 Abb. N. Cas. (N. Y.) 175, there was a missing deed in the chain of title, but there had been an adverse, uninterrupted possession for fifty-five years, and no claim to the land had ever been made by any person. The court presumed that the missing deed had been actually executed and delivered, but had been lost, and the title was held marketable.

In 1821 the record title of certain premises was in the executors of B., with power of sale. T. entered into possession of the premises that year, and he and his assigns held possession for more than fifty years. In a suit for partition of B.'s estate among his heirs, in 1831, no notice was taken of these premises. Held, that a sale and conveyance by the executors of B. to T. must be presumed, and that the title of one claiming through T. was marketable. Ottinger v. Strasburger, 33 Hun (N. Y.), 466. See, also, Shober v. Dutton, 6 Phila. (Pa.) 185; Grady v. Ward, 20 Barb. (N. Y.) 543; O'Connor v. Huggins, 1 N. Y. Supp. 377.

Recent Cases. Jackson v. Creek, 47 Ind. App. 541; 94 N. E. 416; Westerfield v. Cohen, 130 La. 533; 58 So. 175; Dickerson v. Trustees, 105 Md. 638; 66 Atl. 494; Rieman v. Wagner, 74 Md. 478; 22 Atl. 72; Herbold v. Bld'g. Asso., 113 Md. 156; 77 Atl. 122; Safe Dep. & Tr. Co. v. Marburg, 110 Md. 410; 72 Atl. 839; Potomac Lodge v. Miller, 118 Md. 405; 84 Atl. 554; Novak v. Orphans' Home, 123 Md. 161; 90 Atl. 997; Stewart v. Kreuzer, 127 Md. 1; 95 Atl. 1052; Goldman v. Miles, 129 Md. 180; 98 Atl. 531; Arey v. Baer, 112 Md. 541; 76 Atl. 843; Aroian v. Fairbanks, 216 Mass. 215; 103 N. E. 629; Shanahan v. Chandler, 218 Mass. 441; 105 N. E. 1002; Long v. Coal & Iron Co., 233 Mo. 713; 136 S. W. 673; Ocean City Asso. v. Creswell, 71 N. J. Eq. 292; 65 Atl. 454; Freedman v. Oppenheim, 187 N. Y. 101; 79 N. E. 841; 116 Am. St. Rep. 595; Wormser v. Gehri, 106 N. Y. Supp. 295; Taub v. Spector, 108 N. Y. Supp. 723; 124 App. Div. 158; Clark v. Woolport, 112 N. Y. Supp. 547; 128 App. Div. 203; D. W. Alderman Co. v. McKnight, 95 S. C. 245; 78 S. E. 982; Clark v. Asbury, (Tex. Civ. App.) 134 S. W. 286; Summers v. Hively, 78 W. Va. 53; 88 S. E. 608. Title dependent upon adverse possession of part of an abandoned road for more than 50 years, is marketable. Pooler v. Sammet, 115 N. Y. Supp. 578; 130 App. Div. 650. Technical objections to the title shown by the abstract are cured by long adverse possession of the vendor. Cunningham v. Friendly, 70 Oreg. 222; 39 Pac. 928.

Titles not marketable. In the following cases, the evidence was held insufficient to show that the title by adverse possession was free from doubt: Scott v. Simpson, 11 Heisk. 310; Beckwith v. Kouns, 6 B. Mon. (Ky.) 222; Lewis v. Herndom, 3 Litt. (Ky.) 358; 14 Am. Dec. 68; Hightower v. Smith, 5 J. J. Marsh. (Ky.) 542; Shriver v. Shriver, 86 N. Y. 575; Schultze v. Rose, 65 How. Pr. (N. Y.) 75; Griffin v. Cunningham, 19 Grat. (Va.) 571. A trustee cannot acquire title to the trust subject under the Statute of Limitations, because his possession cannot be adverse to that of the *cestui que trust.* 2 Sugd. Vend. (8th Am. ed.) 106, n. and cases cited. Possession for the statutory period under a deed which is insufficiently acknowledged and recorded, to bar a contingent right of dower, will not perfect the title of the grantee. McGuire v. Bowman, 6 Bush (Ky.), 550. In Brown v. Cannon, 5 Gil. (Ill.) 182, the court, while admitting that a purchaser might be compelled to take a title by adverse possession in a case free from doubt, observed:

deny this proposition,[54] but in most of them it will be found that the facts tending to establish the adverse possession for the required length of time were considered by the court too doubtful to support a decree against the purchaser. If the facts upon which such a title rests be clear and undisputed, the title stands upon the same ground as any other title founded upon matters *in pais*.[55] But if the facts alleged be disputed and doubtful, specific performance will be denied under the rule that relieves the purchaser wherever he may, in the future, be compelled to resort to parol testimony to remove doubts about the title.[56] If, however, the proof of adverse possession for the statutory period is so clear that a court would be bound to direct a jury to find for

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"Of all known titles to land beyond a mere naked possession, which are *prima facie* good, there are, perhaps, none recognized by law more doubtful and uncertain than those depending for their validity upon an adverse possession under a statute of limitations." And in the following cases of doubtful questions of law applicable to title by adverse possession, the title was held unmarketable: Whether the words "other charges," in a statute providing that ground rents, annuities and "other charges" should be presumed to be satisfied after a certain length of time, included mortgages. Pratt v. Eby, 67 Pa. St. 396. Whether a statute providing that a trust for the benefit of creditors shall be deemed discharged after the lapse of twenty-five years, operated retrospectively. McCahill v. Hamilton, 20 Hun (N. Y.), 388.

[54] Eyton v. Dicken, 4 Price Ex. 303; Tevis v. Richardson, 7 B. Mon. (Ky.) 654; Mott v. Mott, 68 N. Y. 246, *semble;* Hartley v. James, 50 N. Y. 38, criticised in Ottinger v. Strasburger, 33 Hun (N. Y.), 466, 469; Chapman v. Lee, 55 Ala. 616; McLaughlin v. Brown, (Tex. Civ. App.) 126 S. W. 292.

[55] Thus, in Duvall v. Parker, 2 Duv. (Ky.) 182, it was held that the purchaser must take a title dependent on thirty years' adverse possession, there being, according to the evidence in that case, not the remotest probability that he would ever be disturbed by an adverse claimant.

[56] 2 Beach Mod. Eq. Jur. § 608. "The only reason, if any, why a title by adverse possession is not marketable would be because its validity is a question of evidence rather than of law." Rawle Covt. (5th ed.) § 56. Noyes v. Johnson, 139 Mass. 436; 31 N. E. Rep. 767; McCabe v. Kenny, 52 Hun (N. Y.), 514; 5 N. Y. Supp. 678; Boggs v. Bodkin, 32 W. Va. 566; 9 S. E. Rep. 891; Heller v. Cohen, 154 N. Y. 299; 48 N. E. Rep. 527; McAllister v. Harmon, 101 Va. 17; 42 S. E. Rep. 920; Adkins v. Gillespie, (Tex. Civ. App.) 189 S. W. 275; Sulk v. Tumulty, 77 N. J. Eq. 97; 75 Atl. 757. Titles by adverse possession are in disfavor except in the closest and most indisputable cases. Lincoln Sav. Bank v. Schneider, 174 N. Y. Supp. 529; 105 Misc. Rep. 530; Crocker Pt. Asso. v. Gouraud, 224 N. Y. 343; 102 N. E. 737.

the purchaser if sued in ejectment, the title must be held to be marketable.[57]

In titles founded on the Statute of Limitations the burden is on the vendor to show, (1) that the possession has been open, hostile, adverse, notorious, and uninterrupted for the statutory period; (2) that there is no saving to any person on account of personal disabilities; and (3) it must appear that in all human probability the purchaser will have the means at hand to establish his title by adverse possession if it should be attacked by a third person in the future.[58] True, as has been seen, it is a rule that a purchaser cannot be compelled to take a title which, if attacked in the remote future, he can only sustain by the testimony of witnesses, since these may, in the meanwhile, have become unavailable to him by death or disqualification. But this rule must be given a reasonable construction, else it would render unmarketable some titles of the most satisfactory kind. Thus, title by descent is, as a general rule, to be established only by the testimony of witnesses,[59] and not by documentary or record evidence, yet no one for this reason ever objects that the title is unmarketable if the means of establishing the fact of inheritance exists. The same reasoning applies with equal force to titles under the Statute of Limitations. There must be some present ground to apprehend that the title will be disputed, and the means of sustaining it unavailable to the purchaser.[60]

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[57] Ottinger v. Strasburger, 33 Hun (N. Y.), 466; Shriver v. Shriver, 86 N. Y. 575; Adams v. Rhoner, 44 Hun (N. Y.), 507; Hagan v. Drucker, 85 N. Y. Supp. 601; 90 App. Div. 28; Smith v. Riordan, (Mo. App.) 213 S. W. 61.

[58] Heller v. Cohen, 154 N. Y. 299; 48 N. E. Rep. 527; Ruess v. Ewen, 54 N. Y. Supp. 357; 34 App. Div. 484; Gorman v. Gorman, 57 N. Y. Supp. 1069; 40 App. Div. 225; Roos v. Thigpen, (Tex. Civ. App.) 140 S. W. 1180; Cline v. Booty, (Tex. Civ. App.) 175 S. W. 1081. The purchaser's contention that there can be no adverse possession by a tenant in common against his co-tenant, cannot be sustained. Pope v. Thrall, 68 N. Y. Supp. 137; 33 Misc. Rep. 44.

[59] Affidavits of witnesses as to the fact of inheritance are sometimes taken and spread upon the public records; but these, it is obvious, are mere hearsay and inadmissible as evidence in the courts, and are not, strictly speaking "record" evidence of title. See Warvelle Abstracts, 369.

[60] Eberhardt v. Miller, 71 Ill. App. 215; Hollifield v. Landrum (Tex. Civ. App.), 71 S. W. Rep. 979, citing the text.

The purchaser should not be put in default until he has had a reasonable time to examine the evidence relied on in support of the title by adverse possession.[61]

The possession of the purchaser is the prolongation or continuation of that of the vendor, and if both together amount to a good prescriptive right, the purchaser may be compelled to complete the contract.[62] It seems that if, by the express terms of the contract, the purchaser is entitled to demand a "good title of record,"[63] or that the vendor must furnish an abstract showing a good record title,[64] the purchaser cannot be compelled to accept a title dependent upon adverse possession. And it has been decided that adverse possession can never ripen into a marketable title, unless held under some assurance purporting to convey a fee simple, or other estate equal in quantity to that which the vendor undertakes to sell.[65] This depends upon the familiar rule that the mere naked possession of a trespasser without color of title, no matter how long continued, will not bar the entry of the true owner.

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[61] Crocker Pt. Asso'n. v. Gouraud, 224 N. Y. 662; 120 N. E. 737.

[62] McLaren v. Irvin, 63 Ga. 275; Miller v. Cramer, 48 S. C. 282; 26 S. E. Rep. 657.

[63] Ante, § 6. Page v. Greely, 75 Ill. 400; Noyes v. Johnson, 139 Mass. 436; 31 N. E. Rep. 767; Cherry v. Davis, 59 Ga. 454, *semble;* Payne v. Markle, 89 Ill. 66, where the contract called for a "perfect chain of title." In California it seems that the purchaser cannot be compelled to take a title dependent upon the Statute of Limitations, though the contract does not expressly provide for a "good title of record." It has been held in that State that the purchaser is entitled to a title "fairly deducible of record" (Turner v. McDonald, 76 Cal. 180; 18 Pac. Rep. 262), and that, therefore, a title under the statute is not sufficient. McCroskey v. Ladd, (Cal.) 28 Pac. Rep. 216; Benson v. Shotwell, 87 Cal. 56; 25 Pac. Rep. 249; Gwin v. Calegaris, 139 Cal. 384; 73 Pac. 851, where the agreement was that the title should be "satisfactory" to the purchaser. An agreement by the vendor to furnish a "good deed" to the property does not require him to furnish an abstract showing a record title thereto. Title by adverse possession will be sufficient. Clark v. Asbury, (Tex. Civ. App.) 134 S. W. 286.

[64] Hennig v. Smith, 151 N. Y. Supp. 444; Friend v. Mahin, 202 Ill. App. 40; Mays v. Blair, 120 Ark. 69; 179 S. W. 331; Bradway v. Miller, 200 Mich. 648; 167 N. W. 15; Danzer v. Moerschel, (Mo.) 214 S. W. 849; St. Clair v. Hellweg, 173 Mo. App. 660; 159 S. W. 17; Ives v. Bank, (Mo. App.) 124 S. W. 23; Bruce v. Wolfe, 102 Mo. App. 389; 76 S. W. 724; McLane v. Petty, (Tex. Civ. App.) 159 S. W. 891; Nicholson v. Lieber, (Tex. Civ. App.) 153 S. W. 641; Wright v. Glass, (Tex. Civ. App.) 174 S. W. 717; Cline v. Booty, (Tex. Civ. App.) 175 S. W. 1081; Adkins v. Gillespie, (Tex. Civ. App.) 189 S. W. 275. Where the vendor is to furnish an abstract showing a merchantable title, an abstract showing by affidavits only that the outstanding title to the premises is barred by adverse possession is insufficient. Beeler v. Sims, 91 Kan. 757; 139 Pac. 371; 93 Kan. 213; 144 Pac. 237, citing Linscott v. Mozeman, 84 Kan. 541; 114 Pac. 1088; Van Gundy v.

If the title of the party in possession has ripened under the Statute of Limitations, it will not be rendered doubtful or unmarketable by a subsequent statute extending the period of limitation.[66] A title dependent upon adverse possession against a remainderman is of course unmarketable, since his right of action does not accrue until the precedent estate determines.[67]

If the vendor's title be perfected by lapse of time pending a suit for rescission or specific performance, the purchaser must accept it,[68] unless time was material to the purchaser or was of the essence of the contract.[69]

A title founded upon adverse possession will not be marketable unless sufficient time has elapsed to bar the rights of any person

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Shewey, 90 Kan. 253; 133 Pac. 720; 47 L. R. A. (N. S.) 645. If the contract requires the vendor to convey a perfect record title shown by abstract, the purchaser cannot be compelled to take a title resting upon adverse possession. But if the agreement be only to execute a "good deed," or a "warranty deed," the purchaser may be required to take such a title. Attebury v. Blair, 244 Ill. 363; 91 N. E. 475; 135 Am. St. Rep. 342; Bear v. Fletcher, 252 Ill. 206; 96 N. E. 997; Clark v. Asbury, (Tex. Civ. App.) 134 S. W. 286. Unless the contract calls for a record title, or an abstract showing title, a good title by adverse possession under the statute of limitations is sufficient. Wiemann v. Steffen, 186 Mo. App. 584; 172 S. W. 472. In the case of Jamison v. Van Auken, (Mo.) 210 S. W. 404, it is argued with much force that a title by adverse possession, free from doubt as to the facts on which it depends, satisfies the requirement that the abstract shall show a "good merchantable title." As was there pointed out, an abstract may show perfect title in one who really has no interest in the property; and one may have a perfect title that is not disclosed by documentary evidence of any kind.

[65] Cunningham v. Sharp, 11 Humph. (Tenn.) 116; Chapman v. Lee. 55 Ala. 616; Knedler v. Lang, 63 Hun (N. Y.), 48; affd'd., 137 N. Y. 589.

[66] Shriver v. Shriver, 86 N. Y. 575.

[67] 2 Sugd. Vend. (8th Am. ed.) 104; Wms. Real Prop. (Am. ed. 1886) 450 (355).

[68] Wickliffe v. Lee, 6 B. Mon. (Ky.) 543; Peers v. Barnett, 12 Grat. (Va.) 410.

[69] Post, ch. 32. Costs will be decreed against the vendor in such case. Peers v. Barnett, 12 Gratt. (Va.) 410.

who was under disabilities, such as infancy or coverture, when the cause of action accrued.[70] Generally the Statutes of Limitations in the several States specify a time within which a person whose disabilities have been removed, must assert his rights, and in some of the States it is provided that in no case, including such additional period, shall the period of limitation exceed a specified number of years. Under such a statute it has been held that the possibility of a claim by a person under disabilities could not render the title doubtful where the extreme period of limitation had elapsed.[71] If it may be fairly inferred from the abstract that a defect arising before the period at which the abstract commences, exists, the purchaser may require that the title before that time shall be shown; but if that be not within the vendor's power the title will not be held bad upon mere suspicions.[72]

If the vendor set up title under the Statute of Limitations, the burden will be upon him to show that the title is good.[73] It will be sufficient, it is apprehended, for him to show an exclusive, adverse, notorious, uninterrupted and hostile possession under color of title for the statutory period, including any saving in favor of persons under disabilities. If it be doubtful whether there are any such persons, and he be unable to show that there are none such, the title will be deemed unmarketable.[74] He must be able to show, also, that there are no persons in remainder who might claim the estate, since the Statute of Limitations does not begin to run, as to them, until the determination of the precedent particular estate.[75] It has been held, however, that if the vendor shows a title *prima facie* good under the Statute of Limitations, the burden will devolve upon the purchaser to show facts which would prevent the running of the statute.[76]

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[70] Brown v. Cannon, 5 Gil. (Ill.) 174; Tevis v. Richardson, 7 B. Mon. (Ky.) 654; Simis v. McElroy, 160 N. Y. 156; 54 N. E. Rep. 674; Ford v. Wright, 114 Mich. 122; 72 N. W. Rep. 197; Baumeister v. Silver, 98 Md. 418; 56 Atl. 825; Wilhelm v. Federgreen, 38 N. Y. Supp. 8; 2 App. Div. 483; Fuhr v. Cronin, 81 N. Y. Supp. 536; 82 App. Div. 210; Bess-Mar Realty Co. v. Capell, 164 N. Y. Supp. 803; Hummer v. Buerk, 90 N. J. Eq. 97; 106 Atl. 141; Lalor v. Tucker, 114 N. Y. Supp. 403; 130 App. Div. 688; Alpha Cem. Co. v. Shirk, 227 Fed. 966; 142 C. C. A. 424. The running of the statute is not interrupted by the death of the possible claimant and the infancy of his heirs. Lewine v. Gerardo, 112 N. Y. Supp. 192.

[71] Pratt v. Eby, 67 Pa. St. 396; Shober v. Dutton, 6 Phila. (Pa.) 186; Ottinger v. Strasburger, 33 Hun (N. Y.), 466; N. Y. Steam Co. v. Stern, 46 Hun (N. Y.), 206; Messinger v. Foster, 101 N. Y. Supp. 387; 115 App. Div. 689.

[72] 1 Sugd. Vend. (8th Am. ed.) 552; Seymour v. Delancey, Hopk. Ch. (N. Y.) 436; 14 Am. Dec. 552.

[73] Luckett v. Williamson, 31 Mo. 54, the court saying: "A party making out a title under the Statute of Limitations must show it to be good, that the court may determine whether it shall be received. It is not for the purchaser to contest the validity of such a title with the vendor, as he may be wholly ignorant of the state of it." Knedler v. Lang, 63 Hun (N. Y.), 48; 17 N. Y. Supp. 443; Wilhelm v. Federgreen, 38 N. Y. Supp. 8; 2 App. Div. 483.

In some jurisdictions a vendor, relying on a title under the Statute of Limitations, will be permitted to join the persons holding the apparent legal title as parties defendant in his suit against the purchaser for specific performance, and have their claims determined.[77] If this practice be founded upon sound principles, no reason is perceived why the vendor should not be allowed to bring in such persons and adjudicate their rights in any case in which it is objected that the title is doubtful, at least, in any case in which he would have a right to maintain a bill against such persons to quiet his title.

As a general rule any objection to the title which is cured by the Statute of Limitations other than that applicable to possessory actions, or by lapse of time, constitutes no ground upon which the purchaser can refuse to complete the contract, if the case admit of no reasonable doubt as to the application of the bar. Thus the existence of a prior executory contract for the sale of the premises, the benefit of which had passed to an assignee in bankruptcy, was held no valid objection to the title, the right of the assignee to enforce the contract having become barred by lapse of time.[78]

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[74] Brown v. Cannon, 5 Gil. (Ill.) 174. But see Day v. Kingsland, 57 N. J. Eq. 134; 41 Atl. 99, where the facts were held sufficient to throw the burden of proof in that respect upon the purchaser. In Seymour v. Delancey, Hopk. Ch. (N. Y.) 436 (495); 14 Am. Dec. 552, it was held that if a title derived under a person alleged to have died without heirs, be clearly adverse for a period of twenty-five years, it will not be rendered unmarketable by the possibility of an escheat of said person's estate or of his having left heirs who are under disabilities.

[75] Simis v. McElroy, 160 N. Y. 156; 54 N. E. Rep. 674.

[76] Phillips v. Day, 82 Cal. 24; 22 Pac. Rep. 976, citing Shriver v. Shriver, 86 N. Y. 575; *e. g.*, persons under disabilities. Warne v. Greenbaum, (N. J. Eq.) 101 Atl. 568.

[77] Duvall v. Parker, 2 Duv. (Ky.) 182. Ante, p. 787.

The purchaser may be required to take a title dependent upon the Statute of Limitations, though the vendor did not inform him, at the time of the contract, of the character of the title, and furnish him with proof of its sufficiency.[79]

§ 293. **PRESUMPTIONS FROM LAPSE OF TIME.** Independently of the Statute of Limitations, possession by the vendor and his predecessors in title, for a great length of time has, in some cases, been held to raise a conclusive presumption of a grant or conveyance, and to remove any doubt or uncertainty as to the title which might arise from the inability of the vendor to show such a grant, or to supply a missing link in the record chain of title.[80] There have been cases, also, in which the courts have held that rights of third persons which, if asserted in due season, might have raised insuperable objections to the sufficiency of the title, but which have been lost by lapse of time, furnish no ground on which to hold the title unmarketable.[81] And a purchaser has in some cases been compelled to take a title dependent for its validity upon a presumption of the death of a person interested in the estate, arising from such person's absence for many years without having been heard from in the meanwhile. But such absence must have continued for a length of time sufficient to remove any doubt that the absentee is dead.[82] And it is apprehended that the circumstances must be such as to show, beyond a reasonable doubt, that he died unmarried, intestate and without issue. Generally it may be said that wherever a sufficient length of time has elapsed to raise a conclusive presumption of the existence of any fact, a title dependent upon that fact will be deemed marketable.[83] Thus, under the rule that ancient deeds coming from the proper custody

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[78] Holmes v. Richards, 67 Ala. 577.

[79] Kahn v. Mount, 61 N. Y. Supp. 358; 46 App. Div. 84.

[80] English cases cited, ante, p. 805, note 53. 1 Sugd. Vend. (8th Am. ed.) 41, 584; 2 id. 101; Atk. Mark. Titles, 396, 403. O'Connor v. Hudgins, 113 N. Y. 511, 521; 21 N. E. Rep. 184. Brassfield v. Walker, 7 B. Mon. (Ky.) 96; Logan v. Bull, 78 Ky. 607, 614. To make good a title to the residue of an old term, mesne assignments which cannot be produced will be presumed to exist. White v. Foljambe, 11 Ves. 344. A title may be good though there are no deeds, but there must have been such a long uninterrupted possession, enjoyment and dealing with the property as to afford a reasonable presumption that there is an absolute title in fee simple. 1 Sugd. Vend. (8th Am. ed.) 41; 2 id. 101. The court will presume that the wives of grantors in ancient deeds—those more than thirty years old—are dead, and the property is free from their claims. Jarboe v. McAtee, 7 B. Mon. (Ky.) 279. In the same case it was held that an agent's authority to convey would be presumed after fifty years. A grant from the Commonweath will be presumed after forty years' adverse possession. Henderson v. Perkins, 94 Ky. 207; Jarboe v. McAtee, 7 B. Mon. (Ky.) 279; 3 Starkie Ev. 1221; 1 Greenl. Ev. 50. In Abrams v. Rhoner, 44 Hun (N. Y.), 507, it appeared that B., through whom the vendor claimed, under a deed executed in 1797, had made a prior conveyance of the same premises, in 1771, to parties other than those through whom the vendor claimed title, and there was no evidence that the title acquired under B.'s conveyance in 1771 had ever passed back to him, or vested in any other of the vendor's predecessors in title But those under whom the vendor claimed had been in possession since 1797, and none of the grantees named in the deed of 1771 had ever been in possession of, or made any claim to, the premises, and no conveyance by them to any person had ever been found. Held, that the title of the vendor was marketable, it being conclusively presumed that the grantees in the deed of 1771 had reconveyed to B. before he conveyed in 1797, or that the conveyance of 1771 had, for some reason, never taken effect.

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[81] A. S. Abell Co. v. Firemen's Insurance Co., 93 Md. 596; 49 Atl. 334. In this case it appeared that a leasehold interest, under a lease for 99 years expiring in 1870 but renewable during the term, was sold under decree in a suit for partition in 1852, but the sale was void as to the one-fourth interest of a person who had not been made a party to the proceeding. In 1887, after the expiration of the lease, the purchaser at the partition sale procured a renewal from the owner of the fee and in 1897 he purchased the fee. Afterwards he contracted to sell the property, but it was objected against his title that, by the law of the State, the lessor who forfeits his right to renew by failure to renew during the term is entitled to relief in equity against the forfeiture and hence that the owner of the one-fourth interest in the lease, which had been illegally sold at the partition sale in 1852, not being bound by that sale, was entitled in equity to relief against the forfeiture, and to demand a renewal of the lase. But it appearing that such owner had left the state long before the sale; that he had never made a claim to any interest in the lease; that he died in 1853, the year after the sale; that his heirs never recognized their liability to pay rent to the owner of the fee; and that more than thirty years had elapsed since their right to relief in equity against the forfeiture of the privilege of renewing the lease had accrued, without any assertion of that right on their part, the court held that if they were now to claim that right they would not be entitled to a hearing, and hence that the purchaser's objection to the title could not be sustained.

[82] PRESUMPTIONS OF DEATH, ETC.—*Titles not marketable.* Whether a certain person having an interest in the premises, who had disappeared and had not been heard from for twenty-four years, was dead, unmarried, without issue and intestate. Vought v. Williams, 120 N. Y. 253; 24 N. E. Rep. 195; 8 L. R. A. 591; 17 Am. St. Rep. 634. Seven years, McDermott v. McDermott, 3 Abb. Pr. (N. S.) (N. Y.) 451; Trimmer v. Gorman, 129 N. C. 161; 39 S. E. Rep. 804. Thirty years, Dworsky v. Arndtstein, 51 N. Y. Supp. 597; 29 App. Div. 274. Fourteen years, Fowler v. Manheimer, 75 N. Y. 17; 70 App. Div. 56. About twenty years, Cerf v. Diener, 210 N. Y. 156; 104 N. E. 126. Thirty-five years, Chew v. Tome, 93 Md. 244; 48 Atl. 701. Whether certain

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persons were the only heirs of a decedent. Walton v. Meeks, 41 Hun (N. Y.), 311. A title founded upon a decree in a suit for specific performance against the heirs of a vendor, is unmarketable when it appears that one of the heirs, a married woman, not a party to the suit, was dead when the decree was made. The court will not presume that she died intestate and without issue, and that her interest vested in the other heir. Hays v. Tribble, 3 B. Mon. (Ky.) 106. *Titles held marketable.* Whether a certain person having an interest in the premises, who had disappeared and had not been heard from for more than forty years, had died, unmarried, without issue and intestate. Ferry v. Sampson, 112 N. Y. 415; 20 N. E. Rep. 387; McComb v. Wright, 5 Johns. Ch. (N. Y.) 263; Demarest v. Friedman, 70 N. Y. Supp. 816; 61 App. Div. 576; Day v. Kingsland, 57 N. J. Eq. 134; 41 Atl. 99. See, also, Burton v. Perry, (Ill.) 34 N. E. Rep. 60; Hitt v. Campbell, (Ky.) 114 S. W. 785. Whether the facts in a certain case were sufficient to sustain a title by escheat for want of heirs. In re Trustees N. Y. P. E. Pub. School, 31 N. Y. 574, 587. In Meyer v. Madreperla, (N. J. L.), 53 Atl. 477, the purchaser rejected the title offered and sued to recover his deposit. The objection to the title was an outstanding interest in a sailor who left his home in 1879 and had not been heard from for twenty years. It was held, under a New Jersey statute providing that a person absenting himself and not heard from for seven years, must be presumed to be dead, that the objection to the title was untenable. The statute was held to raise a *conclusive* presumption of the death of the absentee. The court said that this presumption was accompanied by another, namely, that he died without lawful issue. The questions of marriage and intestacy were not considered. In Cambrelleng v. Purton, 125 N. Y. 610, 26 N. E. Rep. 907, the purchaser did not dispute the presumption of the death of the absentee, but contended that there was no presumption that he died unmarried and without issue before the death of his father, whose estate, embracing the premises sold, was partitioned after publication of notice against the absentee. The evidence was thought sufficient to justify both presumptions.

[83] Forsyth v. Leslie, 77 N. Y. Supp. 826; 74 App. Div. 517. In Lyman v. Gedney, 114 Ill. 388; 20 N. E. Rep. 282, the grantors, in a conveyance of property which belonged to a partnership, were, after the lapse of forty years, presumed to have been the persons composing the firm, the conveyance itself being silent upon that point. Port Jefferson Realty Co. v. Woodhull, 112 N. Y. Supp. 678; 128 App. Div 188, in which case the fact that nothing had been done in a widow's suit for dower during twenty years raised the presumption that she was dead, or had been settled with.

require no proof, a title thence derived could not, it is apprehended, be disputed upon the ground that the deeds are not shown to have been duly executed.

To a certain extent, every title depends upon rebuttable presumptions. It has already been observed that when the vendor shows a record of documentary title in himself, the existence of all matters *in pais* necessary to the validity of that title, such as the competency of grantors through whom, and the *bona fides* of conveyances through which, the title is derived, will be presumed, until the purchaser shows that there is ground for reasonable doubt in respect to any such matter.[84] If this were not true, and a vendor could be required to show that everything which could possibly invalidate his title, has no existence in fact, there would practically be no such thing as specific performance at the suit of the vendor; he would be required to prove an infinite number of negatives, a thing as impracticable as it would be unreasonable.

§ 294. **TITLE AS AFFECTED BY NOTICE.** As a general rule a purchaser cannot be compelled to perform the contract when the vendor's title depends upon a question of notice of the rights of third parties.[85] Thus, though a purchaser with notice, it has been held, may safely buy from a purchaser without notice, he will not be compelled to take the title, as he would incur the risk of notice to his vendor being proved.[86] But the mere liability of a deed in the vendor's chain of title to be attacked as having been executed under circumstances that would render it invalid, does not render the title doubtful, if the purchaser be such in good faith, for value, and without notice of the invalidity of the deed.[87] We have already seen that a doubt as to the title resting not on proof or presumption, but on a mere suspicion of *mala fides,* will not condemn the title as unmarketable.[88]

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[84] Ante, § 289. Braun v. Vollmer, 85 N. Y. Supp. 319.

[85] *Questions of Notice.* In the following cases titles dependent upon the existence of notice of the rights of third persons were held unmarketable. Whether a certain person through whom the vendor claimed, was a purchaser without notice of the equitable rights of a stranger in the premises, under a contract of sale: Morris v. McMillen, 3 A. K. Marsh. (Ky.) 565. Whether a grantee of lands took with notice of certain liens upon the premises: Freer v. Hesse, 4 DeG., M. & G. 495. Whether a purchaser without notice under a foreclosure sale, was affected by notice to the plaintiff in the foreclosure suit: Wagner v. Hodge, 34 Hun (N. Y.), 524. Whether a subsequent purchaser had notice of a prior unrecorded deed of the premises: Speakman v. Forepaugh, 44 Pa. St. 363.

[86] 1 Sugd. Vend. (8th Am. ed.) 590, 601. Freer v. Hesse, 4 De G., M. & G. 495. In Bott v. Malloy, 151 Mass. 477; 25 N. E. Rep. 17, suggestions of a latent trust affecting the premises in the hands of the vendor were held insufficient to render the title doubtful, in view of a statute declaring trusts invalid as against a purchaser without notice.

§ 295. **BURDEN OF PROOF.** Inasmuch as the purchaser may suffer a heavy loss if compelled to take a doubtful title, and the vendor can suffer only the temporary inconvenience of delay if his title be good and the purchaser be relieved, the inclination of the court is in favor of the purchaser, and the burden devolves upon the vendor to show a title free from all reasonable doubt.[89] This means, it is apprehended, no more than that the vendor must show in the first instance a title free from doubt so far as disclosed by the public records, or the instruments which evidence the title. The competency of the maker of every deed or will in the chain of title is necessary to the validity of that title, but it is plain that the vendor cannot be required to establish such competency affirmatively before it is questioned by the purchaser. The same observation applies to other matters *in pais* affecting the validity of the title, except, it is presumed, that wherever a break occurs in the record chain of title, such as would be caused by descent, or by a parol partition at common law, the vendor must show facts sufficient to supply the breach. The abstract should contain affidavits showing the essential facts. But after the vendor has shown a title presumptively good, the burden devolves on the purchaser to show wherein it is bad or doubtful,[90] and to prove the facts whereon the doubtfulness of the title depends.[91] And there are cases which go farther and hold that when the purchaser enters into a contract for the sale of lands in which the ownership of the vendor is assumed, and agrees to pay the purchase money, but does not require the vendor to show a good title, the general rule is that the burden is on the purchaser to show defects in the title if he seeks to avoid the contract. The *prima facie* presumption is that he satisfied himself as to the sufficiency of the title before entering into the contract.[92]

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[87] Levy v. Iroquois Building Co., (Md.) 30 Atl. Rep. 707. The fact that a prior grantee of the premises claims that a deed thereof had been obtained from him by fraud, he having waited more than six years without making any effort to recover the land, does not render the title unmarketable. First Af. M. E. Church v. Brown, 147 Mass. 296; 17 N. E. Rep. 549.

[88] Ante, § 285. Prop. VI.

[89] Burroughs v. Oakley, 3 Swanst. 159; Hendricks v. Gillespie, 25 Grat. (Va.) 181, 197, citing Sturtevant v. Jaques, 14 Allen (Mass.), 523; Richmond v. Gray, 3 Allen (Mass.), 25 and Griffin v. Cunningham, 19 Grat. (Va.) 571; McAllister v. Harmon, 101 Va. 17; 42 S. E. Rep. 920; Upton v. Maurice (Tex. Civ. App.), 34 S. W. Rep. 642. In Espy v. Anderson, 14 Pa. St. 308, it was held that it was the purchaser's business to show that the title was doubtful. He should at least be required to point out in what respect or particulars the title is doubtful, leaving to the vendor the burden of removing the doubt.

§ 295-a. **TESTIMONY OF EXPERTS INADMISSIBLE.** The question whether the title is one which the purchaser should be compelled to take, is one of law, to be determined by the court from the contract; and it is error to admit the testimony of attorneys and examiners of title upon that point.[93] But it has been held that the refusal of a title insurance company to guarantee, and of its general counsel to approve, the title, was sufficient to warrant a finding that the title was unmarketable.[94]

§ 296. **ILLUSTRATIONS OF THE FOREGOING PRINCIPLES.** The English and American law reports abound with cases illustrating the principles discussed in this chapter. A large number of the English cases have been collected and referred to very briefly and concisely by Lord St. Leonards, in his work on Vendors and Purchasers.[95] Many of these are comparatively of little value to the

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[90] Ante, § 244. Stevenson v. Polk, 71 Iowa, 278; 32 N. W. Rep. 340; Phillips v. Day, 82 Cal. 24; 22 Pac. Rep. 976; Bank v. Loughran, 122 N. C. 668; 30 S. E. Rep. 17; Van Gundy v. Shewey, 90 Kan. 253; 133 Pac. 720; 47 L. R. A. (N. S.) 645. The burden of proving the title to be unmarketable rests upon the objector. Ante, § 281. Greenblatt v. Hermann, 144 N. Y. 13; 38 N. E. 966; Rosenblum v. Eisenberg, 108 N. Y. Supp. 350; 123 App. Div. 896.

[91] Witte v. Koerner, 108 N. Y. Supp. 560; 123 App. Div. 824.

[92] Baxter v. Aubrey, 41 Mich. 16; 1 N. W. Rep. 897, citing Dwight v. Cutter, 3 Mich. 566; 64 Am. Dec. 105; Allen v. Atkinson, 21 Mich. 361.

[93] Ante, § 283. Evans v. Gerry, 174 Ill. 595; 51 N. E. Rep. 615; Moser v. Cochrane, 107 N. Y. 35; 13 N. E. Rep. 442.

[94] Flood v. von Marcard, 102 Wash. 140, 172 Pac. 804.

[95] 1 Sugd. Vend. (8th Am. ed.) 583 (389).

American lawyer, depending, as they do, upon questions of law peculiar to the English system of conveyancing and settlement of estates, and laws of real property, and it is, therefore, deemed unnecessary to reproduce them here. But it is believed that a collection of American cases, stated in the same concise manner, will be found useful to the profession. No attempt has been made to separate the cases in which the doubt turned upon a question of law from those turning upon doubtful questions of fact; the effort has been rather to arrange the cases in groups, having reference to the sources from which objections to title most frequently spring. It will probably be found that in many of the cases cited the title was not only unmarketable or doubtful but absolutely bad. Thus, it is sometimes said that a title derived through a conveyance executed by a married woman without the precise forms and solemnities required by statute in such cases is not "marketable." It is plain, however, that such a title is not only doubtful or unmarketable, but is absolutely bad, for such an instrument is utterly invalid and inoperative to convey the woman's right. If, however, a grave doubt should arise as to whether there had been, in fact, a sufficient compliance with those requisites, and the court should be of opinion that another judge, or competent person, might well differ with him upon the point, then the title would be, in a technical sense, not "marketable," that is, doubtful. But inasmuch as all bad titles are necessarily not marketable in the sense that purchasers cannot be compelled to accept them, it is apprehended that no inconvenience will result from the want of technical precision in the use of the term "marketable," if any instance thereof should be perceived.

Defects of title, with respect to the manner in which they are disclosed, are obviously of three kinds, namely: (1) Those which appear upon the face of some instrument under which title is claimed, such, for example, as the want of proper words of conveyance, or other essential requisites of a deed, such as a grantor, or a grantee, or a seal, or a sufficient certificate of acknowledgment, and other matters of like kind. (2) Those which appear from the public records; such as a prior conveyance to a stranger; or the absence of any record title whatever; or the want of jurisdiction of the subject-matter in judicial proceedings. (3) Those which rest in parol; that is, to be established by the testimony of witnesses, such as the happening of events upon which title depends, for example, births, deaths, marriages, adverse possession, the performance or happening of conditions antecedent or subsequent, the vesting of contingent remainders, and the like. Cases arising from each of these sources will be found in the preceding pages, and in the notes which follow here.

§ 297. **Errors and irregularities in judicial proceedings.** Errors, defects and irregularities in judicial proceedings, directly or incidentally, for the sale of lands, are the occasion, perhaps, of more objections to title than any other ground; certainly, in cases in which confirmation of the sale is resisted by the purchaser. In the consideration of such objections an important rule should be constantly borne in mind, namely, that no error, defect or irregularity in the proceedings, short of absolute want of jurisdiction on the part of the court, or fraud or mistake, to an extent that would vitiate the proceedings, can affect the title of the purchaser. The reasons for this rule are chiefly two: first, because upon reversal of a judgment for error, a purchaser under the judgment cannot be disturbed in his title and possession, there being only restitution of the proceeds of the sale to the person aggrieved; and, second, because the judgment under which the sale or conveyance to the purchaser was made, cannot be attacked in any collateral proceeding, by a party or privy to the judgment, except for want of jurisdiction to render, or fraud or mistake in the procuration or rendition of the judgment.[96] It may be doubted whether in every instance, cited in the notes below, in which the purchaser has been relieved from his bid or his bargain, on the ground of errors and defects in judicial proceedings rendering the title unmarketable, the decision will stand the test of the foregoing rule, inasmuch as there is no broad line of demarcation between facts which are, and those which are not, sufficient to show jurisdiction in the premises. It is true that most of the cases in which the rule that a title under a judicial sale is not subject to collateral attack, have been those which arose in ejectment by parties to the judgment or their privies, against the purchaser or his privies, and not between vendor and purchaser; but it is apprehended that the rule would be the same in either case, and that a title would not be deemed unmarketable simply because of some error or irregularity in the proceedings, unless there was a reasonable doubt as to whether such error was not based on facts showing an absolute want of jurisdiction in the court. Of course if there should be a reasonable doubt whether the court had jurisdiction, the title would be unmarketable. Purchasers at judicial sales may always before confirmation of the sale object that the title is doubtful or unmarketable, as well as absolutely bad.[97] As a general rule no such objection will be permitted after the sale has been confirmed.[98] The defects of which the purchaser complains must be serious and real. Mere irregularities in judicial proceedings, through which the title passed, capable of amendment or correction, will be no ground upon which to release him from his contract.[99] Nor will the purchaser be relieved if he made his bid with knowledge that the title was open to doubt, even though his objection be made before confirmation of the sale.[1]

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[96] Ante, § 49.

And it has been held that a purchaser at a sale in partition cannot object that the title is doubtful. The reason given was that if actual partition had been made the several partitioners could not have objected to the title, each partitioner taking his allotment *cum onere*.[2] If the proceedings in a suit in which a judicial sale is had, are defective, thereby rendering the title of the purchaser doubtful or unmarketable, the burden of causing the necessary steps to be taken in the suit by which the error or irregularity in the proceedings will be cured, devolves on the plaintiff in the suit. He is bound to see that the action has been brought and prosecuted in accordance with the provisions of law regulating the procedure in such cases, and if a step has been omitted or unreasonably taken, thereby invalidating the judgment as to any of the parties in interest, it is his duty to apply for the necessary relief by way of amendment of the proceedings, before he can insist upon the purchaser's completing the purchase.[3]

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[97] Wilson v. White, 109 N. Y. 59; 15 N. E. Rep. 749; Shriver v. Shriver, 86 N. Y. 575; Jordan v. Poillon, 77 N. Y. 518; Williamson v. Field, 2 Sandf. Ch. (N. Y.) 533; Lee v. Lee, 27 Hun (N. Y.), 1; McCahill v. Hamilton, 20 Hun (N. Y.), 388; Argall v. Raynor, 20 Hun (N. Y.), 567; Cox v. Cox, 18 Dist. Col. 1.

[98] Ante, § 45.

[99] Dalzell v. Crawford, 1 Pars. Sel. Cas. (Pa.) 37; Moot v. Business Men's Asso., 157 N. Y. 201; 52 N. E. 1. An order directing a purchaser at a judicial sale to complete the purchase, he having filed specific objections to the title, does not conclude the purchaser as to questions of title not submitted to the court. Williamson v. Field, 2 Sandf. Ch. (N. Y.) 533.

[1] Ante, § 45. Stewart v. Devries, (Md.) 32 Atl. Rep. 285; Binford's Appeal, 164 Pa. St. 435; 30 Atl. Rep. 298.

[2] Sebring v. Mersereau, 9 Cow. (N. Y.) 344, the court saying: "Upon a bill for specific performance of a contract for the sale of real estate there is no doubt that a court of equity will avoid compelling a purchaser to take a

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doubtful title. So, also, of a purchase under the foreclosure of a mortgage, and analogous cases. But in partition generally, and in this case particularly, there is no dispute as between the parties about the title. Their rights are determined when the order for partition is made. Suppose actual partition might have been made in this case; no notice could have been taken of incumbrances. Each takes the share allotted to him, and subject to such liens as exist upon it. The business of the court in this simple suit, is not to draw into discussion various and conflicting rights and equities of incumbrancers. The property is divided *cum onere*." This decision is, doubtless, sound, where the objection is that the estate is incumbered, assuming that the court will see to the application of the purchase money to the incumbrance. But it is difficult to perceive any reason why a purchaser at a partition sale should be compelled to take a title rendered doubtful by the existence of adverse claims to the premises. The rule *caveat emptor* applies to such a sale, and if he should be evicted he would have no remedy over against the partitioners. Ante, § 44.

[3] Crouter v. Crouter, 133 N. Y. 55; 30 N. E. Rep. 726. This was a suit for partition to which non-resident infants were made parties defendant. The court appointed a guardian *ad litem* for them before jurisdiction of their persons had been acquired by the lapse of a prescribed period after service had been had upon them by order of publication. This was held an error that made the judgment rendered in the suit voidable by the infants. The defect, however, was curable by proper proceedings to be taken for that purpose (presumably in the same suit), and this, it was held, the plaintiff was bound to do before he could compel the purchaser to proceed with the contract.

ERRORS AND IRREGULARITIES IN JUDICIAL PROCEEDINGS.— *Titles held doubtful.* A purchaser cannot be compelled to accept a title depending upon a judicial sale under an erroneous judgment liable to be reversed. Young v. Rathbone, 1 C. E. Green (N. J.), 224; 84 Am. Dec. 151. Want of affidavit in proceedings against unknown heirs renders the title doubtful. Tevis v. Richardson, 7 B. Mon. (Ky.) 654. An insufficient printer's certificate of publication of an order against unknown heirs, makes title of purchaser at judicial sale doubtful. Tevis v. Richardson, 7 B. Mon. (Ky.) 654. Whether a purchaser can be compelled to accept a title under a decree against unknown heirs. Tevis v. Richardson, 7 B. Mon. (Ky.) 654. Where an affidavit for publication of summons against a non-resident failed to state that defendants could not be found after due diligence title of purchaser at a sale under decree against such defendants, held unmarketable. Bixby v. Smith, 3 Hun (N. Y.), 60. Whether a decree setting aside a fraudulent conveyance, and directing a sale of the land, could be enforced by *fieri facias:* McCann v. Edwards, 6 B. Mon. (Ky.) 208, 211. Whether more property had been sold under a mortgage than was necessary to satisfy the debts secured: Hemmer v. Hustace, 51 Hun (N. Y.), 457; 3 N. Y. Supp. 850. Whether a married woman, sued with her husband, was competent to confess a judgment binding her separate estate: Swayne v. Lyon, 67 Pa. St. 436. Whether the declaration in a suit against husband and wife for materials furnished for the improvement of the wife's separate estate, was so drawn that a judgment for the plaintiff by confession absolutely concluded the wife from afterwards showing that the materials were not furnished for the improvement of such estate: Swayne v. Lyon, 67 Pa. St. 436. Whether a judgment creditor, suing to set aside a conveyance from husband to wife, was bound by an order giving leave to file a complaint *nunc pro tunc* in a proceeding to which such creditor was not a party, so as to antedate the filing of his complaint. Weeks v. Tomes, 16 Hun (N. Y.), 349. Whether the Special Term of the Supreme Court of New York had power to make an order providing for service of summons by publication: Crosby v. Thedford, 13 Daly (N. Y.), 150. A sale of the land of a non-resident under an order or decree of court is void, if publication of process be made for less time than that required by law. Jarboe v. McAtee, 7 B. Mon. (Ky.) 279. Whether a lien on the real estate of a county treasurer's surety attached from the date of process in a suit on the treasurer's bond, or whether it attached only at the time of service of the process: Snyder v. Spaulding, 57 Ill. 480. Where a petition for the sale of real estate, the object of which is to defeat a contingent remainder, fails to set forth such purpose as required by the statute under which the proceeding is had, the title of a purchaser under a decree in such cause will be unmarketable: Westhafer v. Koons, 144 Pa. St. 26; 22 Atl. Rep. 885. Whether a title dependent upon the action of the court in amending, *ex parte*, a summons against a mortgagor, who had been summoned under the wrong Christian name, was marketable: Stuyvesant v. Weil, 58 N. Y. Supp. 697; 41 App. Div. 551. Where the record in a suit by an executor for leave to sell the decedent's lands, failed to show that the executor had executed a bond, as required by law. Taylor v. Chamberlain, 39 N. Y. Supp. 737; 6 App. Div. 38. Whether a probate court in Connecticut had power to sell real property for payment of debts of decedent as well as for partition: Taylor v. Chamberlain, 39 N. Y. Supp. 737; 6 App. Div. 38. Whether the failure of the judge to sign an interlocutory order authorizing sale and partition was such an irregularity as affected the title held under such order: Hecker v. Brown, 104 La. 524; 29 So. Rep. 232. Whether a foreclosure sale might, under the laws of Michigan, be made more than ten years after a decree directing the sale: Walker v. Gilman, 127 Mich. 269; 86 N. W. Rep. 830. Whether a bill by a grantor to set aside his deed on the ground of fraud and undue influence, was lawfully discontinued by his committee upon his death, he having been adjudged a lunatic before his death: Stobert v. Smith, 184 Pa. 34; 38 Atl. 1019. Whether a decree of separation between parties neither of whom was a resident of the State, was valid, so as to authorize the wife to convey dotal property free of the rights of the husband: Carter v. Morris B. & L. Asso., 108 La. 143; 32 So. Rep. 473. Whether the court had jurisdiction to order a sale of decedent's *realty* by the administrator. Koch v. Streuter, 232 Ill. 594; 83 N. E. 1072. Whether the surrogate had jurisdiction to authorize a guardian *ad litem* to compromise a suit by him to establish a devise of realty to the infant. Dixon v. Cozine, 114 N. Y. Supp. 615. Whether an affidavit for publication of process, failing to show what effort had been made to find defendant, was sufficient. Reid v. Johnson, 121 N. Y. Supp. 750. Whether the court had jurisdiction to enter judgment by default in an action to quiet title in which the complaint did not allege that plaintiff had ever been in possession. Lese v. Metzinger, 105 N. Y. Supp. 888. Whether sufficient notice of an order to show cause against a probate sale had been given. Weaver v. Esary, 78 Wash. 640; 139 Pac. 607. Where the title depended upon a decree based on service by publication of process, such decree being liable to be vacated at any time within three years. McNutt v. Nellans, 82 Kan. 424; 108 Pac. 834. Whether a title claimed under a will was affected by the failure of the executor to file an inventory of the estate. Atwood v. Fagan, 63 Tex. Civ. App. 659; 134 S. W. 765.

Titles held marketable.— Whether a deputy clerk has power to administer oaths in a suit pending before the court: Mullins v. Porter, 4 Heisk. (Tenn.) 407. Whether a failure to serve a summons on the wife in a suit to foreclose a purchase-money mortgage executed by the husband, affected the title of the *husband* as purchaser at the foreclosure sale: Watson v. Church, 3 Hun (N. Y.), 80. Whether the sanction by a court of chancery of a sale of property belonging to a religious corporation validated the sale, where the law required the sanction of that court *before* the sale: Dutch Church v. Mott, 7 Paige (N. Y.), 77. Whether a petition for partition of lands need be sworn to: Martin v. Porter, 4 Heisk. (Tenn.) 407. Whether a certain advertisement of a sale under a mortgage was sufficient: Streeter v. Illsley, 151 Mass. 291; 23 N. E. Rep. 837; White v. Bates, 234 Ill. 276; 84 N. E. 906. Whether the failure of the court to appoint an attorney to represent absent heirs in a suit for partition invalidated the title of a purchaser at a sale in such suit: Mather v. Lehman, (La. Ann) 10 So. Rep. 939. Whether the improper designation of unknown parties in a summons, rendered the title doubtful: Lenehan v. College, etc., 63 N. Y. Supp. 1033; 30 Misc. 378. Whether the heirs of one who had mortgaged his interest in a trust estate, which mortgage was foreclosed, were entitled to notice of an application for the appointment of a trustee of the estate: Van Wyck v. Richman, 68 N. Y. Supp. 473, 33 Misc. 404. Whether an infant, who appeared by guardian below, was bound by a decree rendered on appeal in a suit by the vendor for specific performance: Early v. Douglas, 23 Ky. Law R. 298, The mere fact that the right of appeal from a judgment, on which the title depends, has not expired, does not render the title doubtful.[4]

§ 298. **Sales of the estates of persons under disabilities.** The courts exact a rigid compliance with all the provisions of law by which sales of the estates of infants, or other persons who are not *sui juris,* are governed. Such sales are to be made only upon authority obtained in judicial proceedings instituted for that purpose, or by special act of the legislature, and the statutes in most of the States provide that the pleadings shall show the necessity of the sale; that they shall be verified by the oath of the guardian, or other person, and that no sale shall be directed unless the allegations of the necessity therefor be sustained by testimony

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62 S. W. Rep. 860. The fact that an order for publication of summons in a suit for partition was signed only with the initials of the judge, is no sufficient objection to the title. Volz v. Steiner, 73 N. Y. Supp. 1006, 67 App. Div. 504. Verification of a petition for appointment of a guardian *ad litem* before a notary, who was attorney in the suit, is no ground of objection to the title when the essential facts stated in the petition appear in a subsequent affidavit in the cause. Baumeister v. Demuth, 82 N. Y. Supp. 831, 84 App. Div. 394. The possibility that a decree, under which the vendor holds, may be opened in behalf of non-resident defendants, is no objection to the vendor's title if the proceedings in the cause appear to have been regular. Hays v. Tribble, 3 T. B. Mon. (Ky.) 106. As to what irregularities in proceedings before a surrogate for the sale of a decedent's real estate for the payment of his debts, will not render the title doubtful, see Regney v. Coles, 6 Bos. (N. Y.) 479. In Stevenson v. Polk, 71 Iowa, 278, 32 N. W. Rep. 340, the possibility that defendants, on whom process had been served by publication, would appear and take advantage of an irregularity in the proceedings, was held insufficient to make the title unmarketable. Whether the sufficiency of an affidavit for publication of process could be attacked in a collateral proceeding. Carman v. Bedell, 144 N. Y. Supp. 328, 82 Misc. Rep. 652. Whether the deed of a referee in a foreclosure proceeding was sufficient, the record failing to show proof of plaintiff's case and examination of plaintiff as to payments. Brody & Co. v. Hochstadter, 144 N. Y. Supp. 631, 160 App. Div. 310. Whether a final decree for distribution in a probate proceeding, entered by consent of all parties in interest, was conclusive upon them. Barette v. Whitney, 36 Utah 574, 106 Pac. 522, 37 L. R. A. (N. S.) 368. Whether service by publication on "Bothwick" was good as service on Borthwick. Harrel v. Neef, 80 Kan. 348, 102 Pac. 838. Whether validity of sale by trustee in bankruptcy was affected by his failure to file copy of adjudication with the recorder of deeds. Kennedy v. Holl, 103 N. Y. Supp. 231.

[4] Adami v. Backer, 60 N. Y. Supp. 683, 29 Misc. 93.

taken in the presence of a guardian *ad litem.* These provisions and others of like character go to the jurisdiction of the court, and if they be not complied with, the court has no power to order a sale. One of the most important points to which the attention of the purchaser must be directed in this connection is that the person under disabilities shall have been represented by guardian *ad litem,* or other appropriate person, in the proceeding to sell. Even the rights of unborn children must be protected by having a representative of their interests before the court.[5] The rule that a purchaser will not be compelled to take a doubtful title applies with special force where infants are not concluded by the judgment or decree in proceedings for the sale of lands in which they are interested.[6]

It has been held, in New York, that the legislature has power to order the sale of separate pieces of land belonging to separate families of infants severally interested, and to direct the proceeds to be brought into a common fund for partition, and that a title dependent upon a sale under such an act was marketable.[7] In a case in Alabama the purchaser denied the power of the legislature to authorize, by private act, the sale of infant's lands by their mother, who was not their guardian, but the court held that the power existed, and required the purchaser to take the title.[8]

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[5] Holmes v. Wood, (Pa.) 32 Atl. Rep. 54. One of the interests sold in this case was liable to open to admit after-born children, and there being no representative of such prospective interests before the court, the title of a purchaser at a sale in the cause was held doubtful.

[6] James v. Meyer, 41 La. Ann. 1100, 7 So. Rep. 618.

[7] Ebling v. Dwyer, 149 N. Y. 460, 44 N. E. 155.

[8] Munford v. Pearce, 70 Ala. 452.

SALE OF INFANT'S ESTATE, ETC.—*Titles held not marketable.* Whether the rights of an infant heir of a mortgagor were concluded by an illegal sale under the mortgage: Hemmer v. Hustace, 51 Hun (N. Y.), 457, 3 N. Y. Supp. 850. Whether want of personal service upon certain infant defendants in partition invalidated a judgment therein rendered: Swain v. Fidelity Ins. Co., 54 Pa. St. 455. Whether in a case in which there was no jurisdiction for partition except by consent, jurisdiction could be given by consent where the rights of infants were involved: Scheu v. Lehning, 31 Hun (N. Y.), 183. Whether certain irregularities in proceedings for the sale of an infant's estate vitiated the title of the purchaser: Gills v. Wells, 59 Md. 492. Whether notice of a tax sale served on infant owners in person without the appointment of a guardian *ad litem* was sufficient to conclude them: Levy v. New-

§ 299. **Want of parties to suits.** A judgment or decree is in no way conclusive upon a person in interest who was not a party

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man, 50 Hun (N. Y.), 438, 3 N. Y. Supp. 324. Whether a judgment in a suit for partition of an estate among devisees barred the rights of unborn children in remainder, the judgment not providing for their protection: Monarque v. Monarque, 80 N. Y. 320. Whether a court of chancery had power to confirm an illegal sale of an infant's land made by the father: Linkous v. Cooper, 2 W. Va. 67. Whether an appearance by an infant in partition by next friend instead of a guardian *ad litem*, was irregular and invalid: Swain v. Fidelity Ins. Co., 54 Pa. St. 455. Whether the appointment of a guardian *ad litem* for an infant defendant in a certain case was valid: Uhl v. Laughran, 4 N. Y. Supp. 827, 22 N. Y. St. Rep. 459. Whether a certain conveyance by executors was in fraud of the rights of infants claiming under the will: Stevens v. Banta, 47 Hun (N. Y.), 329. Whether a guardian's sale of the lands of his ward without authority was validated by a license to sell afterwards obtained: Williams v. Schembri, 44 Minn. 250, 46 N. W. Rep. 403. Whether a sale of an infant's estate ostensibly for the benefit of the infant but really to assist another to get possession of the property was valid, a fair price having been realized for the property and no fraud intended: Weinstock v. Levison, 26 Abb. N. Cas. (N. Y.) 244, 14 N. Y. Supp. 64. The failure of a guardian *ad litem* to file a bond with the clerk in proceedings for sale of an infant's lands cannot be cured by an order *nunc pro tunc*, made without notice to the infant or other parties; and the purchaser cannot be required to take a title dependent upon the validity of such proceedings. Walter v. De Graaf, 19 Abb. N. Cas. (N. Y.) 406. A title founded on a decree against an infant is invalid, since the infant may show cause against the decree after arriving at majority. Bryan v. Read, 1 Dev. & Bat. Eq. (N. C.) 86. This proposition, it is believed, should be limited to cases in which there is reasonable ground to apprehend that the infant will be able to show cause; otherwise there can be no stability of titles under decrees in suits to which there were infant defendants. Whether a probate judge could lawfully grant leave to sell "on the premises" lands of minors not situated in a city: Horne v. Rogers, 113 Ga. 224, 38 S. E. Rep. 768. The fact that lands of an intestate were purchased at an administrator's sale, partly for the administrator's benefit, the rights of minor heirs of the intestate being involved, renders a title held under such sale unmarketable. Griffith v. Maxfield, 63 Ark. 548, 39 S. W. Rep. 852. Whether widow, guardian in socage of her infant child, could take title to the infant's realty under a sale by special guardian. Feller v. Mitchell, 103 N. Y. Supp. 269. Whether sale by guardian was affected by his failure to file the sale bond required by statute. Hubachek v. Bank, 117 Minn. 163, 134 N. W. 640, Ann. Cas. 1913 D. 187. Whether the bringing of the proceeds of the sale into court cured the illegality of the sale. Scheuermann v. De Latour, 130 La. 549, 58 So. 223. Whether a guardian was competent, after the death of the ward, to carry out a license to her and to the ward to sell and convey the ward's property. Costello v. Tasker, 227 Mass. 220, 116 N. E. 573. Whether a certain transaction, in which a guardian *ad litem* became the purchaser of the property, was void or merely voidable. McKean v. Hill, 151 N. Y. Supp. 689, 166 App. Div. 18.

to the proceeding in which such judgment or decree was pronounced.[9] Hence a title so derived, being always open to col-

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Titles held marketable.— Whether a creditor of an infant was competent to act as his next friend in a suit for partition: O'Reilly v. King, 28 How. Pr. (N. Y.) 408. Whether the appointment of a guardian *ad litem* in a suit is valid when it does not appear by affidavit that the infant defendants have no regular guardian: Martin v. Porter, 4 Heisk. (Tenn.) 407. Whether a guardian *ad litem* for an infant defendant can be appointed by a judge at chambers: Disbrow v. Folger, 5 Abb. Pr. (N. Y.) 53. Whether a petition for the sale of an infant's estate may be presented by the parent as natural guardian instead of by next friend: Ex parte Whitlock, 32 Barb. (N. Y.) 48. Whether a clerical error in the date of an affidavit by a guardian *ad litem* in a suit for partition vitiated the proceedings: Martin v. Porter, 4 Heisk. (Tenn.) 407. Whether a judgment confirming a sale in partition was conclusive upon infant defendants: Reed v. Reed, 46 Hun (N. Y.), 212. See, also, Scholle v. Scholle, 55 N. Y. Super. Ct. 468. Whether the legislature could pass a special act authorizing the sale of certain property belonging to minors, the sale being for their benefit: Munford v. Pearce, 70 Ala. 452. Whether an act providing for substituted service was binding on unknown infant heirs: Steinhardt v. Baker, 49 N. Y. Supp. 357, 25 App. Div. 197. Whether unknown infants would be bound by a decree for sale by a referee in a case in which the executors were empowered by the will to sell, the proceeding not being the ordinary statutory application for the sale of infants' lands, but a proceeding for other relief to which the sale was a mere incident. Adami v. Backer, 60 N. Y. Supp. 683, 29 Misc. 93. Failure of the records to show title out of an executor, and the possible existence of persons under disabilities are not sufficient objections to the title, where there is evidence that the whole of the testator's realty was converted into personalty, and that the only persons who could lay claim to the premises, received their shares of the personalty. Doll v. Pizer, 89 N. Y. Supp. 277, 96 App. Div. 194. Where husband and wife were parties to a suit to foreclose a mortgage, and the husband purchased the premises, he could not object that the appearance of his wife, an infant, by attorney instead of guardian *ad litem* was such an error as made the title unmarketable, since her dower rights were unimpaired, the husband being the purchaser. Knight v. Maloney, 4 Hun (N. Y.), 34. Description of curatrix as "guardian" in a proceeding for the sale of an infant's lands does not impair the title. Mitchener v. Holmes, (Mo.) 22 S. W. Rep. 1070. Where the infants were by their guardian *ad litem*, parties to the suit to compel specific performance by the vendor. Guy v. Hansow, 86 Kan. 933, 122 Pac. 879. Whether the heirs of an Indian allottee of land were concluded by their conveyance of the land in fee (approved by the Secretary of the Interior) and by the decree of a State court quieting the title of the grantee. Egan v. McDonald, 36 S. D. 92, 153 N. W. 915. Whether a decree of partial distribution would have the effect of precluding objections by minors — distributees — to the validity of the sale. French v. Phelps, 20 Cal. App. 101, 128 Pac. 772.

[9] Ante, § 287.

lateral attack, is not only doubtful, but absolutely bad. But questions frequently arise as to whether certain persons were necessary parties to proceedings resulting in the sale of lands. Wherever such persons have not been made parties, and the question whether their presence was properly dispensed with, admits of reasonable doubt, either upon the law or the facts, a title depending upon such question becomes, in a technical sense, doubtful or unmarketable, and such as a purchaser cannot be compelled to take.[10] Illustrations will be found in the notes below. The mere non-joinder of persons who would have been proper parties to the suit, but were not absolutely necessary parties, does not, in every instance, create a sufficient doubt as to the title. Thus, it has been held that the non-joinder of the heirs of a decedent as defendants in a suit to enforce a mechanic's lien against his estate did not raise a tenable doubt as to the validity of a title derived under a sale in such suit, in the absence of anything to show that there was a good defense to the suit.[11] The bare possibility that there may have been persons who, if they existed, would have been necessary parties to the suit, presents no objection to the title. Therefore, in a proceeding for partition in which the pleadings set forth certain persons as heirs entitled to partition, it was held that the mere fact that there might have been other heirs than those stated did not make the title doubtful, there being nothing to show that such other heirs had probably existed.[12] Where the title depended on a like proceeding, and the

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[10] Dworsky v. Arndtstein, 51 N. Y. Supp. 597, 29 App. Div. 274.

[11] Reece v. Haymaker (Pa.), 30 Atl. Rep. 404.

[12] Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. Rep. 966.

WANT OF PARTIES — *Title held not marketable.* Whether a sale of lands for payment of a decedent's debts was valid without notice of the proceeding to the heirs: Littlefield v. Tinsley, 26 Tex. 353. Whether the heirs of A. should have been made parties to a suit in which it was decided that a deed was made to A. by mistake: Mead v. Altgeld, 33 Ill. App. 373, 26 N. E. Rep. 388. Whether a tenant, by the curtesy of an undivided interest in mortgaged premises, should have been made a party to a proceeding to foreclose a mortgage: Hecker v. Sexton, 6 N. Y. State Rep. 680. Whether certain children having an interest in remainder in mortgaged premises should have been made parties to a suit to foreclose the mortgage: Lockman v. Reilly, 29 Hun (N. Y.), 434. See, also, Moore v. Appleby, 108 N. Y. 237, 15 N. E. Rep. 377. Whether certain contingent remaindermen should have record therein showed that all parties apparently in interest had been made parties to the suit, it was held that the burden was on the purchaser to show that some necessary party was omitted

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been made parties defendant to a foreclosure suit: Nodine v. Greenfield, 7 Paige (N. Y.) 544; N. Y. Sect. & Tr. Co. v. Schomberg, 84 N. Y. Supp. 359, 87 App. Div. 262. B., tenant in common with A., devised his interest to his wife during widowhood, and in the event of her marriage, then to his children. B.'s widow and A. made partition of the estate among themselves, but B.'s children not having been made parties to the partition, A.'s title was held unmarketable. Herzberg v. Irwin, 92 Pa. St. 48. The fact that a record in partition, under which title is derived, fails to show that certain persons not joined as parties, who would be necessary parties if capable of taking, were incapable for any reason (alien enemies, for example), and, therefore, properly omitted, renders the title doubtful. Toole v. Toole, 112 N. Y. 333, 22 Abb. N. C. 392. A title resting on a sale under execution against heirs upon a judgment founded on a *sci. fa.* in which the heirs were not specially named is unmarketable. Newman v. Maclin, 5 Hayw. (Tenn.) 241; Williams v. Seawell, 1 Yerg. (Tenn.) 83; Henderson v. Overton, 2 Yerg. (Tenn.) 394, 24 Am. Dec. 492. B., tenant in common with C., devised his estate to his wife subject to legacies. The widow conveyed her moiety to the other co-tenant, C., and on his death his heirs brought suit for partition among themselves. B.'s estate was insufficient to pay the legacies. B.'s legatees not having been made parties to the suit, the title thence derived was held doubtful. Jordan v. Poillon, 77 N. Y. 518, a leading case. See, also, Argall v. Raynor, 20 Hun (N. Y.), 267; Scholle v. Scholle, 55 N. Y. Super. Ct. 474. Where a third person, not a party to a suit for partition, had a right to enforce a power of sale against the land in the hands of the partitioner and those claiming under them, the title was held unmarketable. Ford v. Belmont, 7 Rob. (N. Y.) 97, 111. A purchaser will not be required to take a title under a decree in a suit for the construction of a will to which all persons in interest were not parties. Sohier v. Williams, 1 Curt. (C. C.) 479. Where the question was whether certain acts of a widow amounted to an election to accept a provision made for her in her husband's will, and the question was decided in the affirmative, she not being a party to the proceeding in which the question was raised, a title depending thereon was held unmarketable: Reynolds v. Strong, 82 Hun (N. Y.), 202, 31 N. Y. Supp. 329. Where it appeared that a third person might claim an interest in the land by reason of his not having been made a party to the suit. Smith v. Hunter, 241 Ill. 514, 89 N. E. 685, 132 Am. St. Rep. 231.

Titles held marketable.—Whether a judgment in a suit by one proprietor declaring an assessment void for certain defects in the statute under which it was laid was conclusive in favor of other proprietors not parties to the proceeding: Chase v. Chase, 95 N. Y. 373. Whether an assignee for the benefit of creditors should have been made a party to a suit to foreclose a mortgage executed before the assignment: Wagner v. Hodge, 34 Hun (N. Y.), 524. Whether, in a certain case in which remaindermen had not been made whereby the title was rendered unmarketable.[13] The bare possibility that one of the defendants, who was proceeded against as a non-resident, might appear at some future period and make objections to the decree, is no ground on which title under such decree can be held doubtful.[14]

§ 299-a. **Irregularities in foreclosure sales.** A great number of titles depend upon sales under deeds of trust and "power of sale" mortgages executed to secure the payment of debts. These sales are made by the trustee or mortgagee, without the intervention of the courts, after advertisement and the observance of other

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parties to a suit for partition, they were concluded by a judgment in a subsequent suit to which they were parties, by which it was determined that they had no interest in premises allotted to a party to such partition suit under whom the vendor claims: Paget v. Melchior, 58 N. Y. Supp. 913, 42 App. Div. 76. Whether the possible heirs of a married woman were bound by a decree in a suit by her to reform a deed drawn by mistake to convey land to her use for life with remainder to her heirs, instead of conveying to her an absolute fee simple: Kendall v. Crawford, 25 Ky. Law R. 1224, 77 S. W. Rep. 364. Testator devised certain property to his wife for life, with remainder to their married daughter for life, and remainder over to her children. The widow disclaimed under the will, and claimed the property as her separate estate, and brought a suit against the married daughter and the living children of such daughter, to quiet her title to the property. There was a decree in her favor. Held, that title under such decree was not rendered unmarketable by the fact that other children were born to the daughter after the decree. They were virtually represented in the suit by their mother. Gray v. Smith, 76 Fed. 525. Whether, in a certain case, two charities, to each of which testator devised a share of his estate, were one and the same corporation, so that one of them was properly not made a party defendant to a proceeding for the sale of the property devised: Sisters of Mercy v. Benzinger, 95 Md. 684, 53 Atl. 548. The fact that an assignee for the benefit of creditors of property which had been previously mortgaged was not made a party to a suit to foreclose the mortgage, was held, after the lapse of more than twenty-five years, no objection to the title under Laws of New York, 1875, providing that deeds for the benefit of creditors shall be deemed discharged after twenty-five years from their date. Kip v. Hirsh, 103 N. Y. 565, 9 N. E. Rep. 317. Failure to make an incumbrancer a party to a suit to foreclose a prior incumbrance, though error, does not render the title of the purchaser at the foreclosure sale unmarketable, since the purchaser acquires by subrogation all the rights of the prior incumbrancer. De Saussure v. Bollman, 7 Rich. (N. S.) (S. C.) 329.

[13] Day v. Kingsland, 57 N. J. Eq. 134, 41 Atl. Rep. 99.

[14] Wolverton v. Stevenson, 52 La. Ann. 1147, 27 So. Rep. 674.

formalities provided for in the instruments under which they act. If there should be any serious doubt as to the validity of the sale for any cause, such as want of due advertisement of the sale, misconduct of the trustee, collusion between the purchaser and the mortgagee or trustee, gross inadequacy of the price, and the like, and the rights of the parties affected by the sale have not become barred by the lapse of time, title dependent upon such sale will be deemed unmarketable, and not such as a purchaser may be required to take.[15]

§ 300. **Defective conveyances and acknowledgments. Imperfect registration.** A vast number of objections to title are founded upon errors or irregularities in the drafting, acknowledgment, and registration of deeds under which title is claimed. These, of course, may be absolutely fatal to the title, or, at least, render it doubtful; but many of them are merely captious or frivolous, being ferreted out by counsel to aid the purchaser in his escape from a losing bargain. They are principally questions of law suggested by clerical mistakes and inadvertent omissions on the part of those concerned in the execution and authentication of conveyances, such, for example, as the sufficiency of an informal and irregular certificate of acknowledgment; or the sufficiency of a deed in which the spelling of the name of the grantor in the body of the deed, differs from his signature to the deed. Of course, however, graver questions frequently arise; *e. g.*, whether the language employed by the grantor in the granting clause, is sufficient to create a certain interest, and the like. In either case, if the question admit of a reasonable doubt, the title depending thereon will not be forced upon the purchaser. The want of regular registration of deeds under which the vendor deduces title, there being no other proof of execution, is an insuperable objection to specific performance by the purchaser.[16]

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[15] Martin v. Hamlin, 176 Mass. 180, 57 N. E. Rep. 381. In Crutchfield v. Hewett, 2 App. D. C. 373, such a sale was set aside by the lower court after seventeen years' delay, for want of due advertisement and for other irregularities. The decree was reversed on the ground that the complainants had slept too long upon their rights. Failure of the abstract to show that the mortgage contained a power of sale, was not cured by a recital of such power in the sheriff's deed. Bradway v. Miller, 200 Mich. 648, 167 N. W. 15. Want of due notice of foreclosure made the title unmarketable. Foster & Co. v. Sayles, 213 Mass. 319, 100 N. E. 644.

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[16] Hyne v. Campbell, 6 T. B. Mon. (Ky.) 286. George v. Conhaim, 38 Minn. 338, 37 N. W. Rep. 391. The mere non-record of a deed executed by a referee in foreclosure proceedings does not render doubtful a title held thereunder, the court having confirmed the sale and directed the deed to be made. Calder v. Jenkins, 16 N. Y. Supp. 797.

ERRORS AND IRREGULARITIES IN THE DRAFTING, EXECUTION AND ACKNOWLEDGMENT OF INSTRUMENTS — *Titles held not marketable.* Whether a certain conveyance had been executed as an escrow or not: Sloper v. Fish, 2 Ves. & Bea. 145. Whether by a conveyance of lot "fifteen" in a certain block, lot fifteen in a subdivision of original lot fifteen was intended: Parker v. Porter, 11 Ill. App. 602. Where the description of the property in the deed to the vendor varied materially from that in a prior deed in the chain of title: Fitzpatrick v. Sweeny, 56 Hun (N. Y.), 159, 121 N. Y. 707. Where there is a mistake in the description of the premises in a deed under which the vendor holds: Smith v. Turner, 50 Ind. 367; Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527; such, for example, as the insertion of the word "east" instead of "west" in the description of the premises. Brown v. Reichling, 86 Kan. 640, 121 Pac. 1127. Where a tract of land was originally surveyed in a block with other lands, and from fixed monuments and other circumstances, it appears probable that there was a serious interference between the various tracts: Holt's Appeal, 98 Pa. St. 258. Whether a certificate of acknowledgment which failed to state that the grantors were known to the certifying officer to be such, etc., was sufficient: Fryer v. Rockefeller, 63 N. Y. 268; Paolillo v. Feber, 67 N. Y. Supp. 638, 56 App. Div. 241; Freedman v. Oppenheim, 81 N. Y. Supp. 110, 80 App. Div. 487. Where certificate of acknowledgment failed to show that the certifying officer was personally acquainted with the grantor: Mullins v. Aiken, 2 Heisk. (Tenn.) 535. Where the certificate of the clerk of court failed to state that he was acquainted with the officer's handwriting and believed his signature genuine: Freedman v. Oppenheim, 81 N. Y. Supp. 110, 80 App. Div. 487. Where the wife's acknowledgment of a deed under which the vendor claimed, was wanting: McCann v. Edwards, 6 B. Mon. (Ky.) 208. Where the certificate did not show prior examination of the wife: Hepburn v. Auld, 5 Cranch (U. S.), 267, 275. Whether parol evidence of the certifying officer could be received to show that the wife's acknowledgment was duly taken: Tomlin v. McChord, 5 J. J. Marsh. (Ky.) 135. Whether a certain informal certificate of acknowledgment of a deed by a married woman sufficiently showed that the grantor was known to the certifying officer, that the deed had been explained to the grantor, that she had been privily examined apart from her husband, and that she had declared that she had willingly signed, sealed and delivered the same: Black v. Aman, 6 Mackey (D. C.), 131. A title dependent on an acknowledgment of a married woman, taken before a party to the deed acknowledged, is not marketable. Withers v. Baird, 7 Watts (Pa.), 227, 32 Am. Dec. 754. And a title derived through a conveyance defectively acknowledged by a married woman, is un-

The general rule is that in so far as the title depends upon the

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marketable. Beardslee v. Underhill, 37 N. J. L. 309. Where a deed was recorded upon a certificate of acknowledgment before a commissioner of deeds for the State of New York, and was not accompanied by a certificate from the Secretary of State of the State of New York, showing authority on the part of said commissioner, and there was no extraneous evidence to show that the deed had been in fact acknowledged by the grantor, a title thence derived was held unmarketable. Williamson v. Banning, 86 Hun (N. Y.), 203 (33 N. Y. Supp.). In Irving v. Campbell, 121 N. Y. 353, 24 N. E. Rep. 821, 8 L. R. A. 620, the fact that a certificate of acknowledgment of a conveyance did not state the place of residence of the subscribing witness, was held to render the title unmarketable, though it appeared that the person and place of residence of such witness was well known. A title founded upon a decree against husband and wife to enforce specific performance of a contract by the husband to sell the wife's lands, is unmarketable, where it appears that there are no equities binding the wife in a suit, or that she had not released her rights in the manner provided by law. Hays v. Tribble, 3 T. B. Mon. (Ky.) 106. Where an abstract of title showed record title in "H. P. Hepburn" and no title out of him, but title out of "H. P. Hopkins," and the vendor claimed that the deed from Hopkins was in fact from Hepburn, but refused to submit his proofs for examination of the purchaser, it was held that the latter might reject the title and recover his deposit, though the vendor might be able to show that the title was good. Benson v. Shotwell, 87 Cal. 49, 25 Pac. Rep. 249. So, also, where the record title was in "K. F. Redmond" and the next conveyance was from "K. F. Redman," it was held that the two names were not *idem sonans*, and that the title was unmarketable, and that the defect was not cured by a second deed from K. F. Redman to the plaintiff's vendor, reciting that he was the same person as "K. F. Redmond" in the first-mentioned deed. Peckham v. Stewart, 97 Cal. 147, 81 Pac. Rep. 928. So, also, where a conveyance was by error made to "James M." instead of "Joseph M.," though the error was afterwards recited in a suit in which the premises were partitioned between the heirs of Joseph M. and one who had been his co-tenant, such recital and finding not being conclusive upon any one who should claim as "James M." Mead v. Altgeld, 136 Ill. 298, 26 N. E. Rep. 388. Whether a deed had been executed in the proper manner by an attorney in fact. Kohlrep v. Ramm, 79 N. J. Eq. 386, 81 Atl. 1103. Failure of trustee's deed to show a substantial consideration therefor. Slade v. Crum, (Tex. Civ. App.) 193 S. W. 723. Whether the date of an unrecorded deed determined its priority over a judgment. Tausk v. Siry, 180 N. Y. Supp. 439, 110 Misc. Rep. 514. Whether an unrecorded deed had been delivered. Johnston v. Garvey, 124 N. Y. Supp. 278, 139 App. Div. 659. Failure of the certificate to state that grantor was known to the certifying officer. Moran v. Stader, 103 N. Y. Supp. 175. Whether "Gerhard F. Terschuren, grantee in the chain of title, was the same person as "George F. Terschuren." Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315. Where the recorder struck out "Robbins" and inserted "Robben" as grantee in a deed made 38 years before. Robben v. Benson, (Cal. App.) 173 Pac. 766, but see S. C. 185 Pac.

execution, attestation, acknowledgment, and effect of conveyances,

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200. Whether a conveyance by "Noah C. Amsden" was to be treated as a conveyance by "Noah C. Anderson." Geithman v. Eichhler, 265 Ill. 579, 107 N. E. 180. Describing the land as being in a township other than that in which it lies. Bradway v. Miller, 200 Mich. 648, 167 N. W. 15. Describing the property as appearing on the "Whitman" instead of the "Pittman" plat. Boylan v. Wilson (Ala.) 79 So. 364.

Titles held marketable. Whether a conveyance under which the vendor claimed was a sealed instrument: Todd v. Union Dime Sav. Bank, 118 N. Y. 337, 23 N. E. Rep. 299, reversing 20 Abb. N. C. 270, and 44 Hun (N. Y.), 623. Whether the husband must join in a conveyance by an executrix: Tyree v. Williams, 3 Bibb (Ky.), 366; 6 Am. Dec. 663. Whether "Electa Wilder," under whom the vendor claimed, was one and the same person with "Electa Wilds," in whom appeared the record title up to the time of the conveyance by "Electa Wilder": Hellreigel v. Manning, 97 N. Y. 56; Lynch v. Rogers, 134 N. Y. Supp. 1071, 150 App. Div. 311. Whether signing a deed by a wrong name invalidates it, when the true name is recited in the body of the deed, and the grantor also acknowledges the deed by his true name: Middleton v. Findla, 25 Cal. 76. Whether "southeasterly" could be read "southwesterly" where the deed showed that southwesterly was intended. Brookman v. Kurzman, 94 N. Y. 272; Karsel v. Cooper, 149 N. Y. Supp. 977; Barsky v. Posey, (Del. Ch.) 98 Atl. 298; Clark v. Hutzler, 96 Va. 73, 30 S. E. Rep. 469; Maryland Const. Co. v. Kuper, 90 Md. 529, 45 Atl. 197. A misdescription of the boundary lines of the premises does not make the title doubtful, if the land may be clearly identified from the monuments and objects mentioned in the deed. Galvin v. Collins, 128 Mass. 525. See, also, Meyer v. Boyd, 51 Hun (N. Y.), 291, 295, 4 N. Y. Supp. 328. Where a deed under which the vendor claims describes the land as being on the south side of a river, but refers to a patent which places it on the west side, and the identity of the land appears, the misdescription does not render the title unmarketable. Newsom v. Davis, 20 Tex. 419. In the deed of a married man, his name alone appeared as grantor, but the wife's name was included in the *testimonium* clause, and she signed and acknowledged the deed. Held, that the omission of the wife's name in the body of the deed did not render the title unmarketable. Atkinson v. Taylor, 34 Mo. App. 442. The validity of a recorded deed is not affected by the failure of the notary to recognize his official seal in the *testimonium* clause of his certificate of acknowledgment. Mitchener v. Holmes, (Mo.) 22 S. W. Rep. 1070. Whether a certificate of acknowledgment before a mayor of a town, without a seal or other evidence of authority, is sufficient, forty years' possession having been had thereunder: Brown v. Witter, 10 Ohio, 143. Whether an acknowledgment by a married woman before a different officer and at a different time from her husband was valid, under a statute which merely required that, "in addition" to the husband's acknowledgment, the wife should declare, etc.: Ludlow v. O'Neil, 29 Ohio St. 182. Whether the language, "Personally came A. B., the executor of the annexed deed, and acknowledged it," was equivalent to "acknowledged the execution of the annexed deed:"

as they appear upon the record, they must be free from reasonable

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Davar v. Caldwell, 27 Ind. 478. A purchaser cannot reject the title on the ground that the probate of a deed under which the vendor claims does not contain the official title of the person taking the proof, when it can be shown that he was an officer authorized to take such proof at the time. Bronk v. McMahon, 37 S. Car. 309. The fact that the clerk made a short memorandum of an acknowledgment by a married woman, and afterwards wrote out the certificate in full and recorded it, the death of the married woman having supervened, does not affect a title derived under such certificate. Prewitt v. Graves, 5 J. J. Marsh. (Ky.) 114. Whether a certain deed of an executor sufficiently showed authority on his part to convey, there being no recital of a power to convey therein: Doody v. Hollwedel, 48 N. Y. Supp. 93, 22 App. Div. 456. Whether a certain deed executed by the owner of a lot divided by a public highway operated to convey the grantor's interest in one of the parts to the center of the highway, without words to that effect: Pell v. Pell, 73 N. Y. Supp. 81, 65 App. Div. 388 (aff'd). In Garden City Land Co. v. Miller, 157 Ill. 225, 41 N. E. Rep. 753, it was held that the failure of a deed in the vendor's chain of title to mention a meridian, or the county or State in which the land conveyed was situated, did not render the title unmarketable, there being evidence to show beyond dispute what land was intended to be conveyed. Where a decree of court required the vendor to execute a deed to the purchaser, which was done, and the deed was delivered to the court to be disposed of by its future order, the fact that the grantor died before the delivery of the deed to the grantee did not affect the validity of the deed, nor justify the purchaser in refusing to accept it. Faile v. Crawford, 54 N. Y. Supp. 264, 34 App. Div. 278. The vendor was permitted to show that O. L. Hildebrandt, named as a grantor in the abstract of title, was the same person as Levi Hildebrandt, previously named in the abstract as a grantee. Hollifield v. Landrum, (Tex. Civ. App.) 71 S. W. 979. See, also, Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623. Whether "B. W. Robbins" grantee in the chain of title, was same person as B. W. Robben. Evidence to show that no person of the name of B. W. Robbins had ever claimed the land, held admissible. Robben v. Benson, (Cal. App.) 185 Pac. 200. The purchaser's objection "Hannah" in the chain of title is spelled with one "n" in the deed to her, and with two in the deed from her, is frivolous. Kane v. Borthwick, 50 Wash. 8, 96 Pac. 516, L. R. A. 18 (N. S.) 486. Whether affidavits were admissible to show that "Felkel" was intended by "Falker" in the chain of title. Atteberry v. Blair, 244 Ill. 363, 91 N. E. 475, 135 Am. St. Rep. 342. Whether "Jennie L. Shafer," in a transfer of title to, was the same person as "Jennie Shafer" is a transfer of title from, a party in the chain of title. Cummings v. Dolan, 52 Wash. 496, 100 Pac. 989, 132 Am. St. Rep. 989. Whether "Schultz," in a certificate of acknowledgment, could be read "Schutz." Vett v. Schwob, 111 N. Y. Supp. 286, 127 App. Div. 171. Error of the certifying officer in spelling the name of the party is cured by his statement in the certificate that the party is known to him to be the one who executed the deed. Vett v. Schwob, 111 N. Y. Supp. 286, 127 App. Div. 171. Whether affidavits more than 50 years old, accompanying vendor's title papers were admissible to doubt upon their faces, and must have been properly and legally recorded, or be such as are legally entitled to be recorded.[17]

It sometimes happens that the date of a deed in the vendor's chain of title is subsequent to the date of the acknowledgment of the deed. Such a discrepancy will not of itself justify the purchaser in refusing to take a conveyance of the premises on the ground that the title is not clear. The certificate of acknowledgment is presumed to be correct, and will not be controlled by the date inserted in the deed. Even if the date of the deed were inserted subsequently the discrepancy would be immaterial, because the real date of a deed is the time of its delivery, which may be subsequent to the acknowledgment, and even after registration.[18]

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show correction of spelling of name of grantee in chain of title. Coleman v. Bruch, 117 N. Y. Supp. 582, 132 App. Div. 716. Whether error in description of land was cured by reference in one deed to another for further description. Nelson v. Butler, (Tex. Civ. App.) 190 S. W. 811. Where the point of beginning was described as being at the intersection of the northerly, instead of the southerly side of the street. Dougherty v. Carberry, 7 Pen. (Del.) 56, 75 Atl. 789. Whether a description giving three sides of a rectangular piece of land, but omitting the closing call, was sufficient. Barnum v. Lockhart, 75 Oreg. 528, 146 Pac. 975. Omission of the name of the grantee in a deed was cured by a purchase-money mortgage executed by such grantee and recorded at the same time with the deed. Heiberger v. Karfiol, 202 N. Y. 419, 95 N. E. 755. Failure of the abstract to show that grantor's wife joined in the deed with him, no valid objection where there was nothing to show that grantor had a wife when the deed was executed. Russell v. Wales, 104 N. Y. Supp. 143, 119 App. Div. 536. The title of a deceased vendor was not unmarketable from the fact that he held under a deed to himself "and his wife," not naming her — she tendering a deed as executrix and also in her own right. McArthur v. Weaver, 113 N. Y. Supp. 1095, 129 App. Div. 743.

[17] Harrass v. Edwards, 94 Wis. 459, 69 N. W. Rep. 69.

[18] Dresel v. Jordan, 104 Mass. 407.

REGISTRATION OF DEEDS, ETC.— *Titles held doubtful.* Whether an attachment levied upon land took priority over an unrecorded conveyance of the land: Mullins v. Aiken, 2 Heisk. (Tenn.) 535. Want of regular registration of deeds by which the vendor deduces title, there being no other proof of their existence, is a fatal objection to the title. Bartlett v. Blanton, 4 J. J. Marsh. (Ky.) 427. Where the law requires a will of lands, admitted to probate without the State, to be recorded within the State, the title will not be perfected and marketable until such record is made. Wilson v. Tappan, 6 Ohio, 172. A purchaser will not be compelled to take a title under a deed which is not recorded nor shown to have been executed as the law requires. Hyne v. Campbell, 6 T. B. Mon. (Ky.) 286. Harrass v. Edwards, 94 Wis. 459, 69 N. W. Rep. 69. Nor where the question is whether a recorded

§ 301. **Construction of deeds, wills, etc.** Perhaps the most difficult questions on which title to real estate depends, as between vendor and purchaser, are those which involve the true construction of some instrument, such as a deed or will, which forms a part of the vendor's muniments of title. In the law of contingent remainders, executory devises, restraints upon alienation, the creation of perpetuities, and the like, there are many niceties and subtleties, concerning which, as related to the peculiar circumstances of each case, the most learned in the law may well doubt. So, too, the true intent of a testator, whose will has been inartificially and unskillfully drawn, is often a question upon which different judges may entertain different opinions.[19] And oftentimes, with the aid of parol evidence to explain ambiguities in a

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deed had been in fact delivered. Johnston v. Garvey, 124 N. Y. Supp. 278, 130 App. Div. 659.

Titles held marketable. Whether an assignment of a mortgage was necessary to be recorded: Fryer v. Rockefeller, 63 N. Y. 268. Whether a certain conveyance recorded in the county clerk's office of New York county, but not recorded in the office of the register of deeds, was notice to a subsequent purchaser: Wagner v. Hodge, 34 Hun (N. Y.), 524. The fact that a deed under which the vendor claims is unregistered does not make the title doubtful when the grantor in such deed is dead, without creditors, and no subsequent sale is shown, and the grantee is in possession. Cotton v. Ward, 3 T. B. Mon. (Ky.) 304. The omission of a county clerk's certificate to state the name and official character of the officer taking the acknowledgment, may be supplied from the certificate of acknowledgment. And the absence of a date to such certificate is immaterial where not required by statute. So, also, the want of a seal to a county clerk's certificate of the official character of the certifying officer. Thorn v. Mayer, 33 N. Y. Supp. 664. The failure of a recorder of deeds to note the time when a deed was recorded will not affect the title, where the rights of no third person are concerned. Thorn v. Mayer, 33 N. Y. Supp. 664. The fact that a court commissioner's deed in the chain of title had been lost or mislaid, was no objection to the title — the commissioner standing ready to execute another deed. Sutton v. Davis, 143 N. C. 474, 55 S. E. 844. It is no objection to a title under a patent that the patent had not been recorded in the county where the land lies. Doppelt v. Geliebter, 173 Ill. App. 634. The fact that a deed in the vendor's chain of title was not attested in such manner as to entitle it to record, did not justify the purchaser in rejecting the title, in the absence of anything to show that the title had been prejudiced by the registration of the deed on an insufficient attestation. Cowdrey v. Greenlee, 126 Ga. 386, 55 S. E. 918.

[19] Wilson v. Vogel, 87 N. J. Eq. 584, 101 Atl. 173.

will, it is impossible to determine, beyond a reasonable doubt, to what persons or things the testator refers.[20]

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[20] CONSTRUCTION OF INSTRUMENTS — *Titles held doubtful.* Whether in a certain case there was an unlawful suspension of the power of alienation: Beams v. Mela, 10 N. Y. Supp. 429, 58 Hun (N. Y.), 588. Whether in a certain case the purchaser was required to see to the application of the purchase money: Garnett v. Macon, 6 Call (Va.), 308. St. Mary's Church v. Stockton, 8 N. J. Eq. 520. Whether a certain devise was governed by the rule in Shelley's case: Doebler's Appeal, 14 P. F. Smith (Pa.), 9. Monaghan v. Small, 6 Rich (N. S.) (S. C.) 177. Whether a certain deed absolute in form was in fact a mortgage: Cunningham v. Sharp, 11 Humph. (Tenn.) 116. Whether the designation of certain premises on a map of lots as a "wharf," and certain acts in connection therewith, amounted to a dedication of such premises to the uses of the prospective buyers of adjoining lots: Hymers v. Branch, 6 Mo. App. 511. Whether certain language in a deed was sufficient to show that the grantor intended thereby to convey his interest in a highway subject to the public use: Lee v. Lee, 27 Hun (N. Y.), 1. See, also, Mott v. Mott, 68 N. Y. 246; In re Ladue, 54 N. Y. Super. Ct. 528. Whether a quit claim or release by a married woman to a stranger will operate to divest her inchoate right of dower: Merchants' Bank v. Thomson, 55 N. Y. 7. Whether an inchoate right of dower is merged in a conveyance by the husband to the wife: People v. Life Ins. Co., 66 How. Pr. (N. Y.) 115. Whether a husband took a life estate or a fee under his wife's will: Butts v. Andrews, 136 Mass. 221. Whether a limitation over after the determination of a life estate was, in a certain case, void for remoteness: Lowry v. Muldrow, 8 Rich. Eq. (S. C.) 241. Whether a corporation under a conveyance to its president, "his successors and assigns," but without words of inheritance, took an estate in fee: Cornell v. Andrews, 37 N. J. Eq. 7. Whether a devisee took the estate with absolute power of alienation: Cunningham v. Blake, 121 Mass. 333; Starnes v. Allison, 2 Head (Tenn.), 221. Whether certain language in a will created an absolute or a conditional fee: Goerlitz v. Malawista, 56 Hun (N. Y.), 120; 8 N. Y. Supp. 832. Certain doubts arising upon the true construction of a will, held sufficient to make the title doubtful: Sims v. McElroy, 39 N. Y. St. Rep. 324, 14 N. Y. Supp. 241. Whether a certain assignment of a mortgage to the mortgagor as "trustee" amounted to an absolute release of the mortgage: Sturtevant v. Jaques, 14 Allen (Mass.), 523. Whether certain posthumous children of a testator were entitled to take under his will: Kilpatrick v. Barron, 125 N. Y. 751, 26 N. E. Rep. 925. Whether a certain remainder created by will was vested or contingent: Nelson v. Russell, 61 Hun (N. Y.), 528, 16 N. Y. Supp. 395; Ranhofer v. Realty Co., 126 N. Y. Supp. 230, 143 App. Div. 237. Whether a limitation of a fee upon a fee by way of executory devise was valid. The devise was held valid, and the title of one claiming under the first devise was held to be not such as a purchaser could be compelled to take. Smith v. Kimball, (Ill.) 38 N. E. Rep. 1029. Whether a certain trust authorized a sale of the trust subject

§ 302. **Competency and authority of parties to deeds.** The competency, power or authority of those who undertake to execute conveyances of lands, constitutes a most fruitful source of objections to title. The question may be one of fact, as whether the grantor was a minor, a lunatic or a married woman, or it may be a question of law, as whether the courts of one State have power and authority to appoint a commissioner to sell and convey lands in a sister State, or whether one conveying in pursuance of a power has exceeded his authority. A title dependent upon a conveyance executed by one admitted to be an infant or a person *non compos mentis* is absolutely bad, for such a deed is void. But if the fact of infancy or the want of contractual capacity be in dispute, and there be a reasonable doubt as to the existence of either, then the title is technically doubtful or unmarketable, and the purchaser will not be required to complete the contract. In a case in Kentucky, the court held that a title should not be declared doubtful because of the alleged insanity of a remote grantor, if the fact of insanity was left in doubt at the final hearing, nor, if insanity be fully established, unless it appear that the deed of such grantor had been in fact set aside, or probably would be in

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after the beneficiaries reached the age of twenty-one: Paget v. Melchoir, 58 N. Y. Supp. 913, 42 App. Div. 76. Whether, upon a true construction of the testator's will, his executors were authorized to sell his realty before his son arrived at the age of 21: Clouse's App., 192 Pa. 108, 43 Atl. 413. Whether a devise to A. "for his use, benefit, and behoof, in trust for his children" vested an estate in fee in A. on the theory that the language used was insufficient to create a trust estate: Marks v. Halligan, 70 N. Y. Supp. 444, 61 App. Div. 179. Whether a devise to testator's wife for life, the property "or what remains thereof" to go to a son in remainder, gave the widow an absolute power to sell and dispose of the property: Richards v. Knight, 64 N. J. Eq. 196, 53 Atl. 452. Whether, in a case of a limitation over upon the death of another, death in the lifetime of the testatrix was intended. Fisher v. Eggert, (N. J. Eq.) 64 Atl. 957. Whether a certain condition in a deed by heirs, requiring the payment of their ancestor's debts, was a condition subsequent. Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072. To what period the happening of a contingency, prescribed in a will, referred. Brant v. Clifford, (N. J. Eq.) 84 Atl. 206. Whether, in a devise, the words "lawful heirs" were to be construed the equivalent of "children." Harris v. Weed, 89 Conn. 214, 93 Atl. 232. Whether a devise of testator's realty to his wife was affected by the birth of a child to him after the execution of the proceedings already instituted for that purpose.[21] It is not easy to reconcile this decision with the rule that a purchaser cannot be compelled to take a title which will probably expose him to litigation. The same observation will apply to a decision that the incapacity of a corporation to take and hold real estate, does not

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will. Moore v. Elliott, 76 Wash. 520, 136 Pac. 849. Whether, under the true construction of a will, a fee vested in the children of testator living at the time of his death. Williams v. Bricker, 83 Kan. 53, 109 Pac. 998.

Titles held marketable. Whether in a certain case there was an unlawful suspension of the power of alienation: Kelso v. Lorillard, 85 N. Y. 177; Rice v. Barrett, 102 N. Y. 161, 6 N. E. Rep. 898. Cushing v. Spalding, 164 Mass. 287, 41 N. E. Rep. 297. Whether a conveyance by one of two devisees in remainder to the other with general warranty passed the interest of the grantor in remainder by estoppel to the other remainderman: Vreeland v. Blauvelt, 23 N. J. Eq. 483. Whether a certain limitation over upon the death of the first taker without issue was void for remoteness: Miller v. Macomb, 26 Wend. (N. Y.) 229. A testator devised his estate to his wife for life, but made no disposition of the remainder. Testator died without children or descendants, and the property having passed to the wife as heir at law, a purchaser from her was compelled to take the title. Lemon v. Rogge, (Miss.) 11 So. Rep. 470. Whether certain language in a deed or will created a life estate or a fee in the grantee or devisee: Cassel v. Cook, 8 S. & R. (Pa.) 268, 11 Am. Dec. 610. Whether a legacy in a certain case was an equitable charge on lands embraced in a residuary devise of the estate: Wiltsie v. Shaw, 29 Hun (N. Y.), 195. Whether a recital in a conveyance to school trustees "for the uses and purposes of the school district upon which to erect a schoolhouse" created a condition on which the property was to be held: Board of Education v. Reilly, 75 N. Y. Supp. 876, 71 App. Div. 468. Whether, in a certain case, a trustee should have been appointed to hold the legal title of property devised in trust, and make conveyances of the same: Cushing v. Spalding, 164 Mass. 287, 41 N. E. Rep. 297. Whether a sale of land charged with legacies operated to discharge the legacies: Waddell v. Waddell, 68 S. C. 335, 47 S. E. Rep. 375. Whether a conveyance in pursuance of a power was insufficient in that it did not refer to the power. Marden v. Leimbach, 115 Md. 206, 80 Atl. 958. Whether a power to testator's wife to dispose of his property as she saw fit, authorized a sale of his property by her. Welsh v. Davis, 125 Md. 37, 93 Atl. 221. Whether certain words in a will created a power to appoint testator's lands in fee. Mabry v. Brown, 162 N. C. 217, 78 E. E. 78. Whether the birth of a child to a devisee extinguished a condition subsequent that the devisee should have issue. Louisville Gas Co. v. Starin, 170 Ky. 819, 186 S. W. 669. Estates tail having been converted into fees simple by statute, it is no objection to the title that a deed, in the chain if title, was to the grantee "and her bodily heirs." Harrington v. Grimes, 163 N. C. 76, 79 S. E. 301.

[21] Hunt v. Weir, 4 Dana (Ky.), 347.

affect the validity of a title derived through the corporation,[22] unless it was thereby intended to decide that the State could not

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[22] Mo. Valley Land Co. v. Bushnell, 11 Neb. 192, 8 N. W. Rep. 389.

Competency, power or authority of parties — *Titles held doubtful.* In the following cases questions of law or of fact as to the authority or competency of parties to convey were held to render the title unmarketable: Whether a conveyance was executed by a person *non compos mentis:* Freetly v. Barnhart, 51 Pa. St. 279; Stobert v. Smith, 184 Pa. St. 34, 38 Atl. Rep. 1019; Brokaw v. Duffy, 165 N. Y. 391, 59 N. E. Rep. 196. Whether a power of sale conferred upon an executor can be exercised by his executor: Chambers v. Tulane, 9 N. J. Eq. 146. Whether a private act of the legislature empowering a life tenant to sell the remainder and convey a title in fee, was binding upon the remainderman: Bumberger v. Clippinger, 5 W. & S. (Pa.) 311. Whether a personal representative had power to assign a bid made by his intestate at a public sale: Palmer v. Morrison, 104 N. Y. 132, 10 N. E. Rep. 144. Whether a conveyance of lands lying in one jurisdiction, by an officer acting under the orders or decree of a court of another jurisdiction, is valid: Contee v. Lyons, 19 D. C. 207; Watts v. Waddle, 1 McLean. (U. S.), 200. See Corbett v. Nutt, 10 Wall. (U. S.) 464, and Watkins v. Holman, 16 Pet. (U. S.) 57. Whether a deed executed in pursuance of a parol power of attorney was sufficient to pass title: Jackson v. Murray, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec. 53. Whether the deed of a married woman executed by power of attorney as to which she was privily examined, was sufficient to pass her inchoate right of dower: Lewis v. Coxe, 5 Harr. (Del.) 401. Whether power of sale to executors, extended to lands of the testator which he had devised, but as to which the devise failed to take effect: Chambers v. Tulane, 9 N. J. Eq. 146. Whether a power of sale to executors had terminated: Bruner v. Meigs, 64 N. Y. 506. Whether an executor in a certain case had power under the will to sell realty: Alkus v. Goettmann, 39 N. Y. St. Rep. 324; S. C., 14 N. Y. Supp. 241; Droge v. Cree, 39 N. Y. St. Rep. 264; S. C., 14 N. Y. Supp. 300; Warren v. Banning, 21 N. Y. Supp. 883. Whether one of several joint executors had renounced his trust, the validity of a sale by the other executors under a power, being dependent upon such renunciation: Fleming v. Burnham, 100 N. Y. 1; 2 N. E. Rep. 905. Whether executors acting under a power had sold more land than was necessary for the purposes of the testator: Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. Rep. 1056. Whether a deed executed by one of two joint executors was sufficient — the will requiring the executors to act jointly in the settlement of the estate: House v. Kendall, 55 Tex. 40; Hilton v. Sowenfeld, 104 N. Y. Supp. 942. Whether a sale by an assignee in bankruptcy without an order of court was valid: Palmer v. Morrison, 104 N. Y. 132, 10 N. E. Rep. 144. Whether certain trustees of a religious society were competent to convey a good title, under a private act authorizing them to sell and convey, the property being liable to revert to the grantor if diverted from the purposes of the grant: Second Universalist Soc. v. Dugan, 65 Md. 460, 5 Atl. Rep. 415. Whether a church organization was competent to convey a fee where the title was vested in the church's "trustees insist upon a forfeiture of the estate in the hands of the grantee

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and their successors in office forever," and there was no conveyance from the trustees to the church: M. E. Church v. Roberson, (N. J. Eq.) 58 Atl. Rep. 1056. Whether, upon a true construction of testator's will, his executors were authorized to sell and convey his realty before his son reached the age of twenty-one. Clouse's App., 192 Pa. St. 108, 43 Atl. Rep. 413. Whether a married woman was competent, under the laws of Missouri, to execute a conveyance of her separate estate without her husband joining therein: Kennedy v. Koopman, 166 Mo. 87, 65 S. W. Rep. 1020. Whether, in a case in which testatrix created a trust in favor of a son, with power in him to dispose of the property at his death by will, but did not name a trustee, the son was competent to convey the legal title. McDougall v. Dixon, 46 N. Y. Supp. 280, 19 App. Div. 420. A power of attorney defectively acknowledged will not be held good as between the parties, if there be no other evidence of the execution of the power than the defective acknowledgment; and a title dependent on such power is not marketable. Freedman v. Oppenheim, 81 N. Y. Supp. 110, 80 App. Div. 487. In a case in which the title depended on the power of a religious corporation to convey land, and the purchase money was to be reinvested in other lands in trust for the corporation, the purchaser was relieved. St. Mary's Church v. Stockton, 8 N. J. Eq. 520. A sheriff's deed is insufficient to support a title thereunder, unless a record of the judgment and execution under which the sheriff acted, can be produced. Hampton v. Speeknagle, 9 S. & R. (Pa.) 212, 11 Am. Dec. 704; Weyand v. Tipton, 5 S. & R. (Pa.) 332; Wilson v. McVeagh, 2 Yeates (Pa.), 86. Distinguish Burke v. Ryan, 1 Dall. (U. S.) 94, where possession had gone with the deed for more than thirty years. In Smith v. Moreman, 1 T. B. Mon. (Ky.) 155, the vendor, complainant in a suit for specific performance, alleged that he held title under an execution sale, but failed to produce a judgment on which the execution issued, and his bill was dismissed. In Abbott v. James, 111 N. Y. 673, 19 N. E. Rep. 434, there was a devise of an entire estate in remainder to charitable societies, with power to the executor to sell the real estate and divide the proceeds among the societies. Under the laws of New York the devise was invalid, except as to one-half of the testator's estate. After the precedent estate determined, the executor sold the real estate under the power, but the title was held unmarketable: (1) Upon a question of fact, namely, the ability of the heirs to show that there was personal property enough to satisfy the devise to the societies; and (2) upon a question of law, namely, whether the power of sale failed as to so much of the real estate as could not pass to the charitable societies. A purchaser cannot be compelled to take a title dependent on a conveyance of a homestead estate to which the grantor's wife was not a party. Castleberg v. Maynard, 95 N. C. 281. Whether an executor had power to exchange instead of selling property. Turco v. Trimboli, 137 N. Y. Supp. 343, 152 App. Div. 431. Whether a sale and conveyance by executors, and, on the same day, a reconveyance by their grantee to one of them, was a valid transaction. Weintraub v. Seigel, 109 N. Y. Supp. 215, reversed on the evidence, 118 N. Y. Supp. 261, 133 App. Div. 677. See, also, Prentice v. Townsend, 127 N. Y. Supp. 1066, 143 App. Div. 151. Whether of the corporation. The purchaser will not be required to take

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a deed in the chain of title executed by a husband, was liable to be overturned in a divorce proceeding by the wife. Singleton v. Close, 130 Ga. 716, 61 S. E. 722. Where the record failed to show connection between two sets of trustees in the chain of title — the one set being grantees in one deed, and the other set grantors in a later deed. Reffon Realty Co. v. Adams L. Co., 128 Md. 656, 98 Atl. 199. Whether insanity of the wife of the vendor of community property rendered the vendor's title unmarketable. Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634. Whether certain Indians, through whom title was claimed, were of mixed blood. Geray v. Mahnomen Land Co., (Minn.) 173 N. W. 870. Whether an executor had power to accept stock in payment for land. Montrose Realty Co. v. Zimmerman, (N. J. Eq.) 73 Atl. 846. Whether a sale by the trustee of a charity, without the authority and approval of a court, was valid. Seif v. Krebs, 239 Pa. 423, 86 Atl. 872.

Titles held marketable. Whether an act authorizing administrators *c. t. a.*, to execute powers of sale, validated a sale under a will which was probated before the passage of the act: Blakemore v. Kimmons, 8 Baxt. (Tenn.) 470. Whether a certain will charged the testator's realty with the payment of his debts, and whether a power of sale was conferred on the executor: Coogan v. Ockershausen, 55 N. Y. Super. Ct. 286. Whether a power of sale in a conveyance to trustees for the benefit of a married woman was repugnant to the trust: Belmont v. O'Brien, 2 Kern. (N. Y.) 394. Whether a conveyance by an infant trustee under decree of court is valid: Thompson v. Dulles, 5 Rich. Eq. (S. C.) 370. Whether a power of sale had been properly executed: Saunders v. Guille, (Tenn. Ch.) 37 S. W. Rep. 999. Whether the deed of a corporation must show authority of officers to convey: Womack v. Coleman, 89 Minn. 17, 93 N. W. Rep. 663. Whether a certain devise to a religious corporation in 1882, in New York, was within the statutory limit, no question as to the validity of the devise having been raised by the heirs for more than fifteen years: Moskowitz v. Hornberger, 46 N. Y. Supp. 462, 20 Misc. Rep. 558. Whether a conveyance by trustees of the "Society of Shakers" verbally approved, was valid without formal action by the ministry and elders: Feiner v. Reiss, 90 N. Y. Supp. 568, 98 App. Div. 40. Whether, in a case in which the grantor, who had declared a trust reserving to himself the right to sell and convey the premises could convey an absolute estate, the beneficiary not joining in the deed: Griffith v. Maxfield, 66 Ark. 513, 51 S. W. Rep. 832. Whether a power of sale in the executors continued after all debts and legacies were paid: Hatt v. Rich, 59 N. J. Eq. 492, 45 Atl. 969. Whether a power of sale to executors embraced not only the territorial extent of the testator's lands but also all his interest in such lands: Hatt v. Rich, 59 N. J. Eq. 492, 45 Atl. Rep. 969. Whether, in a case in which land had been sold by a referee under a decree of court to carry out the provisions of the will, the referee was competent to convey the title, and a deed from the executor was unnecessary: Straus v. Benheim, 59 N. Y. Supp. 1054, 28 Misc. Rep. 660. Whether the declaration in a will that testatrix has only one child living is sufficient proof of that fact: Revol v. Stroudback, 107 La. 225, 31 So. Rep. 665. The fact that the maker of a power of attorney was described a title dependent upon a conveyance by a trustee, indirectly, to

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therein as "Mrs." when she did not sign as "Mrs." did not render the title unmarketable, there being testimony that she was unmarried. Revol v. Stroudback, 107 La. 295, 31 So. Rep. 665. Where property was devised in trust for the benefit of a daughter, but by codicil the trust was revoked and the devise to the daughter made absolute and unqualified, the power of the daughter to convey cannot be disputed, and a purchaser must take the title. Senning v. Bush, 23 Ky. Law R. 65, 62 S. W. Rep. 489. Defective execution of a power of sale under a will, held no objection to the title thereunder, where no one, for more than forty years, has attempted to take advantage of the defect. Binzen v. Epstein, 69 N. Y. Supp. 789, 58 App. Div. 304 (aff'd). Where a statute authorized personal representatives to specifically perform contracts for the sale of lands made by the testator or intestate during his lifetime, the fact that a testator devised *all* of his lands to his children, does not make doubtful or unmarketable the title which a purchaser of a part of such lands from the testator in his lifetime, will receive from the executor. The statute practically avoids the devise. Hyde v. Heller, 10 Wash. 586, 39 Pac. Rep. 249. The possibility that probate of a will may be revoked, will not affect the title of a purchaser from the executors under a power of sale, when no facts appear showing that probate will probably be revoked. Nor is the title invalidated by a failure of the executors to distribute the proceeds of the sale among those entitled. Seldner v. McCreery, 75 Md. 287, 23 Atl. Rep. 641. In Baker v. Shy, 9 Heisk. (Tenn.) 89, the alienage of the vendor's grantor was held not to render the title unmarketable. A title derived through a grantor who held for an alien, will not be held doubtful or unmarketable because the grantor had conveyed without a previous request from the alien, though he had covenanted with the alien to convey only upon such request. Ludlow v. Van Ness, 8 Bosw. (N. Y.) 178. Whether, where one of two executors qualified, the one so qualifying could exercise a power of sale given them by the will. Heiferman v. Scholder, 119 N. Y. Supp. 520, 134 N. Y. Supp. 579. Whether the purchase and foreclosure of a mortgage on the estate by the executor was valid — the beneficiaries of the estate having received the full benefit of the transaction. Weidenhold v. Koehler, 160 N. Y. Supp. 927, 174 App. Div. 139. Whether the invalidity of a sale by executors to one of themselves, was discounted, as an objection to the title, by the passage of the title through intervening innocent purchasers for value. Weintraub v. Seigel, 118 N. Y. Supp. 261, 133 App. Div. 677. Whether acquiescence by executors in a partition sale was sufficient in the place of a sale by them under a power in the will. Tolosi v. Lese, 104 N. Y. Supp. 1095, 120 App. Div. 53. Whether a power of sale could be executed by surviving executors. Danaher v. Hildebrand, 131 N. Y. Supp. 127, 72 Misc. Rep. 240. Whether executors could, under a power of sale, reconvey mortgaged property to the mortgagee in satisfaction of the mortgage. Clody v. Southard, 109 N. Y. Supp. 411. Whether an executor had power under the will to sell realty. Odell v. Claussen, 104 N. Y. Supp. 1104, 120 App. Div. 535; Connelly v. Putnam, 51 Tex. Civ. App. 233, 111 S. W. 164. Whether an oral declaration of trust, being invalid under the statute of frauds, rendered the vendor's title unmarketable. Eisler v. Halpern, 85 N. J. L. 139, 88 Atl. 831.

himself; as where the trustee conveyed to a stranger, and the stranger reconveyed to him.[23]

§ 303. **Title as dependent upon testacy or intestacy. Debts of decedent.** The bare possibility that a will may be discovered after the death of a decedent, does not render title by descent from him unmarketable.[24] Nor, it is apprehended, would the possibility of the discovery of a later will, where he dies testate, have that effect, unless there were circumstances sufficient to raise a reasonable doubt as to the existence of such a will. And a bare possibility that a decedent may have left debts for which his property would be liable, does not render the title of the heir doubtful, in the absence of anything to show the probable existence of such debts.[25]

Whether a release signed by one of two mortgagees, who were partners, was sufficient. Bachman v. Ennis R. E. & Inv. Co., 199 Mo. App. 674, 204 S. W. 1115. Where will directed property to be sold after death of life tenant and proceeds paid to remainderman, joinder of life tenant and remainderman in the deed made the title good. Sprowl v. Blankenbaker, (Ky.) 127 S. W. 496. Whether the affidavit of a grantee in the chain of title was admissible to supply the failure of the abstract to show whether such grantee was married or single when she acquired title. Singer v. Investment Co., 60 Wash. 674, 111 Pac. 886. Whether a party was estopped by his conduct to enforce a building regulation. Zelman v. Kaupherr, 76 N. J. Eq. 52, 73 Atl. 1048. Whether a certain act revoking the charter of the vendor, a corporation, was constitutional. Diamond State Iron Co. v. Husbands, 8 Del. Ch. 205, 68 Atl. 240.

[23] Gosman v. Pfistner, 80 N. J. Eq. 432, 83 Atl. 781.

[24] Moser v. Cochrane, 107 N. Y. 35, 13 N. E. Rep. 442; Schermerhorn v. Niblo, 2 Bosw. (N. Y.) 161; Disbrow v. Folger, 5 Abb. Pr. (N. Y.) 53; McDermott v. McDermott, 3 Abb. Pr. (N. S.) (N. Y.) 451, *dictum*.

[25] Moser v. Cochrane, 107 N. Y. 35, 13 N. E. Rep. 442; Spring v. Sandford, 7 Paige (N. Y.), 550; Keitel v. Zimmerman, 43 N. Y. Supp. 676, 19 Misc. Rep. 581; Garden City L. Co. v. Miller, 157 Ill. 225, 41 N. E. Rep. 753; Moore v. Taylor, (Md.) 32 Atl. Rep. 320; Wynkoop v. Shoemaker, 37 App. D. C. 258. The bare possibility of the existence of debts, or of omitted or posthumous children, does not make unmarketable a title founded on a sale by executors. Spencer v. Lyman, 27 S. D. 471; 131 N. W. 802. The fact that there was no probate settlement of the estate of one of the grantors in the chain of title, did not make the title unmarketable. Van Gundy v. Shewey, 90 Kan. 253; 123 Pac. 720; 47 L. R. A. (N. S.) 645. In Kling v. Realty Co., 166 Mo. App. 190, it was held that it was incumbent upon the vendor to show that there were no such debts. In Disbrow v. Folger, 5 Abb. Pr. (N. Y.) 53, the title was referred to a master for the purpose of ascertaining whether any such debts existed.

In a case in which title was claimed under a will executed in 1861, but not found until 1892, and not offered for probate until 1899, after objections to the title had been raised by a purchaser at a mortgage sale, it was held that the purchaser could not be compelled to take the title until the validity of the will had been adjudicated by a competent tribunal.[26] And in a case in which there had been no administration of the estate of a decedent through whom the title had descended, and a sufficient time had not elapsed to raise a presumption that administration would not yet be granted, the mere failure of the purchaser to show that there were debts due by the estate, was held no ground on which to compel him to take the title.[27] But if an estate be ultimately liable to the payment of legacies, in case the personalty prove insufficient, the purchaser cannot be compelled to take the title.[28]

It is presumed that no person died without heirs; consequently a vendor, claiming under an escheat to the State for want of heirs, must show that decedent left no heirs competent to take the land by descent.[29]

§ 303*a*. **Title under tax laws.** As tax titles depend upon a strict compliance with all the provisions of law under which tax sales are made, and as such sales have been held invalid for the most trifling matters, *e. g.*, the omission of the dollar mark from the head of a column of figures showing the amount of delinquent taxes in the advertisement of sale,[30] such titles have come to be looked upon with distrust and suspicion. But the mere fact that the vendor holds under a tax title will not justify the purchaser in rejecting the title as unmarketable in those States in which tax sales are by statute declared to be *prima facie* valid. He must be able to point out some particular fact, or show the reasonable probability of the existence of some fact, which would raise a fair question as to the validity of such sale.[31]

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[26] Chew v. Tome, 93 Md. 244; 48 Atl. Rep. 701.

[27] Chauncey v. Leominster, 172 Mass. 340; 52 N. E. Rep. 719. See, also, Ogooshevitz v. Arnold, 197 Mich. 203; 163 N. W. 946. The interest of a deceased purchaser who made partial payments on the land is realty, and his widow, who completed the purchase and took a deed, could not convey a marketable title. Abate v. Bianco, 128 N. Y. Supp. 271; 143 App. Div. 511. As to validity of title dependent upon purchase from an heir where no will has been probated, see Werner v. Wheeler, 127 N. Y. Supp. 158; 142 App. Div. 358.

[28] 1 Sugd. Vend. (8th Am. ed.) 572. Dickinson v. Dickinson, 3 Bro. C. C. 19. See, also, Platt v. Newman, 71 Mich. 112; 38 N. W. Rep. 720.

[29] In re Clark, 116 N. Y. Supp. 101; 131 App. Div. 688.

[30] Coombs v. O'Neal, 1 MacArth. (D. C.) 405.

An outstanding tax title does not render the title to the land unmarketable if entry thereunder be barred by lapse of time.[32]

There is, at least, one advantage in a tax title. The tax deed, being a grant from the State and evidencing a new and independent title, cuts off all such objections to the title as failure of the abstract to show competency of parties in the chain of title; the existence of apparently unsatisfied incumbrances; and many other objections too numerous to mention.[33]

§ 304. **INCUMBRANCES.** As a general rule an incumbrance upon the premises, so long as it may be removed by application of the purchase money, or where the vendor being solvent, offers to remove it or may be compelled to do so, furnishes no ground upon which the purchaser may refuse to complete the contract, or recover damages against the vendor.[34] But if both parties enter into the contract with the express understanding that the premises are free and clear of incumbrances, it may be doubted whether the purchaser would be compelled to take subject to an incumbrance, even though it could be discharged out of deferred payments of the purchase money.[35] If, however, the purchase money be presently due and the vendor can produce some one who is competent to receive payment of the incumbrance and execute a release or satisfaction piece, no reason is perceived why the purchaser should not be compelled to complete the contract.[36] The cases in which the existence of an incumbrance upon the premises will justify the purchaser in refusing to go on with the purchase, until the objection be removed, may be thus classified: (1) Those in which the existence of the incumbrance is admitted, or free from doubt; and (2) those in which the fact or existence of the incumbrance is a matter of doubt or dispute.

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[31] Gates v. Parmly, 93 Wis. 294; 66 N. W. Rep. 253; 67 N. W. Rep. 739. Chopin v. Pollet, 48 La. Ann. 1186; 20 So. Rep. 721. Mere possibility that notice of the tax sale was not given the owner, does not make the title thereunder doubtful. Rosenblum v. Eisenberg, 108 N. Y. Supp. 350; 123 App. Div. 896. The fact that the tax payer remains in possession of the premises, makes the title under the tax sale unmarketable. In re Safe Dep. & Tr. Co., 125 Md. 519; 94 Atl. 93. Where the abstract failed to show any judgment, precept, or affidavit on which a tax deed in the chain of title was based, and there was no proof of possession and payment of taxes under the deed, the title was held unmarketable. Koch v. Streuter, 232 Ill. 594; 83 N. E. 1072. In Matney v. Ratliff, 96 Va. 231; 31 S. E. Rep. 512, it appeared that a grantee of the Commonwealth had failed to enter the granted lands on the tax books and to pay taxes thereon for a number of years, in consequence of which the lands were forfeited to the Commonwealth. It was held no objection to the title of a subsequent grantee of the Commonwealth that there was no judgment, decree, inquest, or other matter of record showing the forfeiture of the lands to the Commonwealth by default of the first grantee. In Fitzpatrick v. Leake, 47 La. 1643; 18 So. Rep. 649, it was held that the purchaser could not be compelled to take the title unless the tax deed was produced and its *prima facie* effect was unimpaired by testimony. Where the vendor held under a tax sale, with a right in minors and others not *sui juris* to redeem from the sale within a year after removal of disabilities, it was held that an agreement by him to perfect the title was not performed by obtaining a decree quieting his title against unknown claimants. Williams v. Doolittle, (Iowa) 88 N. W. Rep. 350.

[32] Gosman v. Pfistner, 80 N. J. Eq. 432; 83 Atl. 781.

[33] Wilson v. Korte, 91 Wash. 30; 157 Pac. 47.

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[34] Ante, § 245. Post, § 308. 2 Sugd. Vend. (8th Am. ed.) 25 (425). The general rule is that a pecuniary charge upon the estate presents no objection to the title if the purchaser can be protected against it. Cox v. Coventon, 31 Beav. 378; Wood v. Majoribanks, 3 De G. & J. 329; 7 H. L. Cas. 806. Tiernan v. Roland, 15 Pa. St. 441; Pangborn v. Miles, 10 Abb. N. Cas. (N. Y.) 42; Ditchey v. Lee, 167 Ind. 267; 78 N. E. 972; Keepers v. Yocum, 84 Kan. 554; 114 Pac. 1063; Boyd v. Hoffman, 241 Pa. 421; 88 Atl. 675; Foor v. Bank & Tr. Co., 144 Ky. 682; 139 S. W. 840; Wren v. Cooksey, 147 Ky. 825; 145 S. W. 1116; Brewer v. Herbert, 30 Md. 301; 96 Am. Dec. 582, a case in which the decree provided that the incumbrance, a judgment against the vendor, be paid out of the purchase money. The vendor had also appealed from the judgment and executed an appeal bond covering the judgment and costs.

[35] Karker v. Haverly, 50 Barb. (N. Y.) 79; Chambers v. Tulane, 9 N. J. Eq. 146; Spencer v. Sandusky, 46 W. Va. 582; 33 S. E. Rep. 221. An obvious reason for this position is, that the existence of the incumbrance might prevent an advantageous resale by the purchaser. Besides if the purchaser, for reasons satisfactory to himself, chooses to insist upon a provision that the premises shall be free of incumbrances, who shall gainsay him, when he insists upon a literal performance of the agreement? Armstrong v. Coal Co., 67 W. Va. 589; 69 S. E. 195; Cooper v. Rutland, 99 S. C. 83; 82 S. E. 994. In Rothwell v. Schmidt, 248 Ill. 586; 94 N. E. 82, it was held that the court erred in entering a decree which required the purchaser to pay the purchase money and take the title, and required the vendor to pay off two mortgages out of the purchase money.

[36] Webster v. Kings Co. Trust Co., 80 Hun (N. Y.), 420; 30 N. Y. Supp. 357.

§ 305. **(1) Admitted incumbrances.** We have seen that an admitted pecuniary charge or lien upon the premises will excuse the purchaser from completing the contract unless the purchase money can be applied to its removal without subjecting him to loss, inconvenience or expense.[37] The vendor has a right to perfect the title by removing incumbrances.[38]

Strictly speaking, an incumbrance is not a defect in the title to an estate,[39] though such a defect may amount to an incumbrance. The technical legal definition of the word "incumbrance," as it relates to real property, is, any right to or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee by a conveyance of the land.[40] Hence, technically the legal title may be perfect, though the estate be incumbered to its full value, for the incumbrances may be paid off and the incumbrancer compelled to execute a release. But, if the title be imperfect, if the better right be outstanding in a stranger, there is no way in which his claim can be quieted without his consent. The courts, however, speak indifferently of incumbrances as well as adverse claims as constituting defects of title, and for all practical purposes they may be so regarded, especially if they be of the irremovable kind, such as easements, rights of way and other incorporeal rights.

A purchaser cannot be compelled to complete his purchase or accept the title if there is an incumbrance on the property which the vendor cannot or will not remove, and which the purchaser cannot himself remove by an application of the purchase money.[41] Of this kind are easements, servitudes, rights of way,[42] reserobjection. Pryor v. Buffalo, 112 N. Y. Supp. 437; White v. Savings Bank, 171 N. Y. Supp. 426; Prentice v. Erskine, 164 Cal. 446; 129 Pac. 585 (irrigation ditch, and dedication of right of way across the premises); Tandy v. Waesch, 154 Cal. 108; 97 Pac. 69; Wingard v. Copeland, 64 Wash. 214; 116 Pac. 670; De Voney v. Chiappi, 192 Ill. App. 437. Right of way reserved by railway company justifies rejection of title by purchaser. Dorsch v. Andrus, 111 Min. 287; 126 N. W. 1071; S. C. 133 N. W. 480. A right of way disused and fenced across for more than twenty-one years, is no objection to the title. Clody v. Southard, 109 N. Y. Supp. 411. Proceedings by a railway company and *lis pendens* to condemn a right of way through the premises, justify the purchaser in rejecting the title, though he might be entitled to receive the condemnation money. Miller v. Calvin Philips & Co., 44 Wash. 226; 87 Pac. 264. Telephone line, visibly in operation on the premises and enhancing the value of the property, did not make the title unmarketable. Sachs v. Owings, 121 Va. 162; 92 S. E. 997. Public highways and other incumbrances affecting the physical condition of the property, open to the observation of the purchaser, and presumably allowed for in the purchase money are no objection to the title. Ferguson v. Edgar, (Cal.) 171 Pac. 1061. The purchaser of a tanyard cannot be compelled to take the premises subject to an easement in the stream supplying the yard. Wheeler v. Tracy, 49 N. Y. Super. Ct. 208. A right on the part of a third person to have a drain pipe and water pipe across the premises sold, to the maintenance of which the purchaser must contribute, is a servitude upon the property amounting to an incumbrance, and entitles the purchaser to rescind. Kearney v. Hogan, 154 Pa. St. 112; 25 Atl. Rep. 1076; Hixson v. Hovey, 18 Cal. App. 230; 122 Pac. 1097. A space to be left for roads and levees by riparian owners is a legal servitude and does not constitute an incumbrance. Bourg v. Niles, 6 La. Ann. 77. A dedication of a part of the premises as a street is a fatal objection to the title. Turner v. Reynolds, 81 Cal. 214; 23 Pac. Rep. 546. Koshland v. Spring, 116 Cal. 680; 48 Pac. Rep. 58; Agens v. Koch, 74 N. J. Eq. 528; 70 Atl. 348. Dedication of unopened street, though not accepted and though purchaser saw map with street marked on it, made the title unmarketable. Simpson v. Klipstein, 90 N. J. Eq. 197; 105 Atl. 218. A right in third persons to pipe away water from a spring on the premises entitles the purchaser to relief. Melick v. Cross, 62 N. J. Eq. 545; 52 Atl. 16. So, also, a right to pipe oil across the land. Krotzer v. Clark (Cal.) 174 Pac. 657. The existence of a highway on the land, at best, only entitles the purchaser to a reduction of the purchase money by the amount that such highway reduces the value of the tract. Beach v. Hudson R. Land Co., 65 N. J. Eq. 426; 56 Atl. Rep. 157. Mere non-user of the right of way, though for a period of more than twenty years, is not sufficient to extinguish the right, in the absence of evidence of acts and possession hostile to the exercise of the right. Marshall v. Wenninger, 46 N. Y. Supp. 462; 20 Misc. Rep. 558. The selection and adoption of a railroad right of way across the premises, evidenced by a plan or map of the route returned by the company's engineers to its office, is such an incumbrance as justifies the purchaser in rejecting the title, though the vendor has not been completely divested of his title to the "right of way" vations of minerals,[43] building restrictions,[44] restrictions as to

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[37] Ante, § 245.

[38] Post, ch. 32; ante, ch. 19.

[39] Heimburg v. Ismay, 35 N. Y. Super. Ct. 35. Stephen's Appeal, 87 Pa. St. 207; Tiernan v. Roland, 3 Harris (Pa.), 441.

[40] Prescott v. Trueman, 6 Mass. 627; 3 Am. Dec. 249.

[41] 1 Sugd. Vend. (8th Am. ed.) 473 (312).

[42] Shackelton v. Sutcliff, 1 De G. & Sm. 609; Scripture v. Morris, 56 N. Y. Supp. 476; 38 App. Div. 377; Kerrigan v. Backus, 74 N. Y. Supp. 906; 69 App. Div. 329; Scott v. Beutel, 23 Grat. (Va.) 873; Hart v. Handlin, 43 Mo. 171, where, however, the purchaser was deemed to have waived the

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land by payment of the damages. Johnston v. Callery, 184 Pa. St. 146; 39 Atl. Rep. 73. A covenant running with the land, limiting the depth to which foundations might be sunk on a dividing line, and providing for the protection of existing foundations in case of building, is an incumbrance justifying rejection of the title. Leinhardt v. Kalcheim, 79 N. Y. Supp. 500; 39 Misc. Rep. 308. Where the evidence showed that the road or street had been abandoned by the municipal authorities and the public for more than twenty-five years, houses having in the meanwhile been built across it, the purchaser was compelled to complete the contract. Baldwin v. Trimble, 85 Md. 396; 37 Atl. Rep. 176; 36 L. R. A. 489.

[43] 1 Sugd. Vend. (8th Am. ed.) 473 (312). Adams v. Henderson, 168 U. S. 573; 18 Sup. Ct. Rep. 179. A reservation of mineral rights is no objection to the title if the evidence shows that there is no reason to believe that there are minerals in the land. Winne v. Reynolds, 6 Paige (N. Y.), 407.

[44] Wetmore v. Bruce, 118 N. Y. 319; 23 N. E. 303; Gilbert v. Peteler, 38 N. Y. 165; 97 Am. Dec. 785; Reynolds v. Cleary, 61 Hun (N. Y.), 590; 16 N. Y. Supp. 421; Nathan v. Morris, 62 Hun (N. Y.), 452; 17 N. Y. Supp. 13; Kountze v. Hellmuth, 67 Hun, 344; 22 N. Y. Supp. 204; Roussel v. Lux, 80 N. Y. Supp. 341; 39 Misc. Rep. 508; Jeffries v. Jeffries, 117 Mass. 184; McGlynn v. Maynz, 104 Mass. 263. Rayman v. Klare, 242 Pa. 448; 89 Atl. 591; Carlton v. Smith, 33 Ky. L. R. 647; 110 S. W. 673; Bull v. Burton, 227 N. Y. 101; 124 N. E. 227; Bacot v. Fessenden, 115 N. Y. Supp. 698; 130 App. Div. 819; McDougall v. Schneider, 118 N. Y. Supp. 861; 134 App. Div. 208; Altman v. McMillin, 101 N. Y. Supp. 970; 115 App. Div. 234; Levin v. Hill, 102 N. Y. Supp. 690; 117 App. Div. 472; Neagle v. Hudson, 144 N. Y. Supp. 221; Shea v. Evans, 109 Md. 229; 72 Atl. 600; Tandy v. Waesch, 154 Cal. 108; 97 Pac. 69; Evans v. Marsh, 38 App. D. C. 341; Krah v. Wassermer, 75 N. J. Eq. 109; 71 Atl. 404. A restriction against building within a certain distance of a street line is an incumbrance not susceptible of pecuniary compensation. Adams v. Valentine, 33 Fed. Rep. 1 (N. Y.). As to whether building restrictions run with the land and bind subsequent purchasers, see Trustees v. Lynch, 70 N. Y. 440; 26 Am. Rep. 615; Post v. Weil, 115 N. Y. 361; 22 N. E. Rep. 145. In Hoyt v. Ketcham. 54 Conn. 60; 5 Atl. Rep. 606, it was held that a restriction against cheap buildings was an interest which the grantor or his executor, with power to convey, might release by quitclaim deed to the holder of the title, and that such release removed an objection to the title founded on the restriction. A condition that no mill, factory, brewery or distillery shall be erected on the premises makes the title unmarketable. Batley v. Foerderer, 162 Pa. St. 460; 29 Atl. Rep. 868. A building restriction created by a former owner is not removed by a subsequent sale of the premises for taxes, and, therefore, remains a substantial objection to the title. Lesley v. Morris, 9 Phila. (Pa.) 110; 30 Leg. Int. 108. Building restrictions are no ground on which the title may be rejected, where they amount to a mere personal covenant not running with the land, and the covenant has been discharged by a conveyance of the land. Krekeler v. Aulbach, 65 N. Y. Supp. 908; 51 App. Div. 591. The purchaser is not required to

uses,[45] unexpired leases,[46] charges upon the property for the sup-

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search the records for building restrictions. Liebman v. Hall, 180 N. Y. Supp. 514; 110 Misc. Rep. 365. Garage held not within a certain building restriction. Goldstein v. Hirsh, 178 N. Y. Supp. 325; 108 Misc. Rep. 294. The court will not inquire whether the building restriction is beneficial or otherwise. Dethloff v. Viot, 158 N. Y. Supp. 522; 172 App. Div. 201, citing Wetmore v. Bruce, 118 N. Y. 319; 23 N. E. 303. The purchaser is not chargeable with notice of a building restriction created by the New York City board of estimate and apportionment. Lincoln Tr. Co. v. Williams Bldg. Corp'n., 169 N. Y. Supp. 1045; 183 App. Div. 225. That the restrictions do not affect the market value of the property is immaterial. Bull v. Burton, 164 N. Y. Supp. 997; 177 App. Div. 824. The purchaser is not obliged to take the property subject to restrictions contained in the deed under which the vendor holds. Bolognino v. Shotland, 147 N. Y. Supp. 981; 162 App. Div. 679. The building restrictions do not make the title unmarketable if they be inoperative under statute or other law. Bull v. Burton, 227 N. Y. 101; 124 N. E. 227. Where the contract was to convey by warranty deed, parol evidence was not admissible to show that building restrictions were to be inserted in the deed. Neff v. Rubin, 161 Wisc. 511; 154 N. W. 976.

[45] Dart. V. & P. (5th ed.) 119, where it is said that a covenant against certain trades being carried on on the premises is a serious defect in the title and should be stated in the particulars. Darlington v. Hamilton, Kay, 550; Bartlett v. Salmon, 1 Jur. (N. S.) 278; 6 De G., M. & G. 33. Supervisors v. Bedford High School, 92 Va. 292; 23 S. E. Rep. 299; Evans v. Marsh, 38 App. D. C. 341; Ingersoll Eng. Co. v. Crocker, 228 Fed. 844; 143 C. C. A. 242; Propper v. Colson, 86 N. J. Eq. 399; 99 Atl. 385; Krah v. Wassmer, 78 N. J. Eq. 305; 81 Atl. 1133; Bacot v. Fessenden, 115 N. Y. Supp. 698; 130 App. Div. 819; Eckel v. Spitzer, 111 N. Y. Supp. 459; Neff v. Rubin, 161 Wisc. 511; 154 N. W. 976. The court cannot decide to be immaterial a restriction as to uses which the parties agreed was a defect to be cured by release or allowed for in the purchase price. Carroll v. Trust Co., 115 N. Y. Supp. 660; 131 App. Div. 221; Flannagan v. Fox, 144 N. Y. 706; 39 N. E. 857. Premises not to be used as a slaughter-house, Raynor v. Lyon, 46 Hun (N. Y.), 227; tavern, Post v. Weil, 8 Hun (N. Y.), 418; reversed in 115 N. Y. 361; 22 N. E. Rep. 145, on ground that subsequent purchaser was not bound by the restriction; for any dangerous or offensive occupation. Terry v. Westing, 5 N. Y. Supp. 99. Any restriction of the right to use the land for any and all reasonable purposes is an incumbrance. Terry v. Westing, 5 N. Y. Supp. 99; Van Schaick v. Lese, 66 N. Y. Supp. 64; 31 Misc. Rep. 610. A covenant by a prior grantee not to create a nuisance on the premises is not an incumbrance to which a purchaser may object as a defect in the title, since the covenant is no more than what the law would oblige the grantee to refrain from doing independently of contract. Clement v. Burtis, 121 N. Y. 708; 24 N. E. Rep. 1013. A covenant binding the land that no intoxicating liquors should ever be manufactured or sold on the premises, renders the title unmarketable. Scudder v. Watt, 90 N. Y. Supp. 605; 98 App. Div. 40.

[46] Judson v. Wass, 11 Johns. (N. Y.) 525; 6 Am. Dec. 392; Tucker v. Wood,

port of particular persons,[47] inchoate rights of dower,[48] outstanding life interests,[49] outstanding contract interests,[50] proceedings in

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12 Johns. (N. Y.) 190; 7 Am. Dec. 305; Fuller v. Hubbard, 6 Cow. (N. Y.) 13; 16 Am. Dec. 423; Green v. Green, 9 Cow. (N. Y.) 46; Warner v. Hatfield, 4 Bl. (Ind.) 392; Coves v. Hallahan, 209 Pa. St. 224; 58 Atl. Rep. 158; Neagle v. Hudson, 144 N. Y. Supp. 221; Foland v. Italian Sav. Bank, 108 N. Y. Supp. 57; 123 App. Div. 598; Colpe v. Lindblem, 57 Wash. 106; 106 Pac. 634. A covenant for renewal of a lease, of which neither party is advised, relieves a purchaser from his agreement to take subject to the unexpired lease. Fruhauf v. Bendheim, 6 N. Y. Supp. 264; affd., 127 N. Y. 587; 28 N. E. Rep. 417.

[47] As to effect and validity of condition to support grantor, see Spaulding v. Hollenbeck, 35 N. Y. 204; Leach v. Leach, 4 Ind. 628; Berryman v. Schumaker, 67 Tex. 312. If the purchaser buys with notice that vendor's title is conditioned upon payment of an annuity charged upon the land, he must complete the contract. Ditchey v. Lee, 167 Ind. 267; 78 N. E. 972.

[48] Sugd. Vend. 572, 575 (382, 384). Parks v. Brooks, 16 Ala. 529; Lewis v. Coxe, 5 Harr. (Del.) 401; Andrews v. Word, 17 B. Mon. (Ky.) 518; Porter v. Noyes, 2 Greenl. (Me.) 22; 11 Am. Dec. 30; Clarke v. Redman, 1 Bl. (Ind.) 379. Contract for "good and lawful title," or conveyance "free from incumbrance," obliges vendor to furnish a deed with relinquishment of contingent right of dower. Thrasher v. Pinkard, 23 Ala. 616; Estep v. Watkins, 1 Bland (Md.), 486; Polk v. Sumter, 2 Strobh. (S. C.) 81; Jones v. Gardner, 10 Johns. (N. Y.) 266; Heimburg v. Ismay, 35 N. Y. Super. Ct. 35; Fitts v. Hoitt, 17 N. H. 530; Goodkind v. Bartlett, 153 Ill. 419; 38 N. E. Rep. 1045; Cowan v. Kane, 211 Ill. 572; 71 N. E. Rep. 1097; Vaughn v. Butterfield, 85 Ark. 289, 107 S. W. 993, 122 Am. St. Rep. 31; Eisler v. Halperin, 89 N. J. L. 278, 98 Atl. 245; Long v. Chandler, 10 Del. Ch. 339, 92 Atl. 256; Lazzell v. Keenan, 77 W. Va. 180, 87 S. E. 80. A statute merely authorizing the sale of the property of lunatics does not authorize the court or its officers to execute a deed which will bar a lunatic wife of her inchoate right of dower, and a purchaser from the husband and committee of a lunatic is not bound to accept such a deed. Dun v. Huether, 64 Hun (N. Y.), 18, 18 N. Y. Supp. 723. Where a wife was a party to a junior mortgage, but was not a party to the senior mortgage and the junior mortgage was foreclosed, and the purchaser thereunder made a party to a suit to foreclose the senior mortgage, it was held that the sale under the junior mortgage extinguished the wife's inchoate dower right, and that a title under a foreclosure of the senior mortgage was free from any claim on the part of the wife. Calder v. Jenkins, 16 N. Y. Supp. 797.

[49] Griffith v. Maxfield, 63 Ark. 548; 39 S. W. 852; Dikeman v. Arnold, 71 Mich. 656; 40 N. W. Rep. 42. In this case vendor was seised in fee of a part of the estate and entitled to a vested remainder in fee as to the other part. It was held that the purchaser could not be compelled to accept a conveyance of the whole and rely on his grantor's covenants of warranty in case he should be disturbed by the owner of the precedent particular estate.

[50] Gates v. Parmly, 93 Wis. 294; 66 N. W. Rep. 253; 67 N. W. Rep. 739.

eminent domain[51] dedication, or condemnation, or ordinance for appropriation of part of the land for street purposes;[52] unopened highways;[53] reservation of right of way for government ditch;[54] reservation for schoolhouse;[55] public servitudes[56] and the like. Wherever these materially lessen the value of the premises and cannot be compensated for by way of damages or abatement of the purchase money, specific performance at the suit of the vendor will be denied.[57] And the fact that the vendor is solvent and able to respond in damages for a breach of the contract is no ground upon which the purchaser can be compelled to accept the incumbered title.[58] We have already considered the question as to when easements affecting the physical condition of the property constitute a breach of the covenant against incumbrances.[59] The cases there cited are equally applicable to the question whether the existence of such easements entitle the purchaser to a rescission of the contract.

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[51] Cavanaugh v. McLaughlin, 38 Minn. 83; 35 N. W. Rep. 576; Evans v. Taylor, 177 Pa. 286; 35 Atl. 635. Contra, Nixon v. Moore, 190 Fed. 913; 111 C. C. A. 503; 36 L. R. A. (N. S.) 1067; but see the dissenting opinion of Sanborn, J., in that case. In Wagner v. Perry, 47 Hun (N. Y.), 516, it was held that the mere filing of a map by street commissioners, containing a plan for widening a street, the effect of which would be to cut off a part of a lot sold, would not entitle the purchaser to rescind the contract; the title not being affected until actual proceedings had been taken to widen the street and they might never be taken. See, however, Forster v. Scott, 136 N. Y. 577; 32 N. E. Rep. 976, and Daniel v. Shaw, 166 Mass. 582; 44 N. E. Rep. 991, where a different view seems to have been entertained.

[52] Grow v. Taylor, 23 N. D. 469; 137 N. W. 451; Evans v. Taylor, 177 Pa. 286; 35 Atl. 635; 69 L. R. A. 790; Atlantic Refining Co. v. Sylvester, 231 Pa. 491; 80 Atl. 1091; Shoub v. Dunbar, 256 Pa. 311; 100 Atl. 829; even though the ordinance was invalid and was afterwards set aside, Graybill v. Ruhl, 225 Pa. 417; 74 Atl. 239.

[53] Lombard v. Kies, 79 Oreg. 355; 154 Pac. 757.

[54] Cosby v. Danzinger, (Cal. App.) 175 Pac. 809.

[55] Reuthler v. Ramsin, 91 N. J. L. 262; 102 Atl. 351.

[56] Morgan v. Dibble (Cal. App.) 184 Pac. 704.

[57] O'Kane v. Kiser, 25 Ind. 168. Special assessments for improvements which add to the value of the property do not make the title unmarketable. Gotthelf v. Stranahan, 138 N. Y. 345; 34 N. E. 286; 20 L. R. A. 455; Blivis v. Franklin Inv. Co., 197 Mo. App. 369; 194 S. W. 1078; Cornelius v. Kromminga, 179 Iowa, 712; 161 N. W. 624.

[58] Ante, §§ 85, 246.

[59] Ante, §§ 126, 127.

The owner of a lot subject to a local building restriction has no such equitable easement in the other lots subject to that restriction as will entitle him to require the observance of the restriction, hence the violation of such restriction by other owners in the vicinity constitutes no incumbrance or defect in his title to which a purchaser may object.[60]

The rights of proprietors in a stream within the limits of their own respective properties are not easements with respect to other persons through whose premises the stream flows; hence, the fact that a stream flows through the purchased land can be no objection to the title. The purchaser is bound to take notice of the physical condition of the property, and his contract is conclusively presumed to have been made subject to such condition.[61] A contract, to give a "good and sufficient title," will not oblige the vendor to extinguish a perpetual rent charge on the premises, where the contract expressly provides that the purchaser shall take subject to such charge.[66] Where the contract refers to the land sold as the same *described in a certain deed,* and provides for a conveyance of the same free from incumbrances, and a deed is tendered describing the land precisely as described in the deed referred to, the purchaser cannot reject such deed on the ground that there is a private right of way over the premises.[63]

A party wall standing equally upon the land of both parties, is not, it seems, such an incumbrance as will justify the purchaser in rejecting the title;[64] especially if he buys with knowledge of the existence of the party wall.[65] But it was held that he was entitled to rescind in a case in which the wall stood wholly upon the premises sold, and there was a perpetual covenant running with the land which bound the owner to share equally with the adjoining owner the expense of repairing or rebuilding the wall, and required that when rebuilt the wall should be of the same size and like materials.[66]

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[60] Mead v. Martens, 47 N. Y. Supp. 299; 21 App. Div. 134.

[61] Archer v. Archer, 84 Hun (N. Y.), 297; 32 N. Y. Supp. 410.

[62] Topliff v. Atlanta Land & Imp. Co., 66 Fed. Rep. 853; 13 U. S. App. 733.

[63] Heppenstall v. O'Donnell, 165 Pa. St. 438; 30 Atl. Rep. 1003.

[64] Hendricks v. Stark, 37 N. Y. 106. (Compare Corn v. Bass, 59 N. Y. Supp. 315; 43 App. Div. 53.) Levy v. Hill, 75 N. Y. Supp. 19; 70 App. Div. 95; Scannel v. Soda Fountain Co., 161 Mo. 606; 61 S. W. Rep. 889; unless it depreciates the value of the property. Cushman v. Bean, 226 Mass. 198; 115 N. E. 574.

[65] Driscoll v. Carroll, 111 N. Y. Supp. 246; 127 App. Div. 265.

The existence of a party wall covenant is, of course, no objection to the title if the covenant be so drawn as not to run with the land; as where it was specifically provided that the covenant should remain in force so long as the parties, or their legal representatives, should hold the title.[67]

We have seen that the purchaser cannot refuse to complete the contract if he was informed of the existence of the incumbrance when he purchased.[68] But if the vendor represent that there are incumbrances to a certain extent only on the property, and other incumbrances appear, the purchaser cannot be compelled to go on with the contract.[69] Or if the purchaser protects himself by a positive provision in the contract that there shall be no incumbrance on the title, the fact that he knew of an incumbrance, such as an unopened street across the property at the time of the contract, is immaterial and he cannot be compelled to pay the purchase money.[70]

Incumbrances affecting the physical condition of the property, such as a public highway, open to the observation of the purchaser and presumably considered by him in estimating the value of the property, constitute no valid objection to the title.[71]

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[66] O'Neil v. Van Tassel, 137 N. Y. 297; 33 N. E. Rep. 314, distinguishing Hendricks v. Stark, *supra*. (Compare Schaefer v. Blumenthal, 169 N. Y. 221; 62 N. E. Rep. 175.) The purchaser may insist that a mortgagee of the contiguous lot shall consent to a proposed cancellation of a party-wall agreement. Maupai v. Jacobs, 124 N. Y. Supp. 220; 139 App. Div. 524.

[67] Kahn v. Mount, 61 N. Y. Supp. 358; 46 App. Div. 84; Hayden v. Pinchot, 158 N. Y. Supp. 215; 172 App. Div. 102.

[68] Ante, § 85.

[69] Park v. Johnson, 7 Allen (Mass.), 378. In Blanck v. Sadlier, 153 N. Y. 551; 47 N. E. Rep. 520, it was held that one who purchased at an auction sale in 1894, subject to a mortgage, was not entitled to rescind and recover his deposit on the ground that the conditions of sale failed to state that the mortgage was payable in gold instead of currency, there being no probability that the United States would during the life of the mortgage (three years) refuse to redeem its obligations in gold. See, also, Frank v. Frank, 108 N. Y. Supp. 549; 123 App. Div. 802.

[70] Evans v. Taylor, 177 Pa. 286; 35 Atl. 635; Bacot v. Fessenden, 119 N. Y. Supp. 464; 64 Misc. Rep. 422; Eriksen v. Whitescarver, 57 Colo. 409; 142 Pac. 413; right of way for irrigation ditch across the premises.

§ 306. **(2) Incumbrances which make the title doubtful.** If there be serious doubts as to whether an incumbrance upon the premises, apparent from the records, has not been satisfied, or if there be an issue or dispute between the vendor and the incumbrancer as to that fact, the purchaser will not be required to take a title so burdened.[72] He will not be compelled to buy a law suit. Especially does this rule apply where the doubts about the discharge of the incumbrance must be removed by parol testimony, and the lapse of time is constantly decreasing the means for that purpose.[73] Neither will the purchaser be compelled to complete the contract when the existence of the incumbrance, or its extension to the purchased premises, is a doubtful question of law or fact.[74] Nor where the incumbrance is inchoate and undetermined in its character, *e. g.*, an attachment levied upon the estate of the vendor in the land.[75] Nor where the incumbrance, a mortgage, contains unusual covenants or restrictions burdensome on the purchaser.[76] But it has been held that a *lis pendens* without evidence to show that it is founded upon a just claim, is no such incumbrance as will justify a purchaser in refusing to perform the contract.[77] And a mortgage duly executed, acknowledged and recorded, but not accepted by the mortgagee, and, therefore, of no force and effect, though apparently a lien upon the premises, is no ground upon which a purchaser can rescind the contract.[78] So, also, a mortgage invalid because executed by one having no authority, creates no objection to the title.[79] After a judgment for the defendant, on the issue of payment, in a suit to recover the amount of the incumbrance from him as a personal liability, to which suit all persons in interest were parties, the incumbrance no longer presents an objection to the title.[80]

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[71] Ante, p. 852. Hornbeck v. Smith, 87 Oreg. 78; 168 Pac. 633.

[72] Rife v. Lybarger, 49 Ohio St. 429; 31 N. E. Rep. 768; Foster etc. Co. v. Sayles, 213 Mass. 319; 100 N. E. 644. In Richards v. Mercer, 1 Leigh (Va.), 125, a purchaser was compelled to complete the contract, though there was a mortgage on the premises, and nothing but "strong grounds" for believing that it had been satisfied. In Wesley v. Eels, 177 U. S. 370; Sup. Ct. Rep. the vendor claimed that a purchase-money mortgage on the premises in favor of the State of South Carolina had been discharged, under the laws of that state by a tender of certain "revenue bond-scrip" issued by the state. The state courts having decided that the issue of such paper by the state was unlawful the Supreme Court held that the purchaser could not be compelled to take the title with the burden of showing the error of that decision in future litigation.

[73] Moore v. Williams, 115 N. Y. 586; 22 N. E. Rep. 233.

[74] Dyker Meadow L. & I. Co. v. Cook, 159 N. Y. 6; 53 N. E. Rep. 690; Wilson v. Bolen, 152 Ill. App. 210; Alling v. Vanderstucken, (Tex. Civ. App.) 194 S. W. 443. An excellent illustration of this proposition is afforded by the well-considered case of Moore v. Williams, 115 N. Y. 586; 22 N. E. Rep. 233; 23 Abb. N. Cas. 404. There the vendor, in answer to the objection that a certain judgment against a prior owner was a lien upon the land, attempted to show that the land, at the time of the judgment, was the property of a firm of which the judgment debtor was a member, and, consequently, was not bound by the judgment. But the court held that the purchaser could not be compelled to take the title so incumbered, since he might not have the means of showing the facts respecting the judgment, if his title should afterwards be questioned or attacked. In Richmond v. Koenig, 43 Minn. 480; 45 N. W. Rep. 1093, the objection to the title was that there were unsatisfied judgments against a former owner of the land. The vendor replied that the

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judgments were not liens because the land was the homestead of the former owner. There were facts in evidence which made it doubtful whether such owner had lost his right of homestead by leaving the State, and it was held that the purchaser could not be compelled to complete the contract. A judgment appearing on the record against a joint defendant, who was not served with process, is no lien on his land, and therefore no ground of objection to his title. Wessel v. Cramer, 67 N. Y. Supp. 425; 56 App. Div. 30. A judgment is also no ground of objection to his title if the time during which, by statute, it is a charge or lien on lands, has expired. Wessel v. Cramer, 67 N. Y. Supp. 425; 56 App. Div. 30.

[75] Linton v. Hichborn, 126 Mass. 32; Grames v. Timber Co., 215 Fed. 785. Attachment will not avoid the sale if the vendor is willing to permit the purchaser to retain enough of the purchase money to indemnify him against a possible judgment against the former. Borden v. Borden, 5 Mass. 67; 4 Am. Dec. 32.

[76] Elterman v. Hyman, 192 N. Y. 113; 84 N. E. 937; 127 Am. St. Rep. 862.

[77] Ante, §§ 124, 290. Wilsey v. Dennis, 44 Barb. (N. Y.) 354. Compare Earl v. Campbell, 14 How. Pr. (N. Y.) 330. Of course, an attachment procured by collusion of the purchaser is no ground of objection to the title. Brown v. Bellows, 4 Pick. (Mass.) 179. And if the attachment and *lis pendens* be discharged before decree, the vendor will be entitled to specific performance. Daniel v. Smythe, 5 B. Mon. (Ky.) 347. Haffey v. Lynch, 143 N. Y. 241; 38 N. E. Rep. 298.

[78] Wilsey v. Dennis, 44 Barb. (N. Y.) 354.

[79] Glasscock v. Robinson, 21 Miss. 85.

[80] Young v. Hervey, 207 Pa. 396; 56 Atl. 946.

In a case in which the grantee reconveyed the premises by way of mortgage to the grantor, and afterwards reconveyed them by absolute deed to the grantor, it was held that the latter conveyance extinguished the mortgage, the legal and equitable estate having become united in one and the same person; the lesser, the equitable estate, having become merged in the greater, the legal estate. Hence, a subsequent purchaser of the legal estate could not reject the title on the ground that the mortgage was an outstanding lien on the property.[81]

The rule that a purchaser cannot be compelled to take a doubtful title applies as well where the doubt is as to the existence and enforceability of an incumbrance upon the premises as where the doubt is as to existence of some fact, or the construction of some instrument upon which the title is founded.[82] Thus, where the purchaser objected that the premises were subject to a railroad mortgage, and the vendor insisted that the railroad company had no power to execute the mortgage, and that the mortgage was further invalid in that it contained no particular description of the property which it was intended to cover, the court held the purchaser's objection good, without deciding whether the mortgage was or was not valid.[83] So, also, where the question was whether the reservation of a railroad right of way across the premises was valid.[84]

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[81] Krekeler v. Aulbach, 64 N. Y. Supp. 908; 51 App. Div. 591.

[82] In Garnett v. Macon, 6 Call (Va.), 308, 369, it was claimed that the rule that a purchaser could not be compelled to take a doubtful title did not apply where the objection was that the estate was incumbered. But MARSHALL, Ch. J., said: "This allegation is not, I think, entirely correct. The objection is not entirely confined to cases of doubtful title. It applies to incumbrances of every description which may in any manner embarrass the purchaser in the full and quiet enjoyment of his purchase. In Rose v. Calland, 5 Ves. 189, the property was stated to be free of hay tithe, and there was much reason to believe that the statement was correct. But the point being doubtful, the bill of the vendor praying a specific performance was dismissed. There is certainly a difference between a defined and admitted charge, to which the purchase money may by consent be applied when it becomes due, and a contested charge which will involve the purchaser in an intricate and tedious law suit of uncertain duration." See, also, Christian v. Cabell, 22 Gratt. (Va.) 82; Hendricks v. Gillespie, 25 Gratt. (Va.) 181; Kenny v. Hoffman, 31 Gratt. (Va.) 442; Griffin v. Cunningham, 19 Gratt. (Va.) 571.

[83] Nicol v. Carr, 35 Pa. St. 381. *Titles held not marketable.* Whether certain building restrictions were intended as a condition defeating the

The obligation of the purchaser to see to the application of the purchase money in certain cases of defined and limited trusts, is, strictly speaking, perhaps not an incumbrance upon the estate, but it is a burden upon the purchaser which, it seems, will excuse him from performing the contract. The estate is obviously of less value to him if he must incur the expense and responsibility of seeing that the purchase money is reinvested upon the same trusts as those under which he purchased. It has even been held that he may refuse to complete the contract if the case be one in which the duty of the purchaser to see to the application of the purchase money is a doubtful question dependent upon the construction of the instrument creating the trust.[85]

In theory a pecuniary incumbrance which is less in amount than the purchase money is, as a general rule, no objection to the

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estate, or merely as a proviso for the benefit of adjacent lots: Jeffries v. Jeffries, 117 Mass. 184. Whether a certain $4,000,000 railroad mortgage was a valid lien on the purchased premises. Nicol v. Carr, 35 Pa. St. 381. *Titles held marketable.* Whether certain lots, in a subdivision of a lot originally charged with the maintenance of a fence along a railroad, were burdened with such charge: Walsh v. Barton, 24 Ohio St. 28. Whether a release of a certain building restriction had ever been executed: Post v. Brenheimer, 31 Hun (N. Y.), 247. Whether a vendor is bound to produce a release of legacies charged on the purchased premises, the legacies having been in fact paid: Cassell v. Cooke, 8 S. & R. (Pa.) 268, 292; 11 Am. Dec. 610.

[84] Bruegger v. Carter, 29 N. D. 575; 151 N. W. 34.

[85] St. Mary's Church v. Stockton, 8 N. J. Eq. 520, 531. A charter under which the vendors (certain church officials) held in this case, contained a proviso that in case of a sale of the premises granted, lands of the full value of those sold should with the proceeds of the sale be purchased and settled for the uses declared in the charter. The court observed: "Without examining particularly the doctrine as to the duty of purchasers to see to the application of the purchase money, and the distinctions which prevail on this subject, it is sufficient to say that this proviso might be a serious embarrassment to a purchaser. He would be subjected to the issue of the question whether the purpose to which the money arising from the sale is required to be applied be of a definite and limited or of a general and unlimited nature. If the first, he would, as it seems from the authorities, be bound to see that the purchase money was applied to the purpose mentioned in the proviso. Story's Eq. Jur. § 1127." Garnett v. Macon, 6 Call (Va.), 308.

title, because the purchase money may be applied to the discharge of the incumbrance and the incumbrancer be compelled to join in the conveyance or to execute a release.[86] But it is obvious that circumstances might exist which would make the incumbrance a serious objection to specific performance by the purchaser. The property may have been purchased with a view to speedy resale as a speculation, and difficulty may be encountered in finding a person competent to release the incumbrance, particularly if created by a remote owner of the property, or if passed by assignment to a third party. In such a case it is apprehended that time would be deemed of the essence of the contract and the purchaser be relieved from the bargain. We have seen that in a case in which the facts entitle the purchaser to a rescission of the contract on the ground that the estate is incumbered, the fact that the incumbrance is less in amount than the unpaid purchase money will not affect the right to rescind if the purchase money be not yet due, especially if the vendor be insolvent, and there be danger that the incumbrance will be enforced, and that the purchaser will lose the property.[87] The fact that the unpaid purchase money may be applied to the discharge of an incumbrance does not affect the purchaser's right to rescind, if the vendor fraudulently concealed the existence of the incumbrance.[88]

The extreme improbability that a valid and subsisting incumbrance upon the premises will ever be enforced renders the title none the less liable to objection. When once it is ascertained that the incumbrance exists, specific performance by the purchaser will not be enforced on the ground that it is doubtful whether the incumbrance will ever be foreclosed.[89]

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[86] Ante, §§ 245, 305.

[87] Ante, ch. 24, § 246. Peak v. Gore, 94 Ky. 533.

[88] Crawford v. Keebler, 5 Lea (Tenn.), 547. Peak v. Gore, 94 Ky. 533.

[89] Seaman v. Hicks, 8 Paige (N. Y.), 665; Hendricks v. Gillespie, 25 Grat. (Va.) 181, 200; Butler v. O'Hear, 1 Des. Eq. (S. C.) 382; 1 Am. Dec. 671. If any person has an interest in or claim upon the estate which he may enforce, a purchaser cannot be compelled to take the estate, however improbable it may be that the right will be exercised. 1 Sugd. Vend. (8th Am. ed.) 590; Drew v. Corporation, etc., 9 Ves. 368, where the vendor was entitled to an absolute term of 4,000 years in the estate, and also to a mortgage of the reversion, which had been forfeited but not foreclosed. In

§ 307. **Apparently unsatisfied incumbrances.** It seems that incumbrances upon the purchased premises which do not appear

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Brooklyn Park Com. v. Armstrong, 45 N. Y. 234; 6 Am. Rep. 70, the defendant purchased certain lands which the plaintiffs, a park commission, held for public purposes; but were authorized to sell by act of the legislature, the fund so realized to be applied to the redemption of bonds issued to obtain funds wherewith to acquire such lands, which bonds were made a lien on the lands in question. One of the objections to the title was the existence of these bonds as a lien on the land. The objection was deemed sufficient, the court saying: "It is true that the danger to the purchaser, to all seeming, is very slight and very remote, that the premises for which he has contracted will ever be called upon to contribute to the payment of these bonds. The probabilities are, that with the wealth concentrated within the corporate bounds of the city of Brooklyn, and with the means at its command, it will always find the ordinary means of raising money by taxation sufficient for the purpose of payment of interest, and the method of a new loan at any time available to pay the principal. But yet there is the possibility. The debt is an incumbrance upon the land, and does affect that for which the appellant bargained. This is a legal certainty. However strong the probability that the debt will never be exacted from the land, it cannot be asserted to be more than a probability. While it exists there is, as matter of law, and matter of fact, the possibility that the creditor may enforce his lien. And this hampers the estate. It may be conceded that a title free from reasonable doubt may be forced upon an unwilling purchaser. Thus, in a case in which it appeared that there was in a prior deed, a reservation of mines, specific performance was decreed, not because there being mines it was not probable that the right reserved would ever be exercised, but because: First. The court saw upon examination the probability was great that there were no mines for the right reserved to act upon. Second. That all legal right to exercise it had ceased. But this is a doubt whether there exists in law or in fact, any defect in the title. When it is ascertained that there is an existing defect in the title, the purchaser will not be compelled to perform on the allegation that it is doubtful whether the defect will ever incommode him." In Rife v. Lybarger, 49 Ohio St. 429; 31 N. E. Rep. 768, the only cloud upon the title was an uncanceled mortgage made to secure certain notes which had become barred by statute. The mortgagee was dead, his estate solvent, and his widow and heirs had quitclaimed any interest which they might have to the vendor. The purchaser was compelled to take the title. The court by BRADBURY, J., lucidly said: "If the title is such that it ought to satisfy a man of ordinary prudence it is sufficient. In the case under consideration, the title was perfect, but was subject to a mere possibility that a claim might be asserted on an old uncanceled mortgage against which full indemnity was tendered. Under such circumstances the objection presents all the features of an excuse for the non-performance of a contract no longer desirable. It is said that the vendees bought the land with a view to its subdivision into town lots and its immediate resale, which purpose was well known to the vendor, and that by reason of this incumbrance, they lost a sale at a con-by the record to have been satisfied will render the title doubtful or unmarketable,[90] even though the vendor be able to show by parol testimony that they have been satisfied.[91] They constitute a cloud upon the title, which the vendor should remove before calling upon the purchaser to complete the contract. The means of showing the satisfaction of the incumbrance may not be within the purchaser's reach, if an attempt to enforce the incumbrance should be made, or if the existence thereof should be urged as an objection to his title. In certain of the States there are statutory provisions for summary proceedings by which the owner of an estate may compel an incumbrancer to enter the fact of satisfaction of the incumbrance on the record.[92] Where the vendor is in possession of evidence which would entitle him to such an entry he should procure it to be made. If he have not such evidence, the purchaser should be relieved from the contract. If, however, the purchase money remains unpaid so that it can be applied to any incumbrance upon the premises, or if the vendor can show that he is able to satisfy the incumbrance, it has been held that the fact that the incumbrance appears unsatisfied of record will not entitle the purchaser to rescind.[93] It seems that if

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siderable advance on the price they were to pay. This may be true, but the vendor is no more to be affected by the captious objections of possible purchasers of the vendees, than by similar objections on the part of the vendees themselves. Whether the sale should be of the entire purchase as a whole or in parcels upon its subdivision into building lots, a perfect title free from any reasonable apprehension of danger from this possible lien, could be made to contemplating purchasers.

[90] Mahoney v. Allen, 42 N. Y. Supp. 11; 18 Misc. 134; Agens v. Koch, 74 N. J. Eq. 528; 70 Atl. 348.

[91] Sachs v. Owings, 121 Va. 162; 92 S. E. 997; Hoyt v. Tuxbury, 70 Ill. 331, provided the objection be made by the purchaser in good faith. Hendricks v. Gillespie, 25 Gratt. (Va.) 181, *semble*. A purchaser at a judicial sale was relieved from his bid where an entry of satisfaction of a prior lien on the premises was found to be a forgery. Charleston v. Blohme, 15 S. C. 124; 40 Am. Rep. 690. In the following cases there are decisions or *dicta* that the purchaser can be compelled to complete the contract, if the vendor can show that apparent incumbrances on the premises have been satisfied. Fagan v. Davidson, 2 Duer (N. Y.), 153; Pangborn v. Miles, 10 Abb. N. C. (N. Y.) 42; Espy v. Anderson, 14 Pa. St. 308.

[92] As in Virginia, Code 1887, § 3564.

[93] Espy v. Anderson, 14 Pa. St. 308.

a suit in equity by the vendor be necessary to remove a cloud upon the title caused by an apparent incumbrance of record, the purchaser cannot be compelled to await the issue of the suit,[94] and may refuse to complete the contract. But if the vendor can, within a reasonable time, remove the objection by procuring releases, or appropriate entries upon the records, showing satisfaction of the incumbrance, no reason is perceived why he should not be permitted to do so, upon the general principle that the vendor may perfect the title wherever time is not material.

In New York it has been held that the existence of a mortgage on the premises, although more than thirty years old, renders the title doubtful, as the mortgagee may have in his possession a promise to pay, or other facts may exist which would prolong the life of the mortgage.[95] In Maryland, in a case in which the right to foreclose had been barred for fifteen years over the statutory period of twenty years, and in which there had been no recognition of the mortgage as a subsisting lien during that time, it was held that the purchaser could not refuse to take the title.[96] The fact that an incumbrance upon the premises appears unsatisfied of record, will not justify the purchaser in his refusal to complete the contract, when the incumbrance is of such long standing as to raise a presumption that it has been paid,[97] or if the circumstances of the case show that the incumbrance is no longer enforceable, as in the case of a mortgage to secure the support of a person who had been many years dead when the contract of sale was made.[98] Where a statute provided that a trust for the benefit of creditors should be deemed discharged after the expiration of twenty-five years from the time of its creation, it was held that the existence of the trust constituted no objection to the title after the lapse of that time.[99] But where it is an open question whether under the law of the place, a mortgage is embraced by the Statute of Limitations, the purchaser cannot be required to take the title.[1]

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[94] Kenny v. Hoffman, 31 Va. 442; Bartle v. Curtis, 68 Iowa, 202, 26 N. W. Rep. 73.

[95] Pangborn v. Miles, 10 Abb. N. Cas. (N. Y.) 42; Austin v. Barnum, 52 Minn. 136, 53 N. W. Rep. 1132.

[96] Baldwin v. Trimble, 85 Md. 396, 36 L. R. A. 489, 37 Atl. 176; Goldman v. Miles, 129 Md. 180, 98 Atl. 531. Compare Justice v. Button, 89 Neb. 367, 131 N. W. 736, 38 L. R. A. (N. S.) 1, where it was held that an unreleased and apparently unsatisfied trust deed on the property, though seemingly barred by the statute of limitations for several years, made the title unmarketable.

[97] Katz v. Kaiser, 154 N. Y. 296, 48 N. E. Rep. 532; Paget v. Melchoir, 58 N. Y. Supp. 913, 42 App. Div. 76; N. Y. Life Ins. Co. v. Lord, 40 C. C. A. 585, 100 Fed. Rep. 17; Belmont v. O'Brien, 2 Kern. (N. Y.) 394, where there were two mortgages on the premises, one sixty-six and the other eighty-four years old; Kip v. Hirsh, 103 N. Y. 565, 9 N. E. Rep. 317; Pangborn v. Miles, 10 Abb. N. C. (N. Y.) 42; Forsyth v. Leslie, 77 N. Y. Supp. 826, 74 App. Div. 517; Barber v. Gery, 64 N. J. Eq. 263, 53 Atl. 483; Morgan v. Scott, 26 Pa. St. 51, where the mortgage was fifty years old and was made to secure a life annuity to a person many years dead at the time of the sale.

In regard to releases, or marginal entries upon the public records, showing the satisfaction of incumbrances, it is to be observed that an authority to make such entry, or to execute such release, must appear from the records, and if the abstract fails to show such authority, the title will be held unmarketable.[2] Thus,

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In Hayes v. Nourse, 8 N. Y. State Rep. 397, a *lis pendens* fifty years old was held to be sufficient objection to the title; satisfaction of a claim to the premises cannot be presumed, so long as a suit asserting the claim is pending. Abbott v. Fellows, 116 Me. 173, 100 Atl. 657; Greenfield v. Mills, 107 N. Y. Supp. 705, 123 App. Div. 43; Barsky v. Posey, (Del. Ch.) 98 Atl. 298; Strickland v. Duffie, (Tex. Civ. App.) 191 S. W. 622. The appearance of the property on a delinquent tax list forty years before the contract of sale, furnished no ground for rejecting the title — the property not having been forfeited to the State, and the subsequent taxes having been, in the meanwhile, continuously assessed to and paid by the vendor. Henry v. Barker, 130 La. 431, 58 So. 138.

[98] Shanahan v. Chandler, 218 Mass. 441, 105 N. E. 1002.

[99] Green v. Hernz, 35 N. Y. Supp. 843; Kip v. Hirsh, 103 N. Y. 565, 9 N. E. Rep. 317, where held also that such statute was retrospective in its operation, and applied to trusts in existence before the passage of the act. Disapproving McCahill v. Hamilton, 20 Hun (N. Y.), 388. Where a vendor had been for fifteen years in possession under an assignment which was on its face void as to creditors, but no creditors had ever sought to impeach it, and thirty-three years had elapsed since the assignment was made, the title of the vendor was held marketable. Morrison v. Brand, 5 Daly (N. Y.), 40.

[1] Godfrey v. Rosenthal, 17 S. Dak. 452, 97 N. W. 365.

[2] Warvelle Abst. 344. Ethington v. Rigg, 173 Ky. 355, 191 S. W. 98. If the mortgage be merged in a subsequent acquisition of the title by the vendor or his predecessors in title, it is no objection to the title that a release of the mortgage, which had been recorded, does not appear of record. Summy v. Ramsey, 53 Wash. 93, 101 Pac. 506.

if the release is by an attorney in fact, assignee or personal representative, and the power of attorney, assignment or qualification of the personal representative has been or may be made a matter of public record, the abstract of title must show such power assignment or qualification as the case may be, or the purchaser will be justified in rejecting the title, if the contract provides that the abstract shall show a good title of record.[3] In a case in which a county auditor released a mortgage upon school lands, and there was nothing to show actual satisfaction of the mortgage, it was held that the purchaser might reject a conveyance, the release being *prima facie* unauthorized and void.[4]

§ 307-a. **Encroachments and deficiencies. Encroachments.** A fruitful source of objections to the title to city property is that the buildings or structures on the property encroach upon the lands of adjoining proprietors. As a general rule in such cases the purchaser is entitled to a rescission of the contract and a return of his deposit, on the ground that the title is unmarketable.[5] Thus, he cannot be compelled to accept title to a city lot and building thereon if an exterior wall of the building rests entirely on the lot of an adjoining proprietor, and belongs exclusively to such proprietor, by whose permission, or with whose acquiescence, the beams of the adjoining building are inserted in such wall, no legal right to the use of the wall being shown.[6] But insignificant and immaterial encroachments upon adjoining property will not entitle the purchaser to rescind.[7] No rule can be laid down that one or two inches of encroachment will justify a rescission of the contract. Each case must be determined upon its peculiar facts. The evidence must establish a reasonable certainty that injury to the purchaser will follow; that he will be prevented from using the buildings in the condition which they were in at the time of the purchase.[8]

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[3] O'Neill v. Douthett, 40 Kans. 689, 20 Pac. Rep. 493, reversing 39 Kans. 316; Durham v. Hadley, 47 Kans. 73, 27 Pac. Rep. 105. Want of satisfaction of a mortgage on the record is no objection to the title, where the property had been reconveyed to the mortgagee in payment of the mortgage debt. Clody v. Southard, 109 N. Y. Supp. 411.

[4] Conley v. Dibber, 91 Ind. 413.

[5] McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527; Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527; Snow v. Monk, 80 N. Y. Supp. 719, 81 App. Div. 206; Keim v. Sachs, 92 N. Y. Supp. 107, 102 App. Div. 44; Bergmann v. Klein, 89 N. Y. Supp. 624, 97 App. Div. 15. Reynolds v. Wynne, 105 N. Y. Supp. 849, 121 App. Div. 272; Kaplan v. Bergmann, 107 N. Y. Supp. 423, 122 App. Div. 876; Heyman v. Steich, 114 N. Y. Supp. 603; Meadows v. Michel, 120 N. Y. Supp. 319, 135 App. Div. 213, S. C. 130 N. Y. Supp. 57, 144 App. Div. 927; Walter v. Mitchell, 6 Cal. App. 410, 92 Pac. 315. The extent of the injury to the adjoining premises is immaterial. Snow v. Monk, 80 N. Y. Supp. 719, 81 App. Div. 206. In Eppig v. Gruhn, 159 N. Y. Supp. 549, 175 App. Div. 787, it was held that, in equity, the vendor would be entitled to a reasonable time in which to remove the objection to the title.

The encroachment will not entitle the purchaser to relief where it has existed for such length of time and under such circumstances as to bar any claim by the owner of the premises encroached upon.[9] But the burden will be upon the vendor to show that his title has been ripened by adverse possession against all possible claimants, including persons under disabilities, if any.[10] In New York it is provided by statute that suit to recover land encroached upon by the wall of a building must be brought within a year after the erection of the building.[11] In cases to which that act applies, the purchaser cannot object to the title where no such suit has been brought within the year prescribed.[12] There is also a statute in the same State which requires a city to begin proceedings within a specified time for the removal or abatement of structures encroaching upon a street. Slight encroachments upon a street are no objection to the title, where the city has brought no such suit within the specified time.[13] That a building on the property does not conform to municipal regulations or ordinances, does not make the title unmarketable.[14]

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[6] Spero v. Shulz, 43 N. Y. Supp. 1016, 14 App. Div. 423; Neher v. Brunckman, 55 N. Y. Supp. 107, 36 App. Div. 625; Hennig v. Smith, 151 N. Y. Supp. 444.

[7] Merges v. Ringler, 54 N. Y. Supp. 280, 34 App. Div. 415; McDonald v. Buch, 60 N. Y. Supp. 557, 29 Misc. 96. The encroachment is immaterial if the building purchased is old, dilapidated, and practically worthless. Weil v. Radley, 52 N. Y. Supp. 398. The encroachment of show windows seventeen inches on the street is no objection to the title. Keim v. Sachs, 92 N. Y. Supp. 107, 102 App. Div. 44; Griffin v. Schneider, 105 N. Y. Supp. 1035; Ungrich v. Shuff, 105 N. Y. Supp. 1013, 119 App. Div. 843; Weintraub v. Seigel, 118 N. Y. Supp. 261, 133 App. Div. 677. Slight projections of cornices, sills, lintels, etc., over the street line, do not make the title unmarketable. Leerburger v. Watson, 134 N. Y. Supp. 818, 75 Misc. Rep. 3. Compare Acme Realty Co. v. Schinasi, (N. Y.) 109 N. E. 577.

[8] Merges v. Ringler, 54 N. Y. Supp. 280, 34 App. Div. 415.

[9] Weil v. Radley, 52 N. Y. Supp. 398; Harrison v. Platt, 54 N. Y. Supp. 842, 35 App. Div. 533; Van Horn v. Stuyvesant, 100 N. Y. Supp. 547. Where a house on the lot had stood for thirty years without objection to an encroachment of two or three inches on an adjoining lot, it was held that the purchaser could not refuse the title. Katz v. Kaiser, 41 N. Y. Supp. 776, 10 App. Div. 137. The mere fact that an encroachment has continued for twenty years does not establish a right by adverse possession to the space encroached upon. Miner v. Hilton, 44 N. Y. Supp. 155, 15 App. Div. 55.

[10] Stevenson v. Fox, 57 N. Y. Supp. 1094, 49 App. Div. 354.

[11] Code Civ. Proc. N. Y. § 1499.

§ 307-b. **Deficiencies in quantity.** The objection is frequently made that the vendor is not able to convey as much land as the purchaser is entitled to under the contract. The deficiency may result either from an incorrect estimate of the quantity of land within certain bounds, or it may result from the want of title of the vendor to some portion of the land included within those bounds, or from the want of such an easement in adjoining property as the vendor represented himself to have. If the deficiency be so great or so important, that the purchaser cannot be required to complete the contract with compensation, or abatement of the purchase money, for the defect, the title is said to be not marketable,[15] though in a technical sense, that term is properly applicable only to those cases in which a doubt arises as to the sufficiency of the vendor's title to some portion of the premises embraced in the contract, and not to cases in which there is a clear want of title to such portion. Trifling deficiencies are no ground on which to reject the title.[16]

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[12] Volz v. Steiner, 73 N. Y. Supp. 1006, 67 App. Div. 504. This provision applies only where the wall abuts a wall on the adjoining lot; it does not apply where the encroachment is upon a lot on which there is no abutting wall. Bergmann v. Klein, 89 N. Y. Supp. 624, 97 App. Div. 15. The limitation does not begin to run against those having a remainder in the lot encroached upon until they have entered. Hence the statute does not cure the objection where the premises encroached upon are occupied by a life-tenant with remainder over. Snow v. Monk, 80 N. Y. Supp. 719, 81 App. Div. 206.

[13] Merges v. Ringler, 54 N. Y. Supp. 280, 34 App. Div. 415; Harrison v. Platt, 54 N. Y. Supp. 842, 35 App. Div. 533; Van Horn v. Stuyvesant, 100 N. Y. Supp. 547; Huber v. Groo, 168 N. Y. Supp. 834, 181 App. Div. 369, a case in which an abandoned strip of a town road through the premises had been conveyed by the town to the abutting owner. In Schaefer v. Hilliker, 124 N. Y. Supp. 1014, the fact that the premises included a part of an abandoned road, title to which was in the city, made the title unmarketable.

[14] Leerburger v. Watson, 134 N. Y. Supp. 818, 75 Misc. Rep. 3. Compare Acme Realty Co. v. Schinasi, (N. Y.) 109 N. E. 577. The fact that the stoop of a building projects several feet beyond the lot line into the street is no objection to the title. Broadbelt v. Loew, 162 N. Y. 642, 57 N. E. Rep. 1105; Levy v. Hill, 75 N. Y. Supp. 19, 70 App. Div. 95. Slight encroachments beyond the street line are no objection to the title where they have existed for a number of years without objection on the part of the city authorities. Webster v. Kings Co. Tr. Co., 145 N. Y. 275, 39 N. E. Rep. 964.

A title will not be rendered unmarketable by a deficiency in area when the contract was made with reference to fixed monuments bounding the land.[17] But the rule that monuments control metes and bounds, courses and distances, does not apply when there is no certain boundary in the description which can make the courses and distances yield to fixed monuments.[18]

§ 307-c. **Physical defects,** dilapidation, want of repairs, or want of facilities required by law, do not make the title unmarketable.[19]

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[15] Post, ch. 33. Albro v. Gowland, 90 N. Y. Supp. 796, 98 App. Div. 474. If the vendor sells the property as bounded by a street but fails to mention the liability of a strip of the land to condemnation for widening the street, the purchaser cannot be required to complete the contract. Celestial Realty Co. v. Childs, 169 N. Y. Supp. 597, 182 App. Div. 85.

[16] Garibaldi Realty Co. v. Santangelo, 149 N. Y. Supp. 669, 164 App. Div. 513.

[17] Pope v. Thrall, 68 N. Y. Supp. 137, 33 Misc. 44; Scannel v. Amer. Soda Fountain Co., 161 Mo. 606, 61 S. W. Rep. 889. The purchaser of a city lot cannot object that the house on the lot encroaches several inches on an adjoining lot, where both lots were formerly owned by the same person, and the vendor holds under a conveyance from that person. In such case the location of the house is conclusive on subsequent grantees of the lot encroached upon as to the extent of the lot, under the rule that natural or artificial boundaries plainly referred to, must control measurements and distances with which they do not agree. Katz v. Kaiser, 41 N. Y. Supp. 776, 10 App. Div. 137. Where the contract described city lots as bounded by a street, the vendor having no fee nor rights in the street, there was no implied covenant that the street had been legally opened, or would remain open. Interborough R. T. Co. v. Littlefield, 149 N. Y. Supp. 741.

[18] Fuhr v. Cronin, 81 N. Y. Supp. 536, 82 App. Div. 210.

[19] Woodenbury v. Spier, 106 N. Y. Supp. 817, 122 App. Div. 396.

CHAPTER XXXII.

OF THE RIGHT OF THE VENDOR TO PERFECT THE TITLE.

BEFORE THE TIME FIXED FOR COMPLETING THE CONTRACT. § 308.

AFTER THE TIME FIXED FOR COMPLETING THE CONTRACT. § 309.

- **Exceptions: (1) Where time is material.** § 310.
- **(2) Where the covenants are mutual and dependent.** § 311.
- **(3) Waiver of the right.** § 312.
- **(4) Loss and injury to the purchaser.** § 313.
- **(5) Fraud of the vendor.** § 314.
- **(6) Want of colorable title.** § 315.
- **(7) Laches of the vendor.** § 316.
- **(8) Effect of special agreements.** § 317.
- **(9) Effect of notice and request to perfect the title.** § 318.

IN WHAT PROCEEDINGS THE RIGHT MAY BE ASSERTED. § 319.

REFERENCE OF THE TITLE TO MASTER IN CHANCERY.

- **When directed.** § 320.
- **When refused.** § 321.
- **At what stage of the proceedings reference may be made.** § 322.
- **Procedure. Costs.** § 323.

INTEREST ON THE PURCHASE MONEY WHILE TITLE IS BEING PERFECTED. § 324.

§ 308. **BEFORE THE TIME FIXED FOR COMPLETING THE CONTRACT.** The vendor may of right perfect his title at any time before the period fixed for the completion of the contract, and the fact that his title was incomplete at the time the contract was made, is immaterial, provided the matters necessary to make the title good can be accomplished before the time specified for making the conveyance.[1] The vendor is not necessarily guilty of fraud in representing that his title is good and indefeasible, if he be able to make it so before the time fixed for completing the contract.[2] Generally speaking the vendor will not be permitted to perfect the title where, at the time of the contract, he has no colorable title to the premises and seeks to compel the vendee to await his efforts to get in the title after the time when the contract should have been performed. The law does not encourage speculation in the property of strangers; the vendor must have been a *bona fide* contractor.[3] But the purchaser cannot object to specific

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[1] 1 Sugd. Vend. (8th Am. ed.) 396; 1 Chitty Cont. (11th ed.) 431; Will. Eq. Jur. 290; Stowell v. Robinson, 3 Bing. (N. C.) 928; In re Bryant, 44 Ch. Div. 218; Gray v. Smith, 76 Fed. 525; Harris v. Carter, 3 Stew. (Ala.) 236; Clemens v. Loggins, 2 Ala. 518; Dresel v. Jordan, 104 Mass. 407; Gibson v. Newman, 1 How. (Miss.) 341; Goss v. Singleton, 2 Head (Tenn.), 67; Andrew v. Babcock, (Conn.) 26 Atl. Rep. 715; Dennis v. Strasburger, 89 Cal. 583, 25 Pac. Rep. 1070; Lemle v. Barry, (Cal.) 183 Pac. 148; Hundley v. Tibbetts, (Ky.) 16 S. W. Rep. 131; More v. Smedburgh, 8 Paige Ch. (N. Y.)

600; Friedman v. Dewees, 33 N. Y. Super. Ct. 450; Whitney v. Crouch, 172 N. Y. Supp. 729; Monsen v. Stevens, 56 Ill. 335; Bowersock v. Beers, 82 Ill. App. 396; Elder v. Chapman, 70 Ill. App. 288; Armstrong v. Breen, 101 Iowa, 9, 69 N. W. Rep. 1125; Maryland Const. Co. v. Kuper, 90 Md. 529, 45 Atl. 197; Moot v. Business Men's Asso., 157 N. Y. 201, 52 N. E. Rep. 1; Mincey v. Foster, 125 N. C. 541, 34 S. E. Rep. 644; Garber v. Sutton, 96 Va. 469, 31 S. E. Rep. 894; Mundy v. Garland, 116 Va. 922, 83 S. E. 491; Jones v. Taylor, 7 Tex. 240, 56 Am. Dec. 48; Runnels v. Pruitt, (Tex. Civ. App.) 204 S. W. 1017; Tison v. Smith, 8 Tex. 147. Here the vendor had no title to a part of the land sold, and had to buy it from a third party in order to fulfill the contract on his part, but the purchaser was aware of all the facts when he bought. Elliott v. Hogue, 113 Ark. 599, 168 S. W. 1097; Silfver v. Daenzer, 167 Mich. 362, 133 N. W. 16; McNally v. Palmer, (N. J. Eq.) 100 Atl. 335; Agens v. Koch, 74 N. J. Eq. 528, 70 Atl. 348; Martinson v. Requa, 18 N. D. 467, 123 N. W. 285; Ward v. James, 84 Oreg. 375, 164 Pac. 370; Morris v. Canal Co., 75 Wash. 483, 135 Pac. 238; Zizich v. Investment Co., 77 Wash. 392, 137 Pac. 1028; Armstrong v. Coal Co., 67 W. Va. 589, 69 S. E. 195. Conveyance to a third party for the purpose of facilitating performance of the contract, is no ground for rescission, vendor having until the "law day" in which to perform. Tanzer v. Banker's Corp. 144 N. Y. Supp. 613, 159 App. Div. 351. In Cook v. Bean, 17 Ind. 504, it was held that the vendor's right to time in which to perfect the title, obtains only in cases where some *secret* defect is discovered in the title, and does not operate to excuse the vendor from doing all in his power to fulfill the contract at the appointed time. This case must not be given too broad an interpretation, else it will conflict with the rule that one purchasing with knowledge that time will be required to perfect the title, is held to have waived his right to demand a strict performance at the time fixed for completing the contract. In Upton v. Maurice, (Tex. Civ. App.) 34 S. W. Rep. 642, it was held that where time was not of the essence of the contract, and the vendee has made no tender of performance on his part and no demand of performance on the part of the vendor, the right of the latter to perfect the title remains until a right of action on the contract is barred by the statute of limitations.

[2] Cases cited in last note.

[3] Armstrong v. Palmer, (Tex. Civ. App.) 218 S. W. 627.

performance on the ground that the vendor had no semblance of title at the time of the contract if he has acquired or can acquire it before the time fixed for the completion of the contract. In such a case the purchaser is put to no delay or inconvenience, and there is nothing of which he can complain.[4] Especially if he entered into the contract knowing that the vendor would have to obtain the title from another.[5] The vendor has, of course, until the time fixed for completing the contract in which to remove incumbrances.[6] The delivery of the deed and the payment of the purchase money are simultaneous acts. The vendor is not bound to raise money and pay the incumbrances in advance. If he produces the holder of the lien ready to satisfy it on payment he can rely on the purchase money as the fund for such payment.[7] Therefore, the foreclosure of a mortgage upon the premises before a final payment of the purchase money becomes due, is no ground upon which to rescind the contract, unless the agreement expressly required the vendor to remove incumbrances before all the purchase money should be paid, or unless there should be circumstances in the case that would make inequitable a compulsory performance by the vendee.[8] If by the contract it is expressly provided that the purchaser shall receive a title clear of all incumbrances, the vendor must discharge these before the time fixed for completing the contract, and the purchaser will not be in default in failing to tender the purchase money if the vendor does not remove the incumbrance before that time.[9] The purchaser should make his objections to the title in time to enable the vendor to remove them.[10] And in any suit in which he seeks to rescind the contract he should specify the defect of title of which he complains in order to give the vendor an opportunity to remove it, and time should be allowed the vendor to bring proper parties before the court, where the title can be perfected by having them present.[11] If a time be specified in which the vendor may perfect the title if defective, the purchaser can maintain no action to recover back the deposit before that time has expired.[12] But where the vendor refused to accept a tender of the balance of the purchase money on the ground that he had no title and could not perform the contract, it was held that he could not, when sued for the deposit, be heard to say that the time fixed for the completion of the contract has not yet expired.[13]

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[4] Post, this chapter, § 315. Webb v. Stephens, (Wash.) 39 Pac. 952. The fact that a guardian had no authority to sell at the time of sale, does not invalidate the contract, if he acquires authority before the time fixed for completing the contract. Morris v. Goodwin, (Ind. App.) 27 N. E. Rep. 985.

[5] Weitzel v. Leyson, 23 S. D. 367, 121 N. W. 868; Walken v. Nokken, 38 S. D. 289, 161 N. W. 194.

[6] Smith v. McMahon, 197 Mass. 16, 83 N. E. 9.

[7] Ante, § 87. Webster v. Kings Co. Trust Co., 80 Hun (N. Y.), 420, 30 N. Y. Supp. 357; Gibson v. Newman, 1 How. (Miss.) 346; Duluth Land Co. v. Klovdahl, 55 Minn. 341, 56 N. W. Rep. 1119; Anderson v. Creston Land Co., 96 Va. 257, 31 S. E. Rep. 82; Griesemar v. Hammond, 18 Cal. App. 535, 123 Pac. 818; Mobley v. Quattlebaum, 101 S. C. 221, 85 S. E. 585; Ward v. James, 84 Oreg. 375, 164 Pac. 370; Posey v. Kemsey, 146 Ky. 205, 142 S. W. 703; Buchanan v. Yudelson, 287 Ill. 138, 122 N. E. 100; Thos. J. Baird Co. v. Harris, 209 Fed. 291, 126 C. C. A. 217; Union Bag Corp. v. Bischoff, 255 Fed. 187. The vendor has until the time for the delivery of his deed in which to remove tax liens on the land. Wilson v. Korte, 91 Wash. 30, 157 Pac. 47.

[8] Pate v. McConnell, (Ala.) 18 So. Rep. 98. Post, this chapter, § 317.

Generally, in the purchase of an estate and the appointment of a particular day for the completion of the title, the principal object is the sale of the estate for a given sum, and the naming of the day is either merely formal, or for the convenience of the parties in the payment of the purchase money on the one side or the execution of a conveyance on the other. "The stipulation means in truth that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case and the nature of the title to be made."[14] In a case in which the contract provided that ten days should be allowed for examination of the title, and that if the title proved unsatisfactory the deposit should be returned, it was held that the purchaser should state his objections to the title, if not approved, and that the vendor would be entitled to a reasonable time thereafter in which to perfect the title, and that the purchaser could not rescind the contract until he had given such notice of his objections and furnished the vendor an opportunity to remove them.[15] If no time for the completion of the contract be fixed, the vendor may perfect the title at any time before it is demanded by the purchaser.[16] And after demand, he must be allowed a reasonable time in which to make out the title.[17] Where the contract is silent as to the time when the vendor is to convey, the legal implication is that the conveyance is to be made and delivered within a reasonable time for that purpose, after the vendee has tendered performance on his part; and if the vendor perfects his title within such time, he may enforce specific performance of the contract.[18] In a suit by the purchaser for specific performance, in which a rescission of the contract is not asked as alternative relief, it is error in the court to rescind the contract without giving the vendor a reasonable time in which to perfect the title.[19] If the parties arrange for the removal of an incumbrance prior to performance, without naming a specific day, the removal within a reasonable time is a sufficient performance.[20] We have already seen under what circumstances the purchaser will be deemed to have waived his right to require a strict performance by the vendor at the time fixed for completing the contract.[21]

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[9] Morange v. Morris, 34 Barb. (N. Y.) 311; Roos v. Thigpen, (Tex. Civ. App.) 140 S. W. 1180.

[10] More v. Smedburg, 8 Paige (N. Y.), 600; Easton v. Montgomery, 90 Cal. 307, 27 Pac. Rep. 280.

[11] Hogan v. McMurtry, 5 T. B. Mon. (Ky.) 181.

[12] Dennis v. Strasburger, 89 Cal. 583, 26 Pac. Rep. 1070.

[13] Seiberling v. Lewis, 93 Ill. App. 549.

[14] Language of ALDERSON, B., in Hipwell v. Knight, 1 Yo. & Coll. 415.

In actions by the vendor to recover the purchase money before the time when he is required by the contract to pass the title, the purchaser cannot defend on the ground that the title is defective, since the vendor may acquire the title before the specified time. It is sufficient if he have a good title at the time when the conveyance is to be made, and the objection that he had none at the time the contract was made will be unavailing.[22] It is true that equity will not decree specific performance by the purchaser when it appears that the vendor, having no title nor color of title, undertakes to sell the property of a third person, speculating in his chances of acquiring the title from that person.[23] But equity will not always rescind a contract which it refuses to enforce, the parties being left to their remedies at law.[24] And, at law, in the case under consideration, the purchaser, having agreed to pay the purchase money before the time when he is entitled to a conveyance, must abide the consequences of his contract. Therefore, it has been held that if, by the contract, the purchase money is to be paid in installments, and the conveyance is not to be made until the last installment is paid, the purchaser cannot refuse to pay the purchase money on the ground that the title is defective,[25] unless it appears that, because of the vendor's insolvency, or for some other reason, the purchaser's remedy by action for breach of the contract will prove unavailing.[26] It is scarcely necessary to say that, if the covenants to pay the purchase money and to convey an indefeasible title are mutual and dependent, the vendor will not be allowed time in which to perfect the title, if time be of the essence of the contract.[27] Neither will he be allowed that privilege if the case be such that the vendee cannot compel specific performance after the title has been perfected. There must be mutuality of obligation between the parties.[28]

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[15] Anderson v. Strasburger, 92 Cal. 38, 27 Pac. Rep. 1095, (citing Englander v. Rogers, 41 Cal. 420; Dennis v. Strasburger, 89 Cal. 583, and Easton v. Montgomery, supra). Arnett v. Smith, 11 N. Dak. 55, 88 N. W. Rep. 1037; Edmison v. Zaborowski, 9 S. Dak. 40, 68 N. W. Rep. 288; Nicholson v. Iieber, (Tex. Civ. App.) 153 S. W. 641.

[16] Evans v. Bolling, 5 Ala. 550; Morgan v. Scott, 26 Pa. St. 51; Gibson v. Brown, 214 Ill. 330, 73 N. E. Rep. 578.

[17] Sugd. Vend. (8th Am. ed.) 397. Baker v. Shy, 9 Heisk. (Tenn.) 85; Tapp v. Nock, 89 Ky. 414. In this case the sale was made March twenty-eighth and the title was perfected and a deed tendered on the following May twenty-eighth. The purchaser was required to accept the deed, though the property had been bought for speculative purposes during a time of inflated prices and had declined in value before the title was perfected.

[18] Williamson v. Neeves, 94 Wis. 656, 69 N. W. 806; Goetzmann v. Caldwell, 152 N. Y. Supp. 491.

[19] Russell v. Shively, 3 Bush (Ky.), 162.

[20] Cramer v. Mooney, 59 N. J. Eq. 164, 44 Atl. 625.

[21] Ante, ch. 8.

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[22] Ante, § 308. Harrington v. Higgins, 17 Wend. (N. Y.) 376; Wright v. Blackley, 3 Ind. 101; Wiley v. Howard, 15 Ind. 169; Taylor v. Johnson, 19 Tex. 351.

[23] Post, § 315.

[24] Ante, § 283.

[25] Ante, § 88, and Harrington v. Higgins and other cases cited, supra. Diggle v. Boulden, 48 Wis. 477; True v. N. Pac. Ry. Co., 126 Minn. 72, 147 N. W. 948.

[26] McIndoe v. Morman, 26 Wis. 588, 7 Am. Rep. 96; Durham v. Hadley, (Kans.) 27 Pac. Rep. 105; Peak v. Gore, 94 Ky. 533.

[27] Post, § 311. Harrington v. Higgins, 17 Wend. (N. Y.) 376; Carpenter v. Brown, 6 Barb. (N. Y.) 147, *semble;* Holmes v. Holmes, 12 Barb. (N. Y.) 137. After a purchaser has exercised his right to rescind for failure of title, under Civil Code of California, section 1689, subdivision 4, which provides that a party to a contract may rescind the same if the consideration, before

Wherever the privilege of perfecting the title is accorded to the vendor he must, as a general rule, pay the costs of the suit; the suit being made necessary by his default.[29]

While the vendor, as a general rule, will be allowed time in which to perfect the title, extraordinary relief by way of injunction or the writ of *ne exeat* will not be granted at the same time.[30] The vendor must show a present ability to perform the contract on his part. Thus, where the contract was for an exchange of lands, and the complainant prayed an injunction to restrain the defendant from receiving the rents and profits of his own property pending the complainant's efforts to remove an incumbrance from the premises he was to give in exchange, the court reversed an order of the court below granting the injunction.[31]

The purchaser will not be allowed to forestall the vendor by acquiring an outstanding right and setting it up adversely to the latter.[32] Specific performance will be decreed against the purchaser, allowing him the amount paid for the interest. The same rule is enforced at law.[33]

The vendor may perfect his title if he chooses, but in the absence of any agreement or covenant to that effect, there is no obligation upon him so to do, and the purchaser cannot recover

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it is tendered to him, fails in a material respect from any cause, the vendor cannot revive the contract by tendering a conveyance of a good and sufficient title. Anderson v. Strasburger, 92 Cal. 38, 27 Pac. Rep. 1095.

[28] White v. Needham, 21 Ky. Law R. 1051, 54 S. W. Rep. 9.

[29] Fishback v. Williams, 3 Bibb (Ky.), 342; Jarboe v. McAtee, 7 B. Mon. (Ky.) 279; Lesesne v. Witte, 5 S. C. 462; Bates v. Lyons, 7 S. C. 85; Lyles v. Kirkpatrick, 9 S. C. 265. Where the purchaser has agreed to share the expenses of perfecting the title he must pay his portion of such expenses as they occur, or he cannot enforce the contract. Hutcheson v. McNutt, 1 Ohio, 16.

[30] Brown v. Huff, 5 Paige (N. Y.), 241; Morris v. McNeill, 2 Russ. 604. See, also, 2 Dicken's R. 497, note.

[31] Baldwin v. Salter, 8 Paige (N. Y.), 472.

[32] Murrell v. Goodyear, 1 De G., F. & J. 432; Westall v. Austin, 5 Ired. Eq. (N. C.) 1; Kindley v. Gray, 6 Ired. Eq. (N. C.) 445; Bush v. Marshall, 6 How. (U. S.) 691; Roller v. Effinger, (Va.) 14 S. E. Rep. 337.

[33] Ante, § 202. Fosgate v. Herkimer Mfg. Co., 12 Barb. (N. Y.) 352.

damages against him for refusing to perfect the title.[34] Nor can the purchaser recover damages from the vendor for loss of the use of the premises while the title is being perfected, in the absence of anything to show that he could not have taken immediate possession of the premises.[35]

The purchaser waives performance within the time limit by returning the abstract with his objections after the expiration of the specified time for performance.[36]

§ 309. **AFTER THE TIME FIXED FOR COMPLETING THE CONTRACT.** If the time for completing the contract has elapsed, the vendor may nevertheless insist upon his right to perfect the title, except in certain cases hereafter to be mentioned.[37] As a general rule it is sufficient if he be able to convey a good title at any time before decree in any proceeding in which it is sought to rescind or to enforce the contract.[38] He may perfect the title at any time before decree by obtaining a release of incumbrances[39] or of adverse claims.[40] Therefore, where the contract required the conveyance of a fee and the vendor had only a life estate, but pending a suit by him for specific performance the life estate fell in, the purchaser was compelled to complete the contract.[41] So, also, where the vendor became divested of the title, but reacquired it

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[34] Presbrey v. Kline, 20 D. C. 513.

[35] Reed-Allen Co. v. Spencer, (Tex. Civ. App.) 138 S. W. 806.

[36] Carroll v. Mundy, (Iowa) 170 N. W. 790.

[37] Post, § 310.

[38] Fry Sp. Perf. (3d Am. ed.) § 1349; 2 Dan. Ch. Pr. 1195, n.; Adams Eq. (5th Am. ed.) 199, 209; Langford v. Pitt, 2 P. Wms. 631; Boehm v. Wood, 1 Jac. & Walk. 419; Haggart v. Scott, 1 Russ. & Myl. 293; Seton v. Slade, 7 Ves. 270; Eyston v. Seymond, 1 Yo. & Coll. E. C. 608; Hepburn v. Dunlop, 1 Wh. (U. S.) 196; McKay v. Carrington, 1 McLean (U. S.), 64; Greogory v. Keenan, 256 Fed. 949; Owens v. Cowan, 7 B. Mon. (Ky.) 152; Gaither v. O'Doherty, (Ky.) 12 S. W. Rep. 306; Spicer v. Jones, (Ky.) 1 S. W. Rep. 810; Holmes v. Holmes, 107 Ky. 163, 53 S. W. Rep. 29; Pierce v. Nichol, 1 Paige (N. Y.), 244; Dutch Church v. Mott, 7 Paige (N. Y.), 77; Voorhees v. De Meyer, 2 Barb. (N. Y.) 37; Baumeister v. Demuth, 82 N. Y. Supp. 831, 84 App. Div. 394; Baldwin v. McGrath, 83 N. Y. Supp. 582, 41 Misc. Rep. 39; Weinheimer v. Ross, 205 N. Y. 518, 99 N. E. 145; Pakas v. Clarke, 121 N. Y. Supp. 192, 136 App. Div. 492; Jenkins v. Whitehead, 15 Miss. 577; Moss v. Davidson, 9 Miss. 112; Fletcher v. Wilson, 1 Smed. & M. Ch. (Miss.) 376; Luckett v. Williamson, 37 Mo. 388; Isaacs v. Skrainka, 95 Mo. 517, 8 S. W. Rep. 427; Hobson v. Lenox, (Mo. App.) 201 S. W. 964; Wilson v. Tappan, 6 Ohio, 172; Dubose v. James, McMull. Eq. (S. C.) 55; Morgan v. Scott, 26 Pa. St. 51; Townsend v. Lewis, 35 Pa. St. 125; Hunter v. Lewis, 234 Pa. 134, 82 Atl. 1100; Syne v. Johnston, 3 Call (Va.), 558; Second Univ., etc., Soc. v. Hardy, 31 N. J. Eq. 442; Young v. Collier, 31 N. J. Eq. 444; McKinney v. Jones, 55 Wis. 39; Mitchell v. Allen, 69 Tex. 70; Burwell v. Sollock, (Tex. Civ. App.) 32 S. W. Rep. 844; Coleman v. Bank, 115 Ala. 307, 22 So. Rep. 84; Stevenson v. Polk, 71 Iowa, 288, 32 N. W. Rep. 340; Mock v. Chalstrom, 121 Iowa, 411, 96 N. W. Rep. 909; Perrin v. Chidester, 159 Iowa

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31, 139 N. W. 930; Allen v. Adams, 162 Iowa 300, 143 N. W. 1092; Maryland Const. Co. v. Kuper, 90 Md. 529, 45 Atl. 197; McNeill v. Fuller, 121 N. C. 209, 28 S. E. Rep. 299; Hobson v. Buchanan, 96 N. C. 444; Allstead v. Nicol, 123 Cal. 594, 56 Pac. Rep. 452; Schwartz v. Woodruff, 132 Mich. 513, 93 N. W. Rep. 1067; Seaver v. Hall, 50 Neb. 878, 70 N. W. Rep. 373, 72 N. W. Rep. 217; Wetternach v. Investment Co., 77 Wash. 144, 137 Pac. 442; Milton v. Crawford, 65 Wash. 145, 118 Pac. 32; Rollyson v. Bourn, (W. Va.) 100 S. E. 682; Monarch, etc., Co. v. Washburn, 89 Kan. 874, 133 Pac. 156; Dore v. So. Pac. R. Co., 163 Cal. 182, 124 Pac. 817; Wynne v. Morgan, 7 Ves. 202. This is a much cited case. The suit was by the vendor for specific performance. The defendant, in his answer, did not object that time was material, and time was accordingly allowed in which to procure an act of parliament removing an objection to the title; and the act was procured in three months thereafter. The rule was thus stated: "Where the time at which the contract was to be executed is not material, and there is no unreasonable delay, the vendor, though not having a good title at the time the contract was to be executed, nor when the bill was filed, but being able to make a good title at the hearing, is entitled to a specific performance." Approved in Richmond v. Gray, 3 Allen (Mass.), 25. If the purchaser acquiesce in steps by the vendor to procure the title, he must accept the same if made out at the hearing. Haggart v. Scott, 1 Russ. & Myl. 293. In Hale v. New Orleans, 18 La. Ann. 321, it seems to have been held that the vendor had no right in that case to perfect the title after the purchaser had begun a suit for rescission. The vendor may perfect the title and tender a deed at any time before final decree for rescission is actually enrolled and signed. Fraker v. Brazelton, 12 Lea (Tenn.), 278; Clifton v. Charles, 53 Tex. Civ. App. 448, 116 S. W. 120, seems to hold that the vendor must have had title at the time he commenced his suit for specific performance. In Van Riper v. Wickersham, 76 N. J. Eq. 232, 76 Atl. 1020; Ann. Cas. 1912 A. 319, it was held that time would be allowed the vendor, even after decree, in which to perfect the title, he having been prevented by the conduct of the purchaser from sooner perfecting the title.

[39] Soper v. Kipp, 5 N. J. Eq. 383; Young v. Collier, 31 N. J. Eq. 444.

[40] Eyston v. Symond, 1 Yo. & Col. Ch. 608; McKay v. Carrington, 1 McLean (U. S.), 64; Voorhees v. De Meyer, 2 Barb. (N. Y.) 37. The vendee cannot refuse to perform the contract on the ground that the vendor has permitted the premises to be sold for delinquent taxes, if the time in which the premises may be redeemed has not expired. Marsh v. Wyckoff, 10 Bosw. (N. Y.) 202.

[41] Jenkins v. Fahig, 73 N. Y. 358.

pending suit by the purchaser for rescission.[42] And where the vendor, pending a suit by him for specific performance had, by mistake, conveyed the subject-matter of the suit with other parcels to a stranger, but procured a conveyance before the hearing, the purchaser was required to complete the contract.[43] Where the contract does not provide a time within which the vendor is to remove defects shown by the abstract, a reasonable time should be allowed therefor.[44]

If the purchaser call upon the vendor to perfect the title by a proceeding in court, he thereby consents that the vendor shall have a reasonable time in which to take such proceeding.[45]

The general statement frequently met with in the reports and text books, that the vendor may perfect the title at any time before decree in the cause in which the right is claimed, is rather vague and indefinite. Time may not have been material at the day fixed for completing the contract, nor at the time when suit for specific performance was begun, but may become so before a hearing and decree be had; these may not transpire for many months, and sometimes years, after the institution of the suit. The rule then, it is conceived, should be taken with this qualification, namely, that if at the hearing, the value of the property, the situations of the parties, and the general circumstances of the transaction have so changed as to render it inequitable to compel the purchaser to receive the perfected title, specific performance on his part will be denied.

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[42] Jenkins v. Whitehead, 7 Sm. & M. (Miss.) 577.

[43] Wooding v. Crain, 10 Wash. 35, 38 Pac. Rep. 756. As to the right to rescind where the vendor has conveyed the premises to a stranger, see post, § 315.

[44] 1 Sugd. Vend. (8th Am. ed.) 397. Easton v. Montgomery, 90 Cal. 307, 27 Pac. Rep. 280. Thirteen months are more than a reasonable time in which to procure releases of mortgages not appearing upon the record to have been satisfied. Alling v. Vanderstucken, (Tex. Civ. App.) 194 S. W. 443. A provision that the seller should furnish a merchantable abstract of title within ten days from the date of the contract, and a deed to the property within three days after the title was found to be good, does not require that the title shall be perfected within the three days after delivery of the abstract. The seller is entitled to a reasonable time in which to correct irregularities. Evans v. Gerry, 174 Ill. 595, 51 N. E. Rep. 615.

[45] Colpe v. Lindblom, (Wash.) 106 Pac. 634.

Of course if the purchaser knows at the time of the contract that the title is defective, and that some time will be required to remove the objections, he cannot insist upon a rescission without affording the vendor an opportunity to perfect the title.[46] Where neither the terms of the contract nor the circumstances of the parties make performance at the specified time material, the purchaser cannot, on finding the title defective, rescind the contract without notifying the vendor to remove the defects within a reasonable time.[47] The question whether the vendor, after he has conveyed the premises to the purchaser with covenants for title, will be allowed to perfect the title by purchasing the rights of an adverse claimant, and requiring the purchaser to take the after-acquired title in lieu of damages for breach of the covenants, has already been considered.[48]

The vendor cannot have an indefinite time in which to perfect the title.[49] In a case in New York, the trial judge directed that the vendor should, by proceedings to be instituted by him within sixty days against certain parties having adverse interests, establish a particular fact necessary to the validity of his title. On appeal this was held error, the court saying: "The effect of this order was to change utterly the purchaser's contract, and bind him to an agreement which he never made. It left the period of performance entirely uncertain and indefinite. The seller could begin his proceeding within sixty days, and after that was free to pursue the litigation at his pleasure, while the purchaser remained bound for an unknown period, with no guaranty of getting a title in the end.[50]

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[46] Ante, § 85. 1 Sugd. Vend. (8th Am. ed.) 407; Fry Sp. Perf. § 1307; Seton v. Slade, 7 Ves. 265, a leading case. Barrett v. Gaines, 8 Ala. 373; Craddock v. Shirley, 3 A. K. Marsh. (Ky.) 288; Jackson v. Ligon, 3 Leigh (Va.), 161; Reeves v. Dickey, 10 Grat. (Va.) 138.

[47] Schiffer v. Dietz, 83 N. Y. 300; Myers v. DeMeier, 52 N. Y. 647.

[48] Ante, § 215.

[49] Eller v. Newell, 159 Iowa, 711, 141 N. W. 52; Carroll v. Mundy, 185 Iowa 527, 170 S. W. 790; Raymond, etc., Co. v. Sharp, (Tex. Civ. App.) 175 S. W. 499; Maupai v. Jackson, 118 N. Y. Supp. 513. Where the vendor reserves the right to perfect his title by proceedings in court, he must promptly institute such proceeding as is found to be necessary. Brya v. Thomas, 186 Ill. App. 281. Reasonable delay of the vendor in removing liens on the property is no ground for refusing specific performance where time was not of the essence of the contract. Rollyson v. Bourn, (W. Va.) 100 S. E. 682.

The vendor cannot take advantage of the purchaser's failure to promptly rescind when the delay was caused by the vendor's promise to cure a defect in the title.[51]

While the vendor may, as a general rule, perfect the title at any time before decree, he cannot, by perfecting his title, provide grounds on which to recover damages from the purchaser in rejecting the title at the time fixed for performance of the contract by the parties.[52]

The question whether the vendor exercised sufficient diligence in perfecting the title is for the court.[53]

§ 310. **Exceptions to the rule: (1) Where time is of the essence of the contract.** The rule which allows the vendor to remove objections to the title after the time fixed for completing the contract does not apply where time is of the essence of the contract.[54] Thus, if a man buy a house, to be used by him as a residence,[55] or if he buy property for speculative purposes, or for the purposes of trade or manufacture, or for any other purpose which would be defeated by compelling him to await the vendor's efforts to perfect the title, specific performance by him will not be enforced if the vendor be unable at the appointed time to convey such a title as the contract requires.[56] Time will not be deemed to have been of the essence of the contract where the purchaser knew that there were defects in the title which could only be removed by legal proceedings for that purpose.[57] Time may be made material by express stipulation in the contract, by the surrounding circumstances of the parties, and by notice that the party giving it will exercise his right to rescind unless the contract be completed within a certain time.[58] If the thing sold be of greater or less value, according to the efflux of time, then time is of the essence of the contract.[59] It should be observed here that the right to perfect the title after the time fixed for completing the contract is a concession to the vendor by the courts of equity. At law time is always deemed of the essence of the contract; and, if the vendor cannot produce a clear title at the appointed time, the purchaser will be entitled to his action for damages.[60]

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[50] People v. Open Board, etc., 92 N. Y. 98. In Emerson v. Roof, 66 How. Pr. (N. Y.) 125, the purchaser was allowed twenty days in which to perfect the title.

[51] Scott v. Desire, 175 Ill. App. 215; Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27.

[52] Ethington v. Rigg, 173 Ky. 355, 191 S. W. 98.

[53] Lewis v. Woodbine Sav. Bank, (Iowa) 174 N. W. 19; Downing v. Anders, (Mo. App.) 202 S. W. 297.

[54] 1 Sugd. Vend. (8th Am. ed.) 404; Fry Sp. Perf. (3d Am. ed.) § 1041, *et seq.* Seibel v. Purchase, 134 Fed. Rep. 484; Rugg v. Realty Co., 261 Pa. 453, 104 Atl. 685; Janulewycz v. Quagliano, 88 Conn. 60, 89 Atl. 897, Ky. Distilleries Co. v. Blanton, 149 Fed. 31; Butterfield v. Harris, 20 Cal. App. 471, 129 Pac. 614; Minto v. Moore, 1 Ala. App. 556, 55 So. 542; Smith v. Browning, 157 N. Y. Supp. 71, 171 App. Div. 278.

[55] Gedye v. Duke of Montrose, 26 Beav. 45; Tilley v. Thomas, L. R., 3 Ch. 61. Distinguish these cases from Webb v. Hughes, L. R., 10 Eq. 281, where the conditions of sale provided that if from any cause whatever the purchase should not be completed on a specified day, interest should be paid on the purchase money. Time was allowed in which to perfect the title, though the premises were bought for immediate occupation as a residence.

As a general rule the objection that time is material cannot be made if the title to a small part, only, of the premises has failed. The vendor may perfect his title to that part, and specific performance will not be denied.[61] It is apprehended that this rule would not apply if the part to which the title had failed, though small, was the principal inducement to the contract.

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[56] Fry Sp. Perf. (3d Am. ed.) § 1044, *et seq.* Going v. Oakland, etc., Soc., 117 Mich. 230, 75 N. W. Rep. 462. Where property was purchased for immediate use as a lumber yard, a delay of four months in perfecting the title was held material. Parsons v. Gilbert, 45 Iowa, 33.

[57] Kemper v. Walker, 17 Ky. Law R. 1100, 32 S. W. Rep. 1093.

[58] Post, "Exceptions," 4, 8 and 9. Fry Sp. Perf. (3d Am. ed.) § 1044, *et seq.* Express stipulation in the contract, Mackey v. Ames, 31 Minn. 103, 16 N. W. Rep. 541; by notice, Myers v. De Meier, 4 Daly (N. Y.), 343; affd., 52 N. Y. 647; Emerson v. Roof, 66 How. Pr. (N. Y.) 125; Carrabine v. Cox, 136 Mo. App. 370, 117 S. W. 616; Mansfield v. Wiles, 221 Mass. 75, 108 N. E. 901, where the delay was caused by the inability of the purchaser to raise the purchase money. Where the parties agreed that the contract should be rescinded unless the title was perfected by a certain day and the title was perfected by a decree entered on that day, the purchaser was required to perform. Peterson v. Hultz, 96 Neb. 406, 147 N. W. 1126. Time will not be considered of the essence of the contract unless it so expressly appears, or is to be implied from the surrounding circumstances. King v. Connors, 222 Mass. 261, 110 N. E. 289.

[59] Hepwell v. Knight, 1 Yo. & Coll. 419; Hoyt v. Tuxbury, 70 Ill. 331.

[60] 1 Sugd. Vend. (8th Am. ed.) 397 (258). Frazier v. Boggs, 37 Fla. 307, 20 So. Rep. 245; Sachs v. Owings, 121 Va. 162, 92 S. E. 997. This operates no very great hardship upon the vendor, as, according to the generally prevalent rule, the purchaser could recover damages only to the extent of the purchase money paid. Ante, § 91.

If the purchaser intends to insist upon time as a material element of the contract, he should demand a title and offer to rescind at the time fixed for completing the contract if the vendor be unable to perform. If he continues in possession and proceeds with the payment of the purchase money after that time, he cannot, as a general rule, deny the right of the vendor to perfect the title.[62] If he gives time after the day fixed for the performance of the contract, or encourages the vendor in his efforts to perfect the title, he will, in most cases, be deemed to have waived the objection that time was material.[63] The vendor as well as the purchaser may avail himself of the objection that time was of the essence of the contract. He cannot be compelled to hold property, fluctuating in value, until the purchaser can pay for it.[64] But if time were not material he cannot refuse to convey because the purchase money was not paid on the day fixed.[65] It is obvious that the purchaser cannot object that time is material when he is in possession, and the failure to convey is brought about by his default in the payment of the purchase money;[66] nor in a case in which he waived a provision that time should be of the essence of the contract.[67]

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[61] 1 Sugd. Vend. (8th Am. ed.) 331 (218). Chamberlain v. Lee, 10 Sim. 444.

[62] Evans v. Bolling, 5 Ala. 550. He waives the objection that time was material by retaining the abstract until after the expiration of the time in which he was to point out objections to the title. St. Clair v. Hellweg, 173 Mo. App. 660, 159 S. W. 17.

[63] Stevenson v. Polk, 71 Iowa, 278, 32 N. W. Rep. 340; Garrison v. Newton, 96 Wash. 284, 165 Pac. 90. The purchaser does not, by a few days' indulgence of the vendor to enable him to complete the title, lose his right to insist upon time being of the essence of the contract. Garrett v. Cohen, 117 N. Y. Supp. 129, 63 Misc. Rep. 450. The purchaser cannot take advantage of a failure to furnish a satisfactory abstract within the time required by the contract, where he acquiesced in the efforts of the vendor to perfect the title after the expiration of that time. Plummer v. Kennington, 149 Iowa 419, 128 N. W. 552. What is meant by the maxim that time is not of the essence of the contract in equity, has been nowhere more clearly stated than in Mr. Bispham's Principles of Equity (3d ed.), § 391: "A court of equity will relieve against, and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for the completion, or the steps towards completion, if it can do justice between the parties, and if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. This is what is meant and all that is meant when it is said that in equity time is not of the essence of the contract." Language of Lord CAIRNS in Tilley v. Thomas, L. R., 3 Ch. App. 67.

[64] Fuller v. Hovey, 2 Allen (Mass.), 325; Goldsmith v. Guild, 10 Allen (Mass.), 239. Here the contract was dated March nineteenth, and was to be

And it has been held, even in a case in which time was made of the essence of the contract, that the purchaser could not resist the payment of the purchase money on the ground that the vendor had not the title on the day fixed for the performance of the contract, if he, the purchaser, failed to tender the purchase money on that day, and the vendor afterwards acquired the title and tendered a deed before bringing his action for the purchase money.[68]

If time be material, the purchaser may rescind if there be incumbrances on the property which the vendor cannot remove at the time fixed for performance.[69] The rule that the vendor may rely on the purchase-money as a means of discharging the incumbrances does not apply in such a case.

§ 311. **(2) Mutual and dependent covenants.** Nor does the rule which permits the vendor to perfect the title apply where the covenants for payment of the purchase money and delivery of the deed are mutual and dependent, and the vendor, at the time fixed by the contract, has not such title as he covenanted to convey,[70] and

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completed in ten days. The purchaser offered to perform March thirty-first, but the vendor refused. Specific performance was denied, there being evidence that the value of the property had changed. But in Barnard v. Lee, 97 Mass. 92, where the purchase money was to have been paid on April first, but was not tendered till the twenty-fifth of the following May, specific performance by the vendor was decreed, the purchaser having in the meanwhile entered upon and improved the land, with his knowledge and consent. Brashier v. Gratz, 6 Wh. (U. S.) 533. See, also, Presbrey v. Kline, 20 D. C. 513.

[65] Taylor v. Longworth, 14 Pet. 174.

[66] Cassell v. Cooke, 8 S. & R. (Pa.) 268, 11 Am. Dec. 610.

[67] Opejon v. Engere, 73 Wash. 324, 131 Pac. 1146.

[68] Augsberg v. Meredith, 101 Ill. App. 629.

[69] Johnson v. Herbst, 140 Minn. 147, 167 N. W. 356.

[70] Stitzel v. Copp, 9 W. & S. (Pa.) 29; Magaw v. Lothrop, 4 W. & S. (Pa.) 321; Clark v. Weis, 87 Ill. 438, 29 Am. Rep. 60; Tryce v. Dittus, 199 Ill. 189, 65 N. E. Rep. 220; Hudson v. Max Meadows L. & I. Co., 99 Va. 537,

this though no demand for the deed was ever made, the time for delivering the deed having been specified in the contract.[71] But if the covenants to make title on the one part, and to pay the purchase money on the other, are independent, and the passing of the title is subject to the payment of the purchase money as a condition precedent, the vendor may, at any time, perfect his title before the purchase money is paid, and it is no defense to an action for the purchase money that the title is incomplete.[72]

§ 312. **(3) Waiver of right.** If the purchaser objects to the title and declares that he will not complete the contract, and the seller acquiesces in the declaration, he cannot afterwards remove the objections to the title and require the purchaser to accept a conveyance.[73] So, *e converso,* as we have seen, a purchaser who refuses to complete the contract on account of a defect in the title, cannot afterwards demand specific performance by the vendor.[74]

§ 313. **(4) Loss and injury to purchaser.** The rule that the vendor may perfect the title after the time fixed for completing the contract, does not apply where to enforce it would entail loss and injury upon the purchaser,[75] as where the land has greatly depreciated in value pending the removal of objections to the title.[76]

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39 S. E. Rep. 215; Meshew v. Southworth, 133 Mich. 335, 94 N. W. Rep. 1047; Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502; Whitney Co. v. Smith, 63 Oreg. 187, 126 Pac. 1000; Reid v. Johnson, 121 N. Y. Supp. 750. If the vendor is not required by the contract to tender a deed until the purchase money has been tendered to him, he has until that time in which to perfect his title. Winkler v. Jerrue, 129 Pac. 804.

[71] Craig v. Martin, 3 J. J. Marsh. (Ky.) 50, 19 Am. Dec. 157.

[72] Ante, §§ 86, 253. Robb v. Montgomery, 20 Johns. (N. Y.) 15; Greenby v. Cheevers, 9 Johns. (N. Y.) 126.

[73] 1 Sugd. Vend. (8th Am. ed.) 408. Guest v. Homfray, 5 Ves. 818.

[74] Ante, § 193. Presbrey v. Kline, 20 D. C. 513.

[75] Maupai v. Jackson, 124 N. Y. Supp. 220, 139 App. Div. 524. If the lapse of time in perfecting the title caused no material change in the subject matter or in the relations of the parties, the vendor is entitled to specific performance. Begen v. Pettus, 140 N. Y. Supp. 765, 80 Misc. Rep. 120.

[76] Bisph. Eq. (3d ed.) § 394; 2 Beach Mod. Eq. Jur. § 495; McKay v. Carrington, 1 McLean (U. S.), 50; Jackson v. Edwards, 22 Wend. (N. Y.) 518; Dutch Church v. Mott, 7 Paige Ch. (N. Y.) 77; Nodine v. Greenfield, 7 Paige Ch. (N. Y.) 544, 34 Am. Dec. 363; Garnett v. Macon, 6 Call (Va.), 308, 370; Morriss v. Coleman, 1 Rob. (Va.) 478; McAllister v. Harmon, 101 Va. 17; 42 S. E. Rep. 920; Hendricks v. Gillespie, 25 Gratt. (Va.) 181, in which case

Therefore, where the improvements on the premises were destroyed by fire after the time fixed for completing the contract, and the vendor furnished no sufficient excuse for not tendering a sufficient deed at the appointed time, it was held that he could not thereafter claim the right to perfect the title.[77] Injury from mere delay in making title will not be presumed; the burden devolves on the purchaser to show that he has been or will be injured by the delay.[78] If the object of the purchaser be to resell, and by reason of a defect in the title he loses an opportunity to sell, time will be deemed of the essence of the contract.[79]

§ 314. **(5) Fraud of the vendor.** The vendor cannot enforce the rule in any case in which he has been guilty of fraud or has

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the war of 1861-1865 intervened between the purchase of the land and the vendor's suit for specific performance, so that the value of the land had greatly depreciated. In Hepburn v. Auld, 5 Cranch (U. S.), 279, LIVINGSTON, J., observed: "It is said by the English authorities that lapse of time may be disregarded in equity in decreeing a specific performance of a contract for the sale of land. But there is a vast difference between contracts for land in that country and this. There the lands have a known, fixed and staple value. Here the price is continually fluctuating and uncertain. A single day often makes a great difference, and in almost every case time is a very material circumstance." These remarks were approved in Richmond v. Gray, 3 Allen (Mass.), 25, the court adding: "At the present day business is done with such comparative speed, and changes of property and in places of business are so frequent, that it would in most cases be inequitable to compel a party to accept property after any considerable delay, or to compel him to keep his funds unemployed through fear that the court may order him to accept it, on terms of delay that he has never assented to." In Darrow v. Horton, 6 N. Y. State Rep. 718, an objection to the title not having been removed until after the usual renting period, whereby an opportunity to rent the premises was probably lost, specific performance at the suit of the vendor was denied. Where time was not originally of the essence of the contract, a delay of two months in making title was held immaterial, even though the premises had somewhat decreased in value. Tapp v. Nock, (Ky.) 12 S. W. Rep. 713. Delay of three months and twenty days after last installment of purchase money became due, held not material, no injury to the purchaser being shown. Wooding v. Crain, 10 Wash. 35, 38 Pac. Rep. 756.

[77] Smith v. Cansler, 83 Ky. 367.

[78] Merchants' Bank v. Thompson, 55 N. Y. 7.

[79] Spaulding v. Fierle, 86 Hun, 17, citing Merchants' Bank v. Thompson, 55 N. Y. 7, and Schmidt v. Reed, 132 N. Y. 116, 30 N. E. Rep. 373, in neither of which cases, however, does it appear that an opportunity to resell had been lost.

acted in bad faith in respect to the title.[80] This exception, of course, cannot apply if the purchaser bought with knowledge that the title was defective.[81] The exception will be enforced as well where the contract has been fully executed as where it is executory. Thus, a covenantor who fraudulently conceals the state of the title cannot compel the covenantee to accept an after-acquired title in satisfaction of the covenants.[82] But a mere innocent misrepresentation of the title will not deprive the vendor of his right to perfect the title.[83] And if the vendee waives the fraud by continuing in possession and negotiating with the vendor, the latter may insist upon perfecting the title.[84] It has been said that if there is great inadequacy of consideration, the vendor will be strictly held to the performance of the contract at the appointed time.[85]

§ 315. **(6) Want of colorable title.** The rule does not apply where the vendor had no power whatever to sell. The vendor cannot undertake to substitute the contract of a third person for his own.[86] This exception will not, of course, apply where the vendor is apparently the owner, or has a colorable title.[87] Nor where, at the time of the sale, he had the equitable title, though he did not disclose to the purchaser the fact that the legal title was outstanding.[88] Nor where the purchaser knew, at the time of the contract, that the vendor did not own the land and would have to obtain title,[89] and that the sale was made subject to approval by the owner.[90] Nor where the title fails to a portion of the estate only.[91] Nor where the vendor gets in the legal title, or procures the holder thereof to join in a conveyance of the estate by the

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[80] Fry Sp. Perf. (3d Am. ed.) § 1342. Dalby v. Pullen, 1 Russ. & Myl. 296; Meeks v. Garner, 93 Ala. 17, 8 So. Rep. 378; Hickson v. Linggold, 47 Ala. 449; Fordtran v. Cunningham, (Tex. Civ. App.) 177 S. W. 212; Christian v. Cabell, 22 Gratt. (Va.) 82; Brown v. Haff, 5 Paige (N. Y.), 241; Easton v. Montgomery, 90 Cal. 307, 27 Pac. Rep. 280; Moss v. Hanson, 17 Pa. St. 379; Blackmore v. Shelby, 8 Humph. (Tenn.) 439; Woods v. North, 6 Humph. (Tenn.) 309, 44 Am. Dec. 312; Green v. Chandler, 25 Tex. 160; Hall v. Clountz, (Tex. Civ. App.) 63 S. W. Rep. 941; Spencer v. Sandusky, 46 W. Va. 582, 33 S. E. Rep. 221; Hays v. Tribble, 3 B. Mon. (Ky.) 106. But see Schiffer v. Dietz, 83 N. Y. 300, and Whitney v. Crouch, 172 N. Y. Supp. 729, where a different view seems to have been taken.

[81] Harris v. Carter, 3 Stew. (Ala.) 233; Teague v. Wade, 59 Ala. 369; Reeves v. Dickey, 10 Gratt. (Va.) 138. The right to perfect the title will not be conceded where the defect was known to the vendor and by him concealed from the purchaser. Kenny v. Hoffman, 31 Gratt. (Va.) 442.

[82] Ante, § 215. Alvarez v. Brannan, 7 Cal. 503; 68 Am. Dec. 275, Elliott v. Blair, 6 Coldw. (Tenn.) 185; Blackmore v. Shelby, 8 Humph. (Tenn.) 438.

[83] Buford v. Guthrie, 14 Bush (Ky.), 690. Failure of the vendor to disclose the fact that the title was in his wife was not a fraud justifying the purchaser's rejection of the wife's deed. Crump v. Schneider, 246 Fed. 225; 158 C. C. A. 385.

[84] Schiffer v. Dietz, 83 N. Y. 300.

[85] Seymour v. Delancey, 7 Paige (N. Y.), 445, 520, citing Kien v. Stukely, 2 Bro. P. C. 396.

[86] 2 Beach Mod. Eq. Jur. § 612; Fry Sp. Perf. (3d Am. ed.) § 1343. In re

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Bryant, L. R., 44 Ch. Div. 218. "The vendor cannot say, 'I will substitute a contract with somebody else,'" per KAY, J. In this case trustees under a will, who had no power to sell until the death of a life tenant, offered to perfect the title by procuring a contract to sell from the life tenant. The offer was refused and a return of the deposit directed. This case must be distinguished from Salisbury v. Hatcher, 2 Yo. & C. Ch. 54, where a tenant for life who had sold the fee was permitted to perfect the title by getting the consent of the parties in remainder. See, also, the remarks of Chief Justice MARSHALL in Garnett v. Macon, 6 Call (Va.), 308, 370. Pipkin v. James, 1 Humph. (Tenn.) 325; 34 Am. Dec. 652; Oliver v. Dix, 1 Dev. & Bat. Eq. (N. C.) 158. Where a husband contracted to sell in his own right property belonging to his wife, specific performance at his suit was denied, even though he tendered a conveyance in which his wife joined. Luse v. Dietz, 46 Iowa, 205. Contra, Chrissman v. Partee, 38 Ark. 31. The fact that the premises have been sold for taxes is no objection to specific performance at the suit of the vendor if the right to redeem has not expired and the vendor offers to redeem; such a case is not a speculation by the vendor in a third person's title. Ley v. Huber, 3 Watts (Pa.), 367. In Wells v. Lewis, 4 Metc. (Ky.) 269, it was held that a title under a deed from a joint executor, invalid because of failure of the other executor to join in the deed, could not be perfected without the purchaser's consent, by tendering to him a deed from one entitled under the will to the proceeds of the sale of the land.

[87] Chamberlain v. Lee, 10 Sim. 444; Nance v. Sexton, 199 Mo. App. 461; 203 S. W. 649.

[88] Prov. Loan & Tr. Co. v. McIntosh, (Kans.) 75 Pac. 498. Compare Walsh v. Colvin, 53 Wash. 309; 101 Pac. 1085.

[89] Olson v. Rogers, 173 Iowa, 331; 155 N. W. 301. But in an action for damages against the vendor for breach of the contract, it is no defence that the purchaser, at the time of the contract, knew that the title was outstanding in another. Arentsen v. Moreland, 122 Wis. 167; 99 N. W. 790; 65 L. R. A. 973; Beck v. Staats, 80 Neb. 482; 114 N. W. 633; 16 L. R. A. (N. S.) 768; Fletcher v. Brewer, 88 Neb. 196; 129 N. W. 288.

[90] Weitzel v. Lyson, 23 S. D. 367; 121 N. W. 868.

[91] As in Dresel v. Jordan, 104 Mass. 407.

time fixed for completing the contract,[92] especially if it appear that the purchaser did not rely upon the existence of title in the vendor at the time of the contract.[93] It has been held that if the vendor have only an equitable title he will not be entitled to time in which to get in the legal title. The purchaser cannot be compelled to await the termination of proceedings instituted for that purpose.[94] But of course, he may get in the legal title if he can at any time before that fixed for completing the contract.[95] And if the purchaser knew, at the time he purchased, that the legal title was outstanding, and the contract provides that the vendor will cause a good and sufficient deed to be made to him, the purchaser cannot resist specific performance on the ground that the vendor has only the equitable title. Such a case is not one in which the vendor, acting *mala fide,* speculates in the property of a stranger.[96] The rule that the vendor may perfect the title at any time before that fixed for performance of the contract, does not apply where the husband sells the community estate of himself and wife, because the husband is, in those States in which such estate exists, prohibited by statute from selling or disposing of the same.[97] But if the purchaser buys in ignorance of the nature of the estate he will not be permitted to rescind if the wife offers to join in the conveyance.[98]

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[92] Dresel v. Jordan, 104 Mass. 414, criticising Hurley v. Brown, 98 Mass. 547; 96 Am. Dec. 671; Caporale v. Rubine, 92 N. J. L. 463; 105 Atl. 226; White v. Bates, 234 Ill. 276; 84 N. E. 906; Logan v. Bull, 78 Ky. 607, in which case the legal title was in the wife of the vendor, and a conveyance executed by both husband and wife was tendered to the purchaser. But see Luse v. Deitz, 46 Iowa, 205, supra, and Ft. Payne Coal & I. Co. v. Webster, (Mass.) 39 N. E. Rep. 786, where held that if the vendor disable himself from performing the contract by conveying the premises to a stranger, the purchaser may, of course, detain the purchase money. In Webber v. Stephenson, (Wash.) 39 Pac. Rep. 952, it was held that a contract for the sale of land would not be rescinded merely because, before the time fixed for its completion, the vendor had conveyed the premises to a stranger, since he might still be able to perform the contract by procuring the stranger to convey to the purchaser. If such a conveyance were made after the time fixed for completing the contract, there would seem to be no question as to the right of the purchaser to rescind.

[93] McNary v. Campbell, 81 Neb. 754; 116 N. W. 671.

[94] Dart. Vend. 70. Camp v. Morse, 5 Den. (N. Y.) 165; Jones v. Taylor, 7 Tex. 240; 56 Am. Dec. 48; Christian v. Cabell, 22 Grat. (Va.) 104.

[95] Beach Mod. Eq. Jur. § 812; Tiernan v. Roland, 15 Pa. St. 429. Townshend v. Goodfellow, 40 Minn. 312.

[96] Scott v. Thorp. 4 Edw. Ch. (N. Y.) 1; Burks v. Davies, 85 Cal. 110; 24 Pac. Rep. 613; Tison v. Smith, 8 Tex. 147; Hunt v. Stearns, 5 Wash. St. 167; 31 Pac. Rep. 468.

A provision in a contract of sale that the vendor shall be allowed time in which to perfect the title, supposes that he has a colorable title to the premises, and does not mean a reasonable time in which to purchase the estate when he has no pretensions to the title.[99] If the vendor takes upon himself to contract for the sale of an estate, and is not the absolute owner of it, and has not the power, by the ordinary course of law or equity, to make himself so, a court of equity will not compel specific performance by the purchaser, though the actual owner offers to make the seller a title; "for any seller ought to be a *bona fide* contractor," and it would tend to infinite mischief if an owner were permitted to speculate upon the sale of another man's estate.[1] The rule that the vendor may, with certain exceptions, perfect his title at any time before decree, cannot be so construed as to compel the purchaser to accept a conveyance from a stranger. The purchaser has a right to the securities afforded by the covenants of his vendor.[2] But if the purchaser actually accept such conveyance, he cannot afterwards refuse to pay the purchase money on the ground that the conveyance was not executed by his vendor.[3]

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[97] Hooper v. Jackson, 3 Wash. Ty. 235; 3 Pac. Rep. 841; Hoover v. Chambers, 3 Wash. Ty. 26; 13 Pac. Rep. 547.

[98] Colcord v. Leddy, 4 Wash. St. 791; 31 Pac. Rep. 320. If the husband sells the wife's land the purchaser cannot rescind if the wife ratifies the contract and joins in a conveyance. Chrisman v. Partee, 38 Ark. 31 (Contra, Luse v. Deitz, 46 Iowa, 205; Gage v. Cummings, 209 Ill. 120; 70 N. E. Rep. 679). In a case in which the vendor, who was to convey with full covenants, acted as agent for his mother without disclosing the fact, it was held that the purchaser must accept a deed from the mother with full covenants of title. McDonald v. Bach, 60 N. Y. Supp. 557; 29 Misc. Rep. 96.

[99] Benedict v. Williams, 39 Minn. 77; 38 N. W. Rep. 707; Primm v. Wise, 126 Iowa, 528; 102 N. W. Rep. 427.

[1] Tendring v. London, 2 Eq. Cas. Abr. 680; Burke v. Davies, 85 Cal. 110; 24 Pac. Rep. 613. But see Backman v. Park, 157 Cal. 607; 108 Pac. 686, where it was held that the vendor may require the purchaser to accept the deed of a stranger, citing Joyer v. Shafer, 97 Cal. 335; 32 Pac. 320; Shively v. Semi-Tropic Co., 99 Cal. 261; 33 Pac. 848; Hanson v. Fox, 155 Cal. 106; 99 Pac. 489; 20 L. R. A. (N. S.) 338.

[2] Ante, § 18. Weitzel v. Leyson, 23 S. D. 367; 121 N. W. 868; Reynolds v. Smith, 6 Bl. (Ind.) 200, the court saying: "Such a title as the purchaser contracted for he had a right to demand, secured by the covenants of the

Inasmuch as it is clear that want of title in the vendor at the time of the sale is no objection to specific performance if he be able to procure the title by the time fixed for completing the contract, no reason is perceived why the purchaser should not be compelled to accept the conveyance of a stranger if the vendor joined therein with such covenants for title as the purchaser could require, for this is in substance the same as if the vendor had taken a conveyance to himself, and thereupon immediately conveyed to the purchaser. It has been held, however, in a case in which the vendor delivered his own warranty deed and the warranty deed of a third person, who held the legal title, to the purchaser, but it did not appear that there had been a conveyance from such third person to the vendor, that the purchaser was justified in rejecting the deed, and this upon the ground that the record must show title in the grantor.[4] The reasons for this decision are not clear. It is true that the purchaser is entitled to insist that the title which he gets shall be evidenced as the law requires, and, generally, in America, that the title shall appear of record. But if he actually gets the record title, it would seem immaterial from what source it comes, provided he has the benefit of his vendor's covenant of warranty.

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vendor, and free from blemish. The terms of the contract would be essentially varied if a third person, without consent, were substituted to do that which one of the contracting parties had bound himself to perform." In re Head's Trustees, L. R., 45 Ch. Div. 310, the objection was made that an executorial trustee in that case had no authority under the will to sell the testator's real estate for the payment of debts, and it was held that the objection could not be removed by procuring the beneficiaries of the estate to join in a conveyance by the executor after the time fixed for completing the contract.

[3] Hamilton v. Hulett, (Minn.) 53 N. W. Rep. 364. Where the title was in a minor, and the vendor procured and tendered a deed from him, and the purchaser accepted such deed, it was held that the contract would not be rescinded thereafter, upon the ground that the minor might disaffirm the deed after coming of age, there being no claim of fraud or mistake in the case. Dentler v. O'Brien, (Ark.) 19 S. W. Rep. 111.

[4] George v. Conhaim, 38 Minn. 338; 37 N. W. Rep. 791. This decision was really *obiter*, the court having overlooked the fact that there had been a conveyance of the legal title to the vendor.

Generally, it may be stated, that if a suit by the vendor at law or in equity, other than to compel a conveyance of the legal title,[5] is necessary to perfect his title, the purchaser cannot be compelled to complete the contract.[6] It has been held that a subsequent sale and conveyance of the premises by the vendor to a stranger is no ground for rescission, where such second purchaser took with notice of the prior purchaser's right.[7] This decision deserves much consideration. Should the first purchaser be put to the trouble and expense of compelling specific performance at the hands of the purchaser with notice?

Specific performance of a contract by two to convey lands may be decreed where the two are able to convey a complete title according to contract, though neither could alone do so.[8]

§ 316. (7) **Laches of vendor.** The vendor cannot insist upon his right to perfect the title after the time fixed for the completion of the contract in a case in which he has shown great *laches* and want of diligence in performing the terms of the contract on his part, or in bringing his suit for specific performance, or in prosecuting the suit after it has been instituted.[9] A party cannot call upon a court of equity for this extraordinary relief "unless he has shown himself ready, desirous, prompt and eager."[10] But less diligence is required of the vendor in perfecting the title when the purchaser is in possession than when he is not. The purchaser will as a general rule be deemed to have waived his right to require a strict performance on the part of the vendor at the time fixed for completing the contract, if he take and retain possession of the premises knowing that the title is imperfect.[11]

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[5] Andrew v. Babcock, (Conn.) 26 Atl. Rep. 715.

[6] People v. Open Board, etc., 92 N. Y. 98; Eggers v. Busch, 154 Ill. 604; 39 N. E. Rep. 619; Reynolds v. Strong, 82 Hun (N. Y.), 202; 31 N. Y. Supp. 329.

[7] Hoock v. Bowman, 42 Neb. 87; 60 N. W. Rep. 391; Kreitsch v. Mertz, 119 Mich. 343; 78 N. W. Rep. 124. But see McCann v. Edwards, 6 B. Mon. (Ky.) 208, which was a suit to enjoin the collection of the purchase money, and in which time was allowed a vendor to file a cross-bill, bringing before the court certain persons, who, it was alleged, had an adverse interest in the premises. And in Lyons v. Piatt, (N. J. Eq.) 26 Atl. Rep. 334, a vendor was allowed forty-five days in which to perfect the title by suit to compel reformation of a deed which was intended to convey a fee, but which, from want of words of inheritance, conveyed only a life estate.

[8] Resnick v. Campbell, (N. J. Eq.) 59 Atl. 452.

[9] Fry Sp. Perf. (3d Am. ed.) § 1071. Watts v. Waddle, 6 Pet. (U. S.) 389; Cotton v. Ward, 3 T. B. Mon. (Ky.) 304, 313; Welch v. Matthews, 98 Mass. 131; McAllister v. Harmon, 101 Va. 17; 42 S. E. Rep. 920; Muller v. Palmer, 144 Cal. 305; 77 Pac. Rep. 954; Harding v. Olsen, 177 Ill. 298; 52 N. E. Rep. 482; Black Hills Nat. Bank v. Kellogg, 4 S. Dak. 312; 56 N. W. Rep. 458; Begen v. Pettus, 129 N. Y. Supp. 218, 144 App. Div. 476. A delay of one year and eight months by the vendor in perfecting the title and delivering a deed, held unreasonable in this case. Thomas v. Seaman, 275 Ill. 267; 115 N. E. 40. In Kimball v. Bell, 49 Kans. 173; 30 Pac. Rep. 240, a delay of seven months

§ 317. **(8) Effect of special agreement.** The rule does not apply, of course, in a case in which the contract expressly stipulates that either party may rescind in case of non-performance at the specified time; or if such an intention can be fairly inferred from the contract. In such a case the parties themselves have chosen to make the time of performance material, and a court of equity has no power to make a new contract for them.[12] Thus, where the vendor agreed to make a good title "on demand," time in which to perfect the title after demand was refused.[13] If the contract ex-

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by the vendor in removing an incumbrance from the premises, after the purchase money had been paid in full, was held unreasonable; and the purchaser was permitted to recover back the purchase money. Lyles v. Kirkpatrick, 9 S. C. 265, the delay in this case held not unreasonable.

[10] Per Lord ALVANLEY, M. R., in Milward v. Earl of Thanet, 5 Ves. 720, note.

[11] Tompkins v. Hyatt, 28 N. Y. 347.

[12] 2 Beach Mod. Eq. Jur. § 592. At one time it seems to have been the doctrine of the equity courts that time would not be deemed of the essence of the contract no matter how clearly such an intention appeared from the contract. Per Lord THURLOW in Greyson v. Riddle, cited in Seton v. Slade, 7 Ves. 268, by Sir SAMUEL ROMILLY *arguendo.* Gibson v. Patterson, 1 Atk. 12. But the rule as stated in the text has been long established. 2 Story Eq. Jur. § 780; Fry Sp. Perf. (3d Am. ed.) § 1046; Bisph, Eq. (3d ed.) § 396. Lowery v. Niccolls, 11 Ill. App. 450.

[13] Goetz v. Walter, 34 Minn. 241; 25 N. W. Rep. 404. Refusal by the purchaser to perform gave the vendor no right to recover damages against him at law, where the vendor had no other title than an interest in an option on the property involved and the contract required that he should perfect the title within a reasonable time. Thrower v. Logan, 137 Ga. 655; 74 S. E. 253. Where the vendor agreed to convey a good title on demand after payment of a part of the purchase money and execution of securities for the balance, it was held that he was entitled to a reasonable time in which to execute the deed after demand, but not to time in which to perfect the title.

pressly provides that the title shall be made good within a specified time, if it proves defective the vendor cannot claim the right to perfect the title after the expiration of that time.[14] But he has the right to perfect the title within that time.[15] So, also, where the contract provided that the vendor should have a reasonable time in which to cure defects in the title.[16] As a general rule until the time fixed for completing the contract the purchaser has a right to rely upon the unpaid purchase money as a fund with which to remove incumbrances. But where the contract requires the vendor to convey free of incumbrances, he must discharge incumbrances before the time fixed for completing the contract. He cannot impose upon the purchaser the burden of procuring releases.[17] Of course the specification in the contract of a time at which it is to be performed will not of itself make time material;[18] it must appear that the parties really intended to make such time an essential element of their agreement;[19] "a material object to which they looked in the first conception of it."[20]

It has been held that the vendor cannot claim the right to cure defects in the title if the contract provides that the purchase money shall be refunded in case the title, upon examination, should prove

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In such case time was made material by the contract, and it devolved upon the vendor to have a perfect title when demand was made. Gregory v. Christian, 42 Minn. 304; 44 N. W. Rep. 202.

[14] Mackey v. Ames, 31 Minn. 103; 16 N. W. Rep. 541. The contract in this case contained the following provision: "And it is agreed that if the title of said premises is not good, and cannot be made good within sixty days from date hereof, this agreement shall be void." Joslyn v. Schwend, 85 Minn. 130; 88 N. W. Rep. 410; Blied v. Barnard, 120 Minn. 390; 139 N. W. 714; Depave v. Rizzo, 27 Cal. App. 200; 149 Pac. 793.

[15] Heller v. Maguin, 261 Ill. 588; 104 N. E. 158.

[16] Donovan v. Hoenig, 157 Wisc. 250; 146 N. W. 1125.

[17] Morange v. Morris, 42 N. Y. 48; Zorn v. McParland, 32 N. Y. Supp. 770.

[18] 2 Beach Mod. Eq. Jur. § 592.

[19] Language of GRAY, J., in Barnard v. Lee, 97 Mass. 94, citing Molloy v. Egan, 7 Ir. Eq. 592; Jones v. Robbins, 29 Me. 351; 50 Am. Dec. 593.

[20] Language of Lord ERSKINE in Hearne v. Tenant, 13 Ves. 289. In Toole v. Toole, 22 Abb. N. Cas. (N. Y.) 392, specific performance at the suit of the vendor was refused apparently upon no other ground than that he had not perfected the title by the time fixed for the completion of the contract. There is nothing in the case to show that time was material.

unsatisfactory to the purchaser.[21] Such an agreement, however, is implied in every case in which time is of the essence of the contract, and no good reason is perceived why the vendor should be denied the right to perfect his title where time is not material, by a mere expression of what is implied in the contract. If the purchaser wishes to deprive the vendor of the right to perfect the title, he may do so by providing that time shall be material.[22]

If, by the contract, the vendor must furnish an abstract showing good title in him and allow a reasonable time in which to examine the abstract and point out objections to the title, it has been held that he cannot insist upon the right to cure such objections, in the absence of a reservation of that right in the contract.[23]

§ 318. **(9) Effect of notice and request to perfect the title.** If the vendor has been guilty of gross, vexatious, unreasonable or unnecessary delay in performing the contract on his part the purchaser may by notice of a purpose to rescind in the alternative, restrict him to a reasonable time within which to perfect the title.[24] And the vendor has the same right with respect to the payment of the purchase money.[25] But neither party can arbitrarily terminate the rights of the other in this respect; the notice must fix a reasonable limit.[26] Thus, a notice by the purchaser, after negotiations respecting the title had been going on for more than three years, that he would rescind unless a marketable title were shown within five weeks, was held unreasonable and ineffectual.[27] It is not necessary, for the purposes of this exception, that the notice should be in writing.[28]

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[21] Averett v. Lipscomb, 76 Va. 404; Watts v. Holland, 86 Va. 999; 11 S. E. Rep. 1015. In a case in which a deed was deposited in escrow, with a written agreement that the purchaser might abandon the sale if the title should not be found by the depositary to be indefeasible, it was held that the vendor had no right to perfect the title by procuring a release from a prior purchaser of the premises. Fletcher v. Moore, 42 Mich. 577.

[22] Mackey v. Ames, 31 Minn. 103; 16 N. W. Rep. 541.

[23] Bragg v. Chilcote, 176 Ill. App. 371.

[24] Frey Sp. Perf. (3d Am. ed.) § 1062; 2 Beach Mod. Eq. Jur. § 592. Prothro v. Smith, 6 Rich. Eq. (S. C.) 324; Mansfield v. Wiles, 221 Mass. 75; 108 N. E. 901; Keater v. Ferguson, 20 S. D. 473; 107 N. W. 678; 129 Am. St. Rep. 947.

[25] Ante, Exception 7. Hatch v. Cobb, 4 Johns. (N. Y.) 559. Jackson v. Ligon 3 Leigh (Va.), 161.

[26] Fry Sp. Perf. (3d Am. ed.) § 1064, and cases there cited. Spencer v. Lyman, 27 S. D. 471; 131 N. W. 802.

§ 319. **IN WHAT PROCEEDINGS THE VENDOR MAY CLAIM THE RIGHT TO PERFECT THE TITLE.** Obviously the right of the vendor to perfect the title while the contract is executory, may be asserted in any proceeding in equity in which specific performance is claimed by him, or rescission is sought by the purchaser.[29] But in an action at law to recover back the purchase money, or for breach of the contract, except in those States in which the distinction between legal and equitable procedure is abolished, or in which equitable defenses may be interposed in actions at law, it is presumed that unless the vendor had perfected his title at the time of trial,[30] he would be forced to seek his relief in equity by suit for specific performance, or by injunction against the purchaser's proceedings at law. In either case, it is apprehended that a judgment at law against the vendor would not be a bar to the proceeding in equity by him, claiming the right to perfect the title, unless the ground of his application to equity would constitute a defense or claim of which he might have availed himself at law. But if the vendor goes to trial at law insisting upon the sufficiency of the title, and judgment is rendered against him, it may be doubted whether he would afterwards be allowed time in which to remove objections to the title.[31] But wherever the distinction between legal and equitable procedure has been swept away, it is apprehended that in any case in which the right to perfect the title exists, and in any action by the vendor to recover the purchase money,[32] or by the purchaser to recover back what has been paid,[33] or to recover damages for a breach of the contract,[34] except in cases of fraud, the vendor may show that he has perfected the title, and thereby removed all ground for the purchaser's claim or defense. In New York, however, it has been held that if neither party, in an action for damages for breach of contract to convey

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[27] McMurray v. Spicer, L. R., 5 Eq. 527. Notice on Dec. 23d that title must be made by next following Jany. 1st, held insufficient in Thompson v. Dulles, 5 Rich. Eq. (S. C.) 370.

[28] Nokes v. Lord Kilmorey, 1 DeG. & Sm. 444.

[29] Hughes v. McNider, 90 N. C. 248. On bill by the purchaser for rescission, the vendor should be allowed a reasonable time in which to clear up the title. Metcalf v. Dallan, 4 J. J. Marsh. (Ky.) 196; Jackson v. Murray, 5 T. B. Mon. (Ky.) 184; 17 Am. Dec. 53. The vendor may remove a technical objection to the title in a suit by the purchaser to enjoin the collection of the purchase money. Mays v. Swope, 8 Gratt. (Va.) 46. See, also, McCann v. Edwards, 6 B. Mon. (Ky.) 208. In Bell v. Sternberg, 53 Kans. 571, the vendor, after being sued by the purchaser to recover back the purchase money, was allowed to perfect the title. But see Pipkin v. James, 1 Humph. (Tenn.) 325, 34 Am. Dec. 652, where it seems to have been held that the vendor cannot perfect the title after a suit to recover back the purchase money has been begun. See, also, Lutz v. Comptom, 77 Wis. 584; 46 N. W. Rep. 889; Goetz v. Waters, 34 Minn. 241; 25 N. W. Rep. 404. This may be doubted; the purchaser would always have it in his power to defeat the vendor's right to perfect the title by bringing an action to recover back what had been paid. In Beauchamp v. Handley, 1 B. Mon. (Ky.) 135, it was said that a vendor when sued for damages for breach of contract in failing to make title at the specified time, is not obliged to avail himself of the defense that he has perfected the title, but may set up that fact as a defense in a suit to enjoin him from collectiong the purchase money; and that, though the judgment for damages in favor of the purchaser was a virtual rescission of the contract.

[30] Lutz v. Compton, 77 Wis. 584; 46 N. W. Rep. 889. In an action by the vendor to recover damages against the vendee for breach of his contract to exchange lands with the plaintiff, the latter may offer in evidence a deed

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curing a defect in his title, which was executed before the action was brought. Burr v. Todd, 41 Pa. St. 206.

[31] In Hayes v. Tribble, 3 B. Mon. (Ky.) 106, the purchaser obtained an injunction against a judgment for the purchase money on the ground that the title was unmarketable. The defendant, instead of asking time to remove the objections to the title, claimed that they were untenable, and tendered a conveyance which the court below decreed that the complainant should accept. This was reversed on appeal, and the vendor, defendant having gone to trial below on the sufficiency of the objections to the title, time in which to remove them was refused.

[32] As in Williams v. Porter (Ky.), 21 S. W. Rep. 643 (not officially reported); Widmer v. Martin, 87 Cal. 88; 25 Pac. Rep. 264; Keep v. Simpson, 38 Tex. 203; Lessly v. Morris, 9 Phila. (Pa.) 110; 30 Leg. Int. 108, where held that incumbrances might be removed up to the time of trial. In an action for the purchase money of land, the purchaser cannot defend on the ground that the conveyance to him is defective in that it fails to contain in the body thereof the name of a party who signed it, if at the trial the vendor tenders a deed in which the objection is removed. Keeble v. Bank, (Ala.) 9 So. Rep. 583.

[33] Lockwood v. Hannibal & St. J. R. Co., 65 Mo. 233.

[34] In Haynes v. Farley, 4 Port. (Ala.) 528, it seems to have been considered that the vendor cannot perfect the title after the purchaser has begun an action to recover damages for breach of the contract.

free of incumbrances, asks equitable relief, it will not avail the defendant that incumbrances were removed by him before the trial.[35]

The collection of the purchase money will, of course, be suspended while the title is being perfected.[36] The vendor gets interest on the purchase money, and the purchaser receives the rents and profits.[37] In some of the States a grantee with covenants for title is allowed an injunction against the collection of the purchase money on failure of the title, where the grantor is insolvent or a non-resident.[38] This relief has been refused where the grantor perfected the title before decree in a suit by the grantee to enforce a lien for the purchase money paid, or to rescind the contract.[39]

§ 320. **REFERENCE OF TITLE TO MASTER IN CHANCERY. When directed.** In suits for the specific performance of contracts for the sale of lands, whether by the vendor or the purchaser, if any question is made as to the ability of the vendor to make title, the court may, at the instance of either party, refer the cause to a master in chancery, or other officer having like duties, with directions to inquire and report to the court whether such a title as the contract requires can be made.[40] It is said that the purchaser is entitled to a reference, even though he knows of no objection to the title.[41] But if it appear that the vendor, at the proper time, disclosed a good title, the purchaser must pay the costs of the inquiry.[42] The reference is a matter of right and may be directed without the consent of the other party.[43] And it has been held error in the court to refuse a reference when asked by either party.[44]

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[35] Mott v. Ackerman, 92 N. Y. 539; Higgins v. Eagleton, 34 N. Y. Supp. 325.

[36] Jones v. Taylor, 7 Tex. 240; 56 Am. Dec. 48.

[37] 2 Bisph. Eq. § 392. Post, § 324.

[38] Post, § 331.

[39] Stokes v. Acklen, (Tenn.): 46 S. W. Rep. 316; McElya v. Hill, 105 Tenn. 319; 59 S. W. Rep. 1025.

[40] 1 Sugd. Vend. (8th Am. ed.) 526; Fry Sp. Perf. (3d Am. ed.) §§ 1280. *et seq.* Jenkins v. Hiles, 6 Ves. 653; Cooper v. Deane, 1 Ves. Jr. 565. McComb v. Wright, 4 Johns. Ch. (N. Y.) 659; Beverly v. Lawson, 3 Munf. (Va.) 317.

[41] Jenkins v. Hiles, 6 Ves. 646; Middleton v. Selby, 19 W. Va. 167.

[42] Lyle v. Earl of Yarborough, John. 70.

[43] Atkinson on Marketable Titles, 226. Brooke v. Clarke, 1 Swanst. 551; Gentry v. Hamilton, 3 Ired. Eq. 376; Beverly v. Lawson, 3 Munf. (Va.) 317.

As a consequence of the rule that the vendor may perfect the title at any time before a decree upon the merits, the inquiry by the master is not whether a title could be made at the date of the contract, or when the suit for specific performance was begun, but whether the vendor can make out a title at any time before the master makes his report.[45] But if, from any cause, such as a material change in the value of the property, it would be inequitable to compel a specific performance by the purchaser upon the coming in of the master's report showing that the title has been or may be perfected, it is apprehended that the vendor could not have a decree.

§ 321. **When refused.** The court will not direct a reference where the sale was of such title only as the vendor might have.[46] Nor where the purchaser has waived all objections to the title.[47] Nor where the conditions of sale provide that the vendor shall not be required to show a title.[48] The inquiry, if directed, will not be extended to matters expressly excluded by the terms of sale, as where they provide that the production of title shall begin with a particular instrument, or shall not be extended back beyond a certain period.[49]

If a defect in the title is alleged, and has been prominently put forward in the pleadings, the court may decree or deny specific performance without a reference to the master,[50] as where the bill and answer discloses that a title cannot be made.[51] Where the validity of the title depends upon a question of law and neither party asks a reference, none should be made; the court itself should decide the question.[52] But if it do not appear from the pleadings that a title cannot be made, it is error to decree a rescission of the contract without directing a reference.[53] In a suit by the vendor for specific performance in which the purchaser answered that the title was defective, but did not ask a reference, and the proof did not show that the title was doubtful, it was held that the court did not err in decreeing specific performance without referring the title.[54] Generally it may be stated that the purchaser will not be entitled to a reference where the court is in possession of all the facts affecting the title.[55]

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[44] Middleton v. Selby, 19 W. Va. 167.

[45] Fry Sp. Perf. (3d Am. ed.) § 1339.

[46] Fry Sp. Perf. (3d Am. ed.) §§ 858, 1287.

[47] Palmer v. Richardson, 3 Strobh. Eq. (S. C.) 16; Fry Sp. Perf. (3d Am. ed.) §§ 1300, 1305. As to what amounts to waiver of objections, see ante, Ch. 8.

[48] Hume v. Bentley, 5 De G. & Sm. 520.

[49] Corrall v. Cattell, 4 M. & W. 734.

[50] Fry Sp. Perf. (3d Am. ed.) § 1280. Tillotson v. Gesner, 33 N. J. Eq. 313. See Linn v. McLean, 80 Ala. 360. In a suit for specific performance in which want of title is alleged, if the court is satisfied that the objections to the title exist and are well founded, it will not direct a reference to the master. Dominick v. Michael, 4 Sandf. (N. Y.) 374. It is not bound to direct a reference in such a case. Paslay v. Martin, 5 Rich. Eq. (S. C.) 351; Omerod v. Hardman, 5 Ves. 722; Cooper v. Denne, 1 Ves. 565.

§ 322. **At what stage of the proceedings reference directed.** The inquiry as to title in a suit for specific performance may be made, (1) on motion before answer; (2) on motion after the answer, but before hearing, and (3) at the hearing.[56] In all these cases it seems that the reference will be denied if any question involving the merits other than the sufficiency of the title is to be determined, otherwise the court would fall into the absurdity of having the master's report on the title, and a subsequent decision that there is no subsisting agreement.[57] It further seems, however, that the defendant, after a reference has been made, may file his answer setting up any defense he pleases.[58]

§ 323. **Procedure. Costs.** Testimony as to all matters of fact material to the title may be taken before the master.[59] In

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[51] 2 Dan. Ch. Pr. 1215; Frost v. Brunson, 6 Yerg. (Tenn.) 36.

[52] Jackson v. Ligon, 3 Leigh (Va.), 161.

[53] Frost v. Brunson, 6 Yerg. (Tenn.) 36. See, also, Middleton v. Selby, 19 W. Va. 167. Reference of the title is unnecessary on bill by the purchaser to rescind if the defendant does not allege title in his answer. Buchanan v. Alwell, 8 Humph. (Tenn.) 516.

[54] Core v. Wigner, 32 W. Va. 277; 9 S. E. Rep. 36.

[55] Goddin v. Vaughn, 14 Grat. (Va.) 102, 128; Thomas v. Davidson, 76 Va. 338.

[56] Fry Sp. Perf. (3 Am. ed.) §§ 1323, 1324, *et seq.* Middleton v. Selby, 19 W. Va. 175.

[57] Language of Lord ELDON in Morgan v. Shaw, 2 Mer. 138.

[58] Emery v. Pickering, 13 Sim. 583.

[59] The American practice, where the title is referred, is indicated in the

England it seems that the master takes the advice of conveyancing counsel before passing on the title. The report of the master should state in terms whether the title can or cannot be made out, and, it seems, in what way it can be perfected.[60] It has been held, however, that a report merely stating that a good title could be made, was sufficient.[61] If the report be in favor of the title, and no exceptions thereto be filed, specific performance will, as a general rule, be decreed at the hearing. If the report be against the title, and exception thereto be overruled, the suit will be dismissed.[62] It seems, however, that even after an exception to the report by the vendor has been overruled, he will be allowed further time in which to remove an objection to the title.[63] If after confirmation of the master's report a new fact appear by which the title is affected, the report will be recommitted to the master for further inquiry.[64]

As a general rule costs are given against the vendor up to the time at which he first shows a good title, since the inquiry results from his default.[65] But if the purchaser be unable to sustain objections to the title upon which the reference was made, costs will be decreed against him.[66] Of course a party excepting to the master's report must pay the costs of the exceptions if they be overruled.[67]

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following language of Chancellor KENT in McComb v. Wright, 4 Johns. Ch. (N. Y.) 659, 670: "I shall direct the usual reference to a master, to examine whether a good title can be given by the plaintiffs for the house and lot sold to the defendants, and that he give to the defendants' solicitor due notice of the examination, and that the evidence taken in chief in this case on the point of title be submitted to the master, together with such other competent proof as the parties, or either of them, may think proper to furnish, and that he report an abstract of such title, together with his opinion thereon, with all convenient speed."

[60] Fry Sp. Perf. (3d Am. ed.) §§ 1346, 1348.

[61] Scott v. Thorp, 4 Edw. Ch. (N. Y.) 1.

[62] Dart Vend. (5th ed.) 1111; Fry Sp. Perf. (3d Am. ed.) § 1354.

[63] Curling v. Flight, 2 Ph. 616; Portman v. Mill, 1 Russ. & Myl. 696.

[64] 1 Sugd. Vend. (8th Am. ed.) 526; 2 Dan. Ch. Pr. 1218; Fry Sp. Perf. (3d Am. ed.) § 1351. Jendvine v. Alcock, 1 Mad. 597.

[65] Green v. Chandler, 25 Tex. 148.

[66] Phillipson v. Gibbon, L. R., 6 Ch. 434.

[67] Scott v. Thorp, 4 Edw. Ch. (N. Y.) 1.

§ 324. **INTEREST ON THE PURCHASE MONEY WHILE THE TITLE IS BEING PERFECTED.** In equity the purchaser of an estate is regarded as the owner from the time of the contract, and, being entitled to the rents and profits, is required to pay interest on the purchase money from that time,[68] especially if he be in the actual possession and enjoyment of the estate.[69] But if he be justified in declining to take possession on the ground that there are material objections to the title, he cannot be compelled to pay interest.[70] Nor to incur the expense of "carrying" the property pending the adjustment of a dispute as to his obligation to take the title.[71] And, where a purchaser, finding that the title was defective, offered to rescind the contract and return the premises to the vendor, and the offer was refused, it was held that he could not thereafter be required to pay interest, even though he was in possession of the estate.[72] But, as a general rule, the act of taking possession is an implied agreement to pay interest,[73] and "it must be a strong case and clearly made out" that relieves the purchaser from that obligation, where he has received the rents and profits.[74] It has been said, however, by the most eminent authority that it cannot be laid down as an absolute rule that a purchaser by private contract shall pay interest from the time of taking possession.[75] It seems that if there be material and valid objections to the title, and the purchaser be obliged to keep his money idle and unproductive in daily expectation of a perfected title, he will be relieved from the payment of interest, even though in possession,[76] provided the vendor was notified that the purchase money was lying dead.[77]

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[68] 2 Sugd. Vend. (8th Am. ed.) 314 (627); 1 Warvelle Vend. 188. Interest should be allowed on the purchase money only from the date of the decree declaring the title to be marketable. Newman v. Gleason, 132 La. 561; 61 So. 620. In Haffy v. Lynch, 77 N. Y. Supp. 587; 38 Misc. 256, a case in which the title was not perfected until thirteen years or more after the sale, the vendor, remaining in possession, was charged with the annual rental value of the property and interest thereon, and penalties, in excess of legal interest, on unpaid taxes and assessments; and the purchaser was charged with the unpaid purchase money and interest thereon from the day of sale, together with taxes and assessments levied since the day of sale.

[69] Oliver v. Hallan, 1 Grat. (Va.) 298. "If this rule be not universal, the party who claims an exemption from its operation must bring himself within some established exception." Brockenbrough v. Blyth, 3 Leigh (Va.), 619, 647. A purchaser must pay interest on a sum reserved in his hands as an indemnity against an alleged claim of dower, he having had possession of the land, and the right to dower not having been asserted within the statutory period of limitation. Boyle v. Rowand, 3 Des. (S. C.) 553.

[70] 2 Sugd. Vend. (8th Am. ed.) 318 (630), citing Forteblow v. Shirley, 2 Swan 223; Carrodus v. Sharp, 20 Beav. 56; Luckett v. Williamson, 37 Mo. 388, 395, *obiter.* Kennedy v. Koopman, 166 Mo. 87; 65 S. W. Rep. 1020; Faile v. Crawford, 52 N. Y. Supp. 353; 30 App. Div. 536; Lowther etc. Co. v. Gunnell, 184 Ky. 587; 212 S. W. 593. It has been held that if the objection is that the title is doubtful only and not absolutely bad, the purchaser cannot refuse to pay interest on the purchase money. Sohier v. Williams, 2 Curt. (C. C.) 195, 199. But see Kester v. Rockel, 2 Watts & S. (Pa.) 365, 371. In Selden v. James, 6 Rand. (Va.) 465, it was held that the prosecution of an adverse but groundless claim to the land against the purchaser, by reason of which he detained the purchase money in his hands, would not excuse him from the payment of interest, he being in possession of the estate. This was a case in which the contract had been executed by a conveyance. See, also, Breckenridge v. Hoke, 4 Bibb (Ky.), 272.

[71] Steiner v. Presb. Ch., 45 N. Y. Supp. 524, 7 App. Div. 500.

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[72] Rutledge v. Smith, 1 McCord Ch. (S. C.) 402.

[73] Fludyer v. Cocker, 12 Ves. 25; Kutzinger v. Enering, (Iowa) 174 N. W. 1038.

[74] Powell v. Matyr, 8 Ves. 146.

[75] 2 Sugd. Vend. (8th Am. ed.) 317 (629). Comer v. Walker, Rey. lib. A, 1784, fol. 625, where the purchaser had been in possession twenty-two years. He was required to pay only a low rate of interest, such as he might have realized from securities readily convertible into money. Where the purchaser has been harassed or disturbed in the possession, where there has been willful and vexatious delay or gross or criminal laches in the vendor, where there are any well-founded doubts of the title, or where from neglect, or other cause, for a long time no person is appointed to whom payment can be made, it should be referred to a jury to say whether the purchaser should be required to pay interest.

[76] 2 Sugd. Vend. (8th Am. ed.) 315 (628). Jenkins v. Fahig, 73 N. Y. 355, *obiter*. Osborne v. Bremer, 1 Des. (S. C.) 486; Hunter v. Bales, 24 Ind. 303. The presumption is that the money is unproductive in the vendee's hands, and he is not chargeable with interest, unless he used it, which use it devolves on the vendor to prove. Hunter v. Bales, 24 Ind. 294, 304; Bass v. Gilliland, 5 Ala. 761. A purchaser who is prevented from improving the land by a suit against his vendor for recovery of the land, cannot be required to pay interest pending the suit, though it was agreed that improvements should be at the risk of the purchaser if the title should be attacked. Wightman v. Reside, 2 Des. (S. C.) 578. A purchaser from one holding under color of title only, must pay interest only from the time his vendor's title was perfected by adverse possession. Baskin v. Houser, 3 Pa. St. 430.

[77] Powell v. Matyr, 8 Ves. 146, where it was said by the master of the rolls after laying down the general rule that the purchaser must pay interest from the time of the contract: "It does not follow that the mere circum-

In such a case the purchaser takes the rents and profits in satisfaction of the interest he might have realized from the investment of his money. To charge him with the rents and profits would be in effect to make him pay interest when losing the interest on his own money. Hence, he cannot be compelled to pay rent pending the vendor's efforts to perfect the title.[78] In accordance with the foregoing principles, it has been held that if the vendor be unable to convey a good title when demanded by the purchaser on payment of the purchase money, and the latter be afterwards required to take a perfected title, the vendor must pay to him interest on the purchase money received.[79] But this principle has, of course, no application to cases in which the payment of the purchase money and the execution of a conveyance is deferred until some future day, unless, upon the maturity of the purchaser's obligations for the purchase money, the vendor be unable to convey and the purchaser be obliged to keep the money idle awaiting the tender of a perfected title.[80]

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stance that the vendor was not ready to complete the title at the day will vary the rule. The purchaser must state something more than mere delay, viz., that he has not had the benefit of his money, and I think it reasonable to add the other term that has been mentioned, that in some way it shall be intimated to the vendor that the purchaser has placed himself in that situation, his money unproductive and to wait the event, otherwise there is no equality. The one knows that the estate produces rent, the other does not know that the money does not produce interest. Wherever, therefore, the purchaser is delayed as to the title and means to insist upon this, he ought to apprise the other party that he is making no interest." See, also, Rutledge v. Smith, 1 McCord Ch. (S. C.) 403; Brockenbrough v. Blythe, 3 Leigh (Va.), 619.

[78] 1 Sugd. Vend. (8th Am. ed.) 12 (8). Dowson v. Solomon, 1 Drew. & S. 1; Aukeny v. Clark, 148 U. S. 345; Bangs v. Barrett, (R. I.) 18 Atl. Rep. 250.

[79] Pierce v. Nichols, 1 Paige (N. Y.), 244.

[80] Hunter v. Bales, 24 Ind. 303.

CHAPTER XXXIII.

OF THE RIGHT OF THE VENDOR TO REQUIRE THE PURCHASER TO TAKE THE TITLE WITH COMPENSATION FOR DEFECTS.

GENERAL RULE. § 325.
EXCEPTIONS. § 326.
INDEMNITY AGAINST FUTURE LOSS. § 327.

§ 325. **GENERAL RULE.** The vendor, under some circumstances, may require the purchaser to take the property, with compensation for failure of the title as to a portion of the premises not material to the due enjoyment of the remainder, or with compensation for inconsiderable liens, charges or incumbrances.[1] This rule has been carried so far that a fraudulent misrepresentation as to the title of a small portion of the land, not constituting a principal inducement to the purchaser, and not indispensable to the intended purposes of the whole, has been held no ground for rescinding the contract.[2] This rule has also been applied where the purchaser sought to rescind an executed contract. Thus, where by mistake the grantor included in a conveyance of 1,269 acres, 80 acres to which he had no title, it was held that the grantee was entitled to compensation for the deficiency, but not to a rescission of the contract, the eighty acres not being indispensable to the due enjoyment of the rest, and not having formed a special inducement to the purchaser.[3]

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[1] 1 Sugd. Vend. (8th Am. ed.) 572 (312); Adams Eq. 210; Bisph. Eq. (3d ed.) 445; Fry Sp. Perf. (3d Am. ed.) § 1178, *et seq.;* 2 Kent Com. (11th ed.) 475; 1 Story Eq. § 779; Hepburn v. Auld, 5 Cranch (U. S.), 262; Pratt v. Campbell, 9 Cranch (U. S.), 494; Cheesman v. Thorn, 1 Edw. Ch. (N. Y.) 629; Meyers v. Ringler, 54 N. Y. Supp. 280, 34 App. Div. 415; Ten Broeck v. Livingston, 1 Johns. Ch. (N. Y.) 357, where the incumbrance was a quit rent of fifty-four cents a year, of which the purchaser had notice. Hadlock v. Williams, 10 Vt. 570; Foley v. Crow, 37 Md. 51; Keating v. Price, 58 Md. 52; Stoddart v. Smith, 5 Binney (Pa.), 355; Anderson v. Snyder, 21 W. Va. 632; Creigh v. Boggs, 19 W. Va. 240; Mech. Bank v. Cleland (Ky.) 67 S. W. 386; Kemper v. Walker, 17 Ky. Law R. 1100, 32 S. W. 1093; Florence Oil Co. v. McCandless, 26 Colo. 534, 58 Pac. 1084; Rollyson v. Bourn, (W. Va.) 100 S. E. 682; Phinizy v. Guernsey, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680, 78 Am. St. Rep. 207. The following instances in which specific performance with compensation for defects was decreed in favor of the vendor, have been mentioned by Mr. Fry (Sp. Perf. [3d Am. ed.] § 1194): "Where an estate of about 186 acres was described as freehold, and, in fact, about two acres, part of a park, were held only from year to year. Calcraft v. Roebuck, 1 Ves. Jr. 221. Where there was an objection to the title of six acres out of a large estate, and those acres do not appear to have been material to the enjoyment of the rest. McQueen v. Farquhar, 11 Ves. 467." The same rule applies, of course, where the title to the entire premises is good, but there is a small deficiency in the number of acres called for by the contract. King v. Wilson, 6 Beav. 124. Or where a small portion of the property is not of the kind or quality specified in the agreement of sale. Scott v. Hanson, 1 Russ. & Myl. 128. Or where a term for years is slightly shorter than that which the vendor purported to sell. 1 Sugd. Vend. (8th Am. ed.) 457 (299). The purchaser cannot be required to take the premises if they are subject to a ground rent, though compensation be offered, the ground rent being an incumbrance incapable or removal without the consent of the incumbrancer.

A condition of sale that if any mistake or omission should be discovered in the description of the property compensation must be accepted, does not apply to a defect of title to a part material to the enjoyment of the rest.[4]

"If that part to which the seller has a title was the purchaser's principal object, or equally his object with the part to which a title cannot be made, and is itself an independent subject and not likely to be injured by the other part, equity will compel the purchaser to take it at a proportionate price," and an inquiry will be directed as to whether the part to which a title cannot be made is material to the possession and enjoyment of the rest of the estate.[5] Where the purchaser entered into the contract with knowledge that there was a trifling incumbrance on the property, namely, a reservation of a yearly rental of one pound of wheat, specific performance by the purchaser was decreed without compensation.[6]

As a general rule, an acknowledged and undisputed charge or

Gans v. Renshaw, 2 Barr (Pa.), 34, 44 Am. Dec. 152. The existence of a highway on the land at best only entitles the purchaser to a reduction of the purchase money by the amount that such highway reduces the value of the tract. Beach v. Hudson R. Land Co., 65 N. J. Eq. 426, 56 Atl. 157.

[2] Coffee v. Newson, 2 Ga. 442. But see, post, this chapter, Exception 6, § 326.

[3] Key v. Jennings, 66 Mo. 356.

[4] 1 Sugd. Vend. 478.

[5] 1 Sugd. Vend. (8th Am. ed.) 477.

[6] Winne v. Reynolds, 6 Paige (N. Y.), 407.

incumbrance of a pecuniary nature upon the premises is no valid objection to specific performance, since the purchase money may be applied to the discharge of the incumbrance, either under the direction of the court or by the purchaser himself, who thereupon is subrogated to the right of the incumbrancer.[7] But specific performance by the purchaser cannot be compelled if the incumbrance exceed the unpaid purchase money,[8] unless, of course, the purchaser assumed the payment of the incumbrance as part of the consideration of the contract.

Of course if the contract stipulates that there shall be a deduction from the purchase money if the title to a part of the premises should fail, the purchaser cannot, in the absence of fraud, imposition or gross mistake, upon failure of title to part of the premises, demand a rescission of the contract as to the other part.[9] The purchaser cannot refuse to complete the contract because, before the execution of a conveyance, a part of the premises had been taken in condemnation proceedings. He becomes in equity the owner of the land as soon as the contract of sale is made, and entitled to compensation from those at whose instance the land was condemned.[10] A partial restriction upon the purchaser's power of alienation, such as a pre-emption right of purchase in the original owner for a specified time, or a fine in case of alienation, does not justify the purchaser in refusing specific performance, but diminishes the value of the property, and entitles him to a compensation.[11] If the purchaser has waived his right to rescind the contract where the title is defective, he cannot refuse to pay the purchase money, with compensation or abatement as to that portion of the premises to which the vendor has no title.[12] He will be deemed to have waived that right if he purchased with knowledge that the title to a portion of the premises was defective.[13]

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[7] Ante, §§ 245, 305. The existence of a water tax on the premises is no ground for rescission. The purchaser must take the title with an abatement of the purchase money. Cogswell v. Boehm, 5 N. Y. Supp. 67.

[8] Hinckley v. Smith, 51 N. Y. 21.

[9] Harris v. Granger, 4 B. Mon. (Ky.) 369.

[10] Kuhn v. Freeman, 15 Kans. 423.

[11] Winne v. Reynolds, 6 Paige (N. Y.), 407.

[12] Hancock v. Bramlett, 85 N. C. 393.

[13] Kimmel v. Scott, (Neb.) 52 N. W. Rep. 371.

In the English practice the conditions of sale usually provide that any description, mistake or error in the particulars, shall not avoid the sale, but shall be the subject of compensation; and the conditions usually fix the mode in which the amount of compensation shall be determined. A condition that no compensation shall be allowed the purchaser for defects, applies only to trivial errors.[14]

We have seen that when a purchaser elects to complete the contract with compensation for a part to which title cannot be obtained, compensation is to be decreed according to the relative and not the average value of the part lost.[15] No reason is perceived why the same rule should not apply when he is *required* to complete the contract with compensation. Where, however, the vendor sold 2,000 acres and included in his conveyance 39 acres to which he had no title and which was not included within the boundaries of the premises sold, it was held that the purchase money must be abated according to the contract price per acre, and not according to the relative value of the thirty-nine acres.[16]

Where the right of the vendor to require the purchaser to take the title with compensation for defects, exists, it cannot be enforced in an action to recover the purchase money, or for a breach of the contract, or in any other proceeding at law. At law the contract is an entirety and can only be enforced as such. The remedy of the vendor is exclusively in equity.[17]

Objections to the title which, if well founded, could result only in a trifling loss to the purchaser will be disregarded on the principle *de minimis lex non curat.*[18]

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[14] Dart Vend. & P. (5th ed.) 134. Whittemore v. Whittemore, L. R., 8 Eq. 603. The cases in which the common condition of sale requiring the purchaser to take the property with compensation for defects do not apply have been thus classified by Mr. Dart (V. & P. [5th ed.] 138): 1. Where the property is not of the same description as it appears to be in the particulars of sale. 2. Where the property, as described, is not identical with that intended to be sold. 3. Where a material part of the property described has no existence, or cannot be found; or where no title can be shown to it. 4. Where the misdescription is upon a point material to the due enjoyment of the property. 5. Where the misdescription as to quantity is so serious that it is no longer a fit subject for compensation. 6. Where the misdescription is of such a nature that the amount of the compensation cannot be estimated.

[15] Ante, § 170.

[16] Stockton v. Union Oil Co., 4 W. Va. 73.

[17] 1 Sugd. Vend. (8th Am. ed.) 417 (314). Shaw v. Vincent, 64 N. C. 690.

§ 326. **EXCEPTIONS TO THE RULE.** (1) The rule that the purchaser may be compelled to accept the title with compensation, applies only where the title is good as to part, and bad as to part. If the objection go to the whole title, he can in no case be required to accept the property with indemnity against eviction.[19]

(2) The contract cannot be specifically enforced in part and rescinded in part. It must either be rescinded in whole, or specific performance decreed with compensation for an inconsiderable part to which the title fails.[20] This exception does not apply where the purchase is of several lots at auction, and the titles to some are bad.[21] The purchaser must take a conveyance of those to which

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[18] Huber v. Johnson, 174 Ky. 697, 192 S. W. 821, in which case the loss would have been about $25.

[19] 1 Sugd. Vend. (8th Am. ed.) 573. Balmanno v. Lumley, 1 Ves. & Bea. 224; Paton v. Brebner, 1 Bligh, 42; Nouaille v. Flight, 7 Beav. 521; Blake v. Phinn, 3 C. B. 976.

[20] Bailey v. James, 11 Grat. (Va.) 468, 62 Am. Dec. 659; Jopling v. Dooley, 1 Yerg. (Tenn.) 289, 24 Am. Dec. 450; Reed v. Noe, 9 Yerg. (Tenn.) 283; Galloway v. Bradshaw, 5 Sneed (Tenn.), 70; McKinney v. Watts, 3 A. K. Marsh. (Ky.) 268; Bryan v. Read, 1 Dev. & B. Eq. (N. C.) 78; Wilson v. Brumfield, 8 Bl. (Ind.) 146; Johnson v. Houghton, 19 Ind. 359; Rector v. Price, 1 Mo. 373; Christian v. Stanley, 23 Ga. 26; York v. Gregg, 9 Tex. 85; Ankeny v. Clark, 138 U. S. 345.

[21] Van Epps v. Schenectady, 12 Johns. (N. Y.) 436; Poole v. Shergold, 2 Bro. C. C. 118; Stoddard v. Smith, 5 Binney (Pa.), 355; Foley v. Crow, 37 Md. 51; Waters v. Travis, 9 Johns. (N. Y.) 450. If the title fail to one of two purchased lots, both of which were necessary to the purchaser's uses, he cannot be compelled to take the other lot. Shriver v. Shriver, 86 N. Y. 575. In Osborne v. Breman, 1 Des. (S. C.) 485, several lots adjoining each other were sold separately at auction. Title to one of the principal lots failed, but there being no evidence that this lot was the principal inducement to the purchase, the purchaser was compelled to complete the contract. If two distinct portions of land are sold as one tract, a good title to both must be shown in order to sustain an action against the purchaser for refusing to complete the contract. Barton v. Bouvien, 1 Phila. (Pa.) 523. When a tract of land, divided into city lots, is sold in separate parcels, a defect in the title to one lot or parcel does not affect the sale of the other parcels, but a defect in the title to any one of several lots sold as one parcel, avoids the sale of the entire parcel. Mott v. Mott, 68 N. Y. 246. A clause in a contract for the sale of lots abutting on a street shown on a map of a subdivision, provided that if title failed to any of the lots the contract should be deemed

the title is good, unless the lots to which the title is bad are necessary to the enjoyment of the rest.[22] If a person purchases at an auction several distinct though adjacent parcels of land, separately described in the advertisement of sale and separately sold, signing a separate memorandum of the purchase of each which contains the terms of the sale, the purchase of each parcel constitutes a distinct contract, and the inability of the vendor to make title or perform the contract as to one of the parcels will not relieve the purchaser from his obligation to pay the purchase price and accept a conveyance of the other parcels.[23]

(3) The purchaser cannot be required to complete the contract with compensation or abatement of the purchase money if the title has failed to a considerable portion of the property,[24] or to a part which is indispensable to the due enjoyment and intended purposes of the residue.[25] But a failure of title to an inconsiderable or dis-

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severable, and the compensation should abate *pro tanto*. Held, not applicable to a defect consisting in the want of dedication of the street to public uses. Cleveland v. Bergen B. & I. Co., (N. J. Eq.) 55 Atl. 117.

[22] 1 Sugd. Vend. (8th Am. ed.) 484. Emerson v. Hiles, 2 Taunt. 38; James v. Shore, 1 Star. 426; Baldry v. Parker, 2 B. & C. 37; Roots v. Dormer, 4 B. & Ad. 77; Seaton v. Booth, 4 Ad. & El. 528. Compare Gosman v. Pfistner, 80 N. J. Eq. 432, 83 Atl. 781.

[23] Wells v. Day, 124 Mass. 38. So held where the sale was private and the contract provided that failure of the title to one of the parcels should not work a forfeiture as to the other parcels. Sage L. & I. Co. v. McGowan, 30 Cal. App. 126, 157 Pac. 244.

[24] 1 Sugd. Vend. (8th Am. ed.) 479; Fry Sp. Perf. (3d Am. ed.) § 1182; 2 Kent Com. 475; Boyce v. Grundy, 3 Pet. (U. S.) 210; Hayes v. Skidmore, 27 Ohio St. 331; Groves v. Stouder, 58 Okl. 744, 161 Pac. 239; Burwell v. Sollock, (Tex. Civ. App.) 32 S. W. Rep. 844; Newman v. Maclin, 5 Hayw. (Tenn.) 241; Reed v. Noe, 9 Yerg. (Tenn.) 282, where the title to twenty-five acres out of fifty was defective. Cunningham v. Sharp, 11 Humph. (Tenn.) 116; Terrell v. Farrar, 1 Miss. 417, where title to only half of the property purchased could be had. In Morgan v. Brast, 34 W. Va. 332, 12 S. E. Rep. 710, the purchaser was compelled to accept title with compensation for a deficiency of 20 acres out of 254, average value. The purchaser cannot be required to take the title where the vendor had previously sold the mineral rights in the land to another. Eversole v. Eversole, 27 Ky. Law Rep. 385, 85 S. W. Rep. 186; Davis v. Watson, 89 Mo. App. 15.

[25] Authorities cited. Ante, § 325, n. 1. Parham v. Randolph, 5 Miss. 435, 35 Am. Dec. 403; Jackson v. Ligon, 3 Leigh (Va.), 161, where the part to which title failed was separated from the rest by a public road. A familiar illustration of this exception is the case in which a wharfinger bought a

pensable portion of the property,[26] or the existence of a trifling charge or incumbrance upon the premises,[27] or a trifling deficiency in the quantity of the land to be conveyed,[28] is no ground for refusing specific performance with compensation. Compensation cannot be decreed if there be no accurate and certain means of determining the amount of compensation to be allowed,[29] such for ex-

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wharf and a jetty protecting it, and it afterwards appeared that the jetty was liable to be removed by the municipal authorities. It was held that he could not be compelled to take the wharf with compensation for the loss of the jetty. Peers v. Lambert, 7 Beav. 546. So, also, in Keating v. Price, 58 Md. 532, where a purchase of twenty acres was made in order to get possession of an acre and a half at a particular point as a factory site. Title to the acre and a half having failed, the purchaser was not required to accept the remainder with compensation. Where the vendor of a house and lot was unable to make title to a small strip of land between the house and the highway, from which passers-by could look in at the window, it was held that the purchaser could not be compelled to accept the residue with compensation. 1 Sugd. Vend. 478. Perkins v. Ede, 16 Beav. 193.

[26] Tomlinson v. Savage, 6 Ired. Eq. (N. C.) 430, where a deficiency of 17½ out of 350 acres was deemed immaterial. Reynolds v. Vance, 4 Bibb (Ky.), 213; Buck v. McCaughtry, 5 T. B. Mon. (Ky.) 216, deficiency of 50 acres out of 800 deemed immaterial.

[27] Fry Sp. Perf. (3d Am. ed.) §§ 1188, 1196. In Guynet v. Mantel, 4 Duer (N. Y.), 86, the purchase price of the property was $50,000, and the purchaser took possession with notice that there was an outstanding incumbrance on the property of $1,000. Specific performance by the vendor, with compensation or allowance for the incumbrance, was decreed. A deficiency of twenty-one acres of land in a tract of 400 acres, not material to the enjoyment of the rest, may be compensated, and affords no ground for rescission. Cotes v. Raleigh, 1 T. B. Mon. (Ky.) 164. A small and trifling charge on the land for the maintenance of a division fence, being the subject of compensation, is no ground for resisting specific performance. Keating v. Gunther, 10 N. Y. Supp. (N. Y.) 734.

[28] Keepers v. Yocum, 84 Kan. 554, 114 Pac. 1063.

[29] In Evans v. Kingsberry, 2 Rand. (Va.) 120, 14 Am. Dec. 779, a husband sold an estate in which the wife had a life interest in case she survived him, but in which he had the entire interest in case he survived. The purchaser refused to take the property, and specific performance with compensation was denied, the court saying that the contingency of the wife surviving the husband, and in that event becoming entitled to a moiety of the land for her life, was such a defect of title as could not be compensated, since there was no rule by which the compensation could be estimated. But see ante, § 199. There is no means of ascertaining the present value of an estate devised to a widow for life but defeasible, except as to dower, upon her re-marriage. Scheu v. Lehning, 31 Hun (N. Y.), 183.

ample as in the case of a building restriction binding the purchaser, or a restriction as to the uses to which the premises shall be put.[30] The encroachment of the walls of a building a couple of inches on the building line of a street has been held no case for compensation, and the purchaser was excused from performing the contract.[31] On the other hand, a deficiency of fourteen inches in a frontage of seventy-five feet was held a case for compensation and not for rescission, the fourteen inches not being indispensable to the due enjoyment and intended use of the premises.[32] Obviously, the question whether the purchaser must take the title with compensation, or may rescind the contract, depends upon the circumstances of each particular case. Specific performance is a matter of grace, and will neither be enforced in one case nor denied in another unless equity and good conscience so require. It is incumbent upon the purchaser to show that the part to which title has failed was material to the proper use and enjoyment of the rest, or formed a special inducement to the purchase.[33]

(4) The purchaser cannot be compelled to accept an estate of a different tenure from that which he purchased; thus, if he purchases a freehold, he cannot be compelled to accept a lesser estate as a copyhold or a leasehold.[34]

Where the contract provided that the vendors should begin and prosecute to final judgment a suit to recover possession of a part of the premises, the purchase money to be abated in case of inability to recover in such suit, and the vendor failed to bring the suit, specific performance with abatement of the purchase money, at the suit of the vendors, was refused.[35]

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[30] Adams v. Valentine, 63 Fed. Rep. 1 (N. Y.).

[31] Smithers v. Steiner, 34 N. Y. Supp. 678. See, also, the following encroachment cases, in which the purchaser was excused: McPherson v. Schade, 28 N. Y. Supp. 659, 8 Misc. Rep. 424, one and one-half inches; Smith v. McCool, 22 Hun (N. Y.), 595, five inches; Arnstein v. Burroughs, 27 N. Y. Supp. 958, two inches; Bowie v. Brahe, 4 Duer (N. Y.), 676, one and seven-eighths inches. See, also, King v. Knapp, 59 N. Y. 462; Stokes v. Johnson, 57 N. Y. 673; Webster v. Trust Co., 145 N. Y. 275, 39 N. E. Rep. 964.

[32] Kelly v. Brower, 7 N. Y. Supp. 752.

[33] Keating v. Price, 58 Md. 532.

[34] 1 Sugd. Vend. (8th Am. ed.) 461.

[35] Wold v. Newgaard, 123 Iowa, 233, 98 N. W. Rep. 640.

(5) Where the vendor has only a joint interest or interests in the estate, he cannot compel the purchaser to accept the shares he actually has with a deduction for those he does not own.[36] In some cases, however, the purchaser has been compelled to take a different interest from that which the vendor undertook to sell.[37] If the purchase be from tenants in common and one of them die, the survivors cannot compel the purchaser to accept their shares unless he can procure the share of the deceased tenant.[38]

(6) The purchaser cannot be required to take the title with compensation for defects in a case where the vendor has been guilty of fraud in the sale.[39]

(7) If the vendor turns the purchaser out of possession, he thereby rescinds the contract and cannot afterwards require a specific performance with compensation for defects.[40]

§ 327. **INDEMNITY AGAINST FUTURE LOSS.** As a general rule a purchaser can neither require nor be compelled to accept a conveyance with indemnity against possible loss in the future from a defect in the title to the estate.[41] An apparent exception to the rule that he cannot *demand* an indemnity exists in those cases in which he is permitted to detain a part of the purchase money as an indemnity against the possible consummation of an inchoate right of dower in the premises.[42] But it is believed that there is no well-considered case in which the purchaser has been forced to take a defective title with indemnity against possible loss from the defect. Hence, it has been frequently held that a purchaser cannot be compelled to accept title with indemnity against an inchoate right of dower in the premises,[43] or against the enforcement of an incumbrance on the property.[44] Of course, if the contract provide for indemnity it may be required.[45]

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[36] 1 Sugd. Vend. (8th Am. ed.) 480 (316).

[37] Id. 457 (299).

[38] 1 Sugd. Vend. (8th Am. ed.) 480; 1 Story Eq. Jur. § 778. Atty.-Gen. v. Day, 1 Ves. 218.

[39] Fry Sp. Perf. (3d Am. ed.) § 1192; Harris v. Granger, 4 B. Mon. (Ky.) 369; Isaacs v. Skrainka, 95 Mo. 517, 8 S. W. Rep. 427. But see Coffee v. Newsom, 2 Ga. 442, a case apparently at variance with the foregoing authorities.

[40] 1 Sugd. Vend. (8th Am. ed.) 523; Fry Sp. Perf. (3d Am. ed.) § 1193; Knatchbull v. Grueber, 1 Ves. Jr. 224.

[41] 1 Sugd. Vend. (8th Am. ed.) 467, 475; Fry Sp. Perf. (3d Am. ed.) §§ 1190, 1245; Batten Sp. Perf. 67, Law Lib. 171; Balmano v. Lumley, 1 Ves. & Bea. 224; Aylett v. Ashton, 1 Myl. & Cr. 105; Paton v. Brabner, 1 Bligh 42, 66; Ridgway v. Gray, 1 Mac. & G. 109; Powell v. So. Wales R. Co., 1 Jur. (N. S.) 773; Bryan v. Read, 1 Dev. & Bat. Eq. (N. C.) 78, 86; Wilson v. Zajicek, (Tex. Civ. App.) 36 S. W. Rep. 1080; Weaver v. Esary, 78 Wash. 640, 139 Pac. 607; Barickman v. Kuykendall, 6 Bl. (Ind.) 21, where the guardian of a minor, one of several heirs selling an estate, offered the purchaser a bond with security, conditioned that the minor should convey when he came of age. In Rife v. Lybarger, 49 Ohio St. 422, 31 N. E. Rep. 768, in a decree for specific performance against a purchaser, provision was made for his indemnity against an old, uncanceled mortgage. This is an interesting case. The purchaser bought during the fever and excitement of a "boom" in city property, but finding a mortgage on the prem-

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ises refused to complete the purchase. The "boom" subsided, and within four weeks after the contract should have been completed the value of the property shrank nearly one-half. Releases from the personal representatives and heirs of the mortgagee were procured and filed by the vendor, but the purchaser still objected to the title on the ground that the right to enforce the mortgage might be outstanding in an assignee. Specific performance by him was decreed, with indemnity against this possibility. The case seems at variance with the general rule established by the authorities above. In Simpson v. Hawkins, 1 Dana (Ky.), 303, a case in which the contract had been executed by a conveyance with covenants for title, it was held that the grantor might be required to provide an indemnity against the possible reopening of a decree against a non-resident adverse claimant.

[42] Ante, § 199. Young v. Paul, 10 N. J. Eq. 415, 64 Am. Dec. 456. In Jackson v. Edwards, 7 Paige Ch. (N. Y.) 386, a purchaser at a partition sale declined to complete the contract on the ground that the wife of one of the parceners had a contingent right of dower in the premises. But the court held that under the laws of New York the value of that interest might be ascertained by means of the life tables and commuted at a certain sum to be abated from the purchase money, and invested under the direction of the court for the benefit of the wife. But, obviously, this is a case in which the purchaser is compelled to take the title with an abatement of the purchase money, and not a mere indemnity.

[43] Ante, § 199. Peters v. Delaplaine, 49 N. Y. 362; Trimmer v. Gorman, 129 N. C. 161, 39 S. E. Rep. 804. See, also, Prescott v. Trueman, 4 Mass. 629, 3 Am. Dec. 249; Shearer v. Ranger, 22 Pick. (Mass.) 447; Smith v. Cornell, 32 Me. 126; Holmes v. Holmes, 12 Barb. (N. Y.) 137; Henderson v. Henderson, 13 Mo. 152. Contra, Obernyce v. Obertz, 17 Ohio, 71; Manson v. Brimfield Mfg. Co., 3 Mason (C. C.), 855; Blair v. Rankin, 11 Miss. 440.

[44] Smith v. Browning, 157 N. Y. Supp. 71; 171 App. Div. 278.

[45] Aylett v. Ashton, 1 Myl. & Cr. 105; Ridgway v. Gray, 1 Mac. & G. 109; Milligan v. Cooke, 16 Ves. 1; Walker v. Barnes, 3 Mad. 247 (132); Paterson v. Long, 6 Beav. 598; Ross v. Boards, 8 Ad. & El. 290.

RESCISSION BY PROCEEDINGS IN EQUITY WHERE THE CONTRACT HAS BEEN EXECUTED.

CHAPTER XXXIV.

OF THE REMEDY BY INJUNCTION AGAINST THE COLLECTION OF THE PURCHASE MONEY.

GENERAL OBSERVATIONS. § 328.
FRAUD ON THE PART OF THE GRANTOR. § 329.
WANT OF OPPORTUNITY TO DEFEND AT LAW. § 330.
INSOLVENCY OR NON-RESIDENCE OF GRANTOR. § 331.
WHERE THE ESTATE IS INCUMBERED. § 332.
FORECLOSURE OF PURCHASE-MONEY MORTGAGE. § 333.
WHERE THERE ARE NO COVENANTS. § 334.
TEMPORARY AND PERPETUAL INJUNCTIONS. § 335.
RESUME. § 336.
WHERE THERE IS NO PRESENT RIGHT TO RECOVER SUBSTANTIAL DAMAGES FOR BREACH OF THE COVENANTS. § 337.

§ 328. **GENERAL OBSERVATIONS.** The jurisdiction of equity to restrain the collection of the purchase money where the title has failed is frequently revoked, either upon the ground that there is no adequate remedy at law, or that the plaintiff has not had or cannot have an opportunity to avail himself of that remedy. The purchaser may have been deprived of his defense at law by fraud, accident or mistake; or the facts constituting his defense may not have transpired until after judgment was recovered against him; as where he was evicted after judgment for the purchase money. Or he may have had, for other reasons, no opportunity of making a defense at law; as where the vendor seeks to foreclose a deed of trust or other security for the purchase money, in the enforcement of which no legal proceedings are required.[1] So far as the covenants of warranty, or for quiet enjoyment are concerned, there can be no doubt of the adequacy of the remedy at law as soon as a right of action upon them occurs. In contemplation of law no wrong arises out of a mere failure of the title without an eviction or disturbance of the possession where these are the only covenants taken; consequently there being no wrong there is no remedy. After a breach of these covenants has occurred, the remedy is ample and complete. But with respect to the covenants of seisin and against incumbrances a different view may prevail; for while the right of action upon them is complete as soon as they are made, if the title be outstanding in a stranger or the estate be encumbered, unless he has been evicted in the one case or has discharged the incumbrance in the other, he has, according to the rule generally prevailing in the United States, no right to recover substantial damages for the breach, and, consequently, nothing to offer in defense of an action for the purchase money. In that respect, therefore, the remedy at law upon those covenants, while existing, would seem inadequate;[2] and the covenantee has in some cases been permitted to enjoin the collection of the purchase money until the defendant should remove an incumbrance from the land;[3] and, in others, upon a complete and undoubted failure of the title and insolvency of the vendor, has been held entitled to a perpetual injunction, upon condition that he reconvey the premises to the grantor.[4]

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[1] As to the remedy by injunction, where the contract is executory, see ante, § 520.

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[2] There are *dicta* in several cases which would tend to establish a different principle from that stated here, namely, that the remedy at law upon the covenant of seisin is complete and adequate immediately upon the execution of the conveyance and covenant if the vendor have no title, because there is then a breach of that covenant for which the covenantee may recover damages; and that the remedy at law upon the covenant of warranty is incomplete and inadequate because there can be no recovery of damages until an eviction occurs. Ingram v. Morgan, 4 Humph. (Tenn.) 66, 40 Am. Dec. 626; Baird v. Goodrich, 5 Heisk. (Tenn.) 20; Leird v. Abernethy, 10 Heisk. (Tenn.) 636; Koger v. Kane, 5 Leigh (Va.), 606, 608. It is submitted with diffidence that these cases are open to criticism in two particulars: First, in assuming that substantial damages for a breach of the covenant of seisin may be recovered where there has been no eviction or disturbance of the possession. This is directly opposed to the weight of American authority. Rawle Covts. for Title (5th ed.), ch. 9. And, second, in declaring that the remedy at law on the covenant of warranty is incomplete because no damages can be recovered until eviction. In contemplation of law, so far as this covenant is concerned, want of title in the grantor constitutes no injury to the covenantee unless it results in an eviction; and until eviction, there being no wrong at law, there is no remedy. To say then that the remedy at law before eviction is inadequate is to produce the illogical result, that the remedy at law is inadequate in a case in which there is neither wrong nor remedy. It is true that in such a case there may be room for the "*quia timet*" jurisdiction of equity, but this is founded upon the possibility of an injury to the complainant in the future and not upon a present wrong which requires compensation or redress. 2 Story Eq. (13th ed.) § 826. The foregoing observations, so far as they relate to the covenant of seisin, appear to be in accord with the opinion of Mr. Rawle (Covts. for Title [5th ed.], § 378).

The right of the covenantor to an injunction against proceedings to collect the purchase money may be conveniently considered with respect to the following circumstances:

1. Where the covenantor made fraudulent representations respecting the title.

2. Where there is a present right to recover substantial damages for breach of the covenants for title, and there has been no opportunity to defend at law.

3. Where there has been no such breach of the covenants for title as to give a present right to recover substantial damages at law, but suit is being actually prosecuted or threatened by an adverse claimant or incumbrancer, and the covenantor is either insolvent or a non-resident.

4. Where there is no present right to recover substantial damages on the covenants, but there is a clear outstanding title in a stranger.

§ 329. **FRAUD ON THE PART OF THE GRANTOR.** 1. *Where the covenantor was guilty of fraud with respect to the title.* Actual fraud by the vendor in a contract for the sale of lands, unless waived by the vendee, seems to be at all times ground for enjoining the collection of the purchase money, whether there has or has not been a breach of the covenants for title.[5] Indeed, where there is such fraud an injunction will be granted, though there are no covenants for title.[6] The same rule applies in a case of mistake as to the premises sold and conveyed.[7] And inasmuch as a court of equity is always open for the abrogation and rescission of a contract procured by fraud, it would seem that the collection of the purchase money in such case might be enjoined, whether the facts alleged would or would not avail, or have availed, the covenantee at law, as a defense to an action for the purchase money. It has been held, however, that fraud is no ground for an injunction to stay an action on an obligation for the purchase money not under seal, since the fraud may be set up in defense of an action, and the remedy at law in that respect is complete.[8] If this be true no reason is perceived why the same rule would not apply in those States in which the defendant is permitted to set up equitable defenses in an action on a sealed instrument. But these decisions do not appear to have been generally followed in the American States. The fact that the purchaser has a remedy at law by action to recover damages caused by the vendor's deceit, has been held no ground for refusing an injunction to stay the collection of the purchase money.[9] If the purchaser sets up fraud as a defense in an action for the purchase money and fails, he cannot afterwards avail himself of the same matter in equity by way of injunction against the judgment so obtained.[10]

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[3] Post, § 332.

[4] Jackson v. Norton, 6 Cal. 187, 5 Cal. 262. This is the rule in Virginia, except that no reconveyance of the premises is required and no importance seems to have been given to the solvency of the covenantor as respects the right to the injunction. Post, § 337.

[5] High on Injunctions (3d ed.), 289; Rawle Covts. (5th ed.) § 372; Fitch v. Polke, 7 Bl. (Ind.) 565; Reed v. Tioga Mfg. Co., 66 Ind. 21.

[6] In Houston v. Henley, 2 Del. Ch. 248, the purchaser, through the fraudulent representations of the vendor, had accepted a conveyance without covenants for title, and was permitted to enjoin proceedings to collect the purchase money, until the vendor should perfect the title.

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[7] Spurr v. Benedict, 99 Mass. 463, where the conveyance (quit claim) did not include lands which were pointed out to the buyer as belonging to the vendor, but to which he had no title, and which were not included in the conveyance.

[8] Barkhamstead v. Case, 5 Conn. 528, 13 Am. Dec. 92; Moore v. Ellsworth, 3 Conn. 403.

[9] Ransom v. Shuler, 8 Ired. Eq. (N. C.) 307, the court saying: "Admitting that he might recover damages in an action at law for the deceit, yet that would not impair his right to equitable relief, since that and the legal remedy are not of the same nature, but the latter may be, and generally is, that the vendor cannot, with a good conscience, coerce the payment of the whole purchase money, and leave the vendee to pursue a personal action at law for the uncertain damages which a jury might assess for the fraud in selling what did not belong to the vendor; but, on the contrary, the vendee has the right of withholding so much of the purchase money (because to that extent the consideration has failed) as a security in his own hands against the loss impending over him." Compare *dictum* in Hammatt v. Emerson, 27 Me. 309.

[10] Johnson v. Jones, 13 Sm. & M. (Miss.) 580; Thomas v. Phillips, 4 Sm. & M. (Miss.) 358. Cf. Allen v. Hopson, 1 Freem. Ch. (Miss.) 276.

§ 330. **WANT OF OPPORTUNITY TO DEFEND AT LAW.** 2. *Where there is a present right to recover substantial damages for breach of the covenants for title, and there has been no opportunity to defend at law.* If the application for an injunction be made *before* judgment and the bill shows facts which may be availed of as a defense to the action by way of recoupment, counterclaim or set-off, there is no ground for the interposition of equity, and the injunction should be denied.[11] So, also, if the application be made *after* judgment, and the facts presented would have been a complete defense at law.[12] But if by fraud, accident or mistake the covenantee has been deprived of his opportunity to defend at law, or if no such opportunity existed or exists, as where the right to damages arose after the judgment had been recovered, or where the covenantor seeks to enforce a security for the purchase money, without legal proceedings, then, and in all such cases, the covenantee may be enjoined from any further proceeding, either to collect his judgment or to enforce such security.[13] So, also, where at the time of the judgment the covenantee was ignorant of the facts which would have constituted a defense to the action.[14] It may be observed generally, however, that an injunction to stay the collection of the purchase money, whether before or after judgment, will not be granted unless the complainant shows that for some reason his legal remedy on the covenants for title will be unavailing.[15]

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[11] Hopper v. Lutkin, 3 Gr. Ch. (N. J.) 149. In Tone v. Brace, Clarke Ch. (N. Y.) 291, the action was to recover rent for the year 1839 on a lease terminating in 1842. The lessee prayed an injunction on the ground that he had been evicted in January, 1840, and asking to have his damages set off against the rent. The injunction was dissolved on the ground that the remedy on the covenants in the lease was complete.

[12] Nelms v. Prewitt, 37 Ala. 389; Wray v. Furniss, 27 Ala. 471; Shipp v. Wheless, 33 Miss. 647. The contract was executory in this case, but the principle remains the same. Ricker v. Pratt, 48 Ind. 73. Allen v. Thornton, 51 Ga. 594; Desvergers v. Willis, 58 Ga. 388, 21 Am. Rep. 289; Kibler v. Cureton, Rich. Eq. Cas. (S. C.) 143. In Woodruff v. Bunce, 9 Paige Ch. (N. Y.) 443, 38 Am. Dec. 559, it seems to have been assumed that if the covenantee had been evicted and the covenantor is insolvent, the former will at any time be awarded an injunction to stay the collection of the purchase money. This is true if the eviction occurred *after* judgment, and that, too, whether the vendor was or was not insolvent. If, however, the eviction occurred *before* judgment, and the covenantee might have set up that defense by way of recoupment or counterclaim, but neglected to do so, there might be a grave doubt as to his right to involve the covenantor in the expense of a chancery suit, notwithstanding the insolvency of the latter. And especially would the right to an injunction against an assignee of the covenantor seem doubtful under these circumstances. Indeed, the insolvency of the covenantor seems immaterial to the question of the right to an injunction to stay the collection of the purchase money, except in those cases in which no present right of action on the covenant of warranty exists, and the complainant is invoking the "*quia timet*" jurisdiction of equity. If the covenantee should be evicted from the premises after the recovery of a judgment against himself for the purchase money, he may enjoin the judgment if the covenantor or his estate is insolvent and the defense of failure of title could not have been made in the action for the purchase money. Wray v. Furniss, 27 Ala. 471.

§ 331. **INSOLVENCY OR NON-RESIDENCE OF THE GRANTOR.** 3. *Where there has been no such breach of the covenants for title as to give a present right to recover substantial damages at law, but suit is being actually prosecuted or threatened by an adverse claimant or incumbrancer, and the covenantor is either insolvent or a non-resident.* Strictly speaking, it cannot be said that there is no remedy at law on the covenants for title in these cases, for in contemplation of law nothing has occurred of which the covenantee can complain as respects the covenants of warranty and for quiet enjoyment; nor can there be any ground for complaint at law until an eviction occurs.[16] But the covenantor being insolvent or a non-resident, judgment for the covenantee will be worthless when the right of action at law shall have accrued. Hence arises the jurisdiction in equity for a bill of injunction "*quia timet,*" that is, "because he fears some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief."[17] Accordingly in many cases, injunctions against proceedings to collect the purchase money have been granted upon allegations of the actual pendency[18] or threatened prosecution[19] of a suit by an adverse claimant against the covenantee, and that the covenantor, because of insolvency[20] or non-residence,[21] cannot be compelled to respond in damages for a breach of his covenant when it shall have occurred. It has been held, however, that the insolvency of the covenantor must be alleged in the bill as ground for the injunc-

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[13] Kingsbury v. Milner, 69 Ala. 502; Luckett v. Triplett, 2 B. Mon. (Ky.) 39; Coster v. Monroe Mfg. Co., 1 Gr. Ch. (N. J.) 476.

[14] Fitch v. Polke, 7 Bl. (Ind.) 565, the court saying: "We are satisfied that this is a proper case for the interference of a court of equity. It appears that the complainant was deceived by the false representations of the vendor as to his title, and that he remained ignorant of the fact that the vendor had not a good title until after the rendition of the judgment at law. This excuse for not defending at law was sufficient to authorize the interference of a court of equity." Citing Williams v. Lee, 3 Atk. 223; Simpson v. Hart, 1 Johns. Ch. (N. Y.) 98.

[15] Haggin v. Oliver, 5 J. J. M. (Ky.) 237.

[16] Ante, § 144.

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[17] 2 Story Eq. (13th ed.) § 826.

[18] High on Injunctions (3d ed.), § 400; Rawle Covts. (5th ed.) §§ 372, 375. The earliest case in which this doctrine, or at least a part of it, was applied was that of Johnson v. Gere, 2 Johns. Ch. (N. Y.) 546, decided by Chancellor **Kent** in 1817. The authority of this case has been denied in New York and elsewhere, but it is to be observed that it was neither alleged in the bill nor shown that the covenantor was a non-resident or insolvent, nor that for any other reason, the complainant's remedy upon the covenants, when it should accrue, would be insufficient for his protection. There are many cases which decide that an injunction against proceedings to collect the purchase money will not be granted where the covenantee has not been disturbed in his possession by an adverse claimant, but few which refuse the injunction where it was shown that the covenantor was a non-resident or insolvent, and that suit by the adverse claimant was being prosecuted or threatened. Legett v. McCarty, 3 Edw. Ch. (N. Y.) 126, *obiter;* Edwards v. Bodine, 26 Wend. (N. Y.) 114, *obiter;* Shannon v. Marselis, Saxt. (N. J.) 413, 425; Van Riper v. Williams, 1 Green Ch. (N. J.) 407; Van Waggoner v. McEwen, 1 Green Ch. (N. J.) 412; Green v. Whipple, 1 Beas. Ch. (N. J.) 50; Coster v. Monroe Mfg. Co., 1 Green Ch. (N. J.) 467; Jaques v. Esler, 3 Gr. Ch. (N. J.) 462; Hile v. Davison, 5 C. E. Gr. (N. J.) 228; Fehre v. Turner, 77 Ind. 530, overruling Strong v. Downing, 34 Ind. 300.

[19] Harding v. Commercial Loan Co., 84 Ill. 251, 260, *obiter.*

[20] Warvelle on Vendors, 937; Rawle Covts. (5th ed.) § 380; Walton v. Bonham, 24 Ala. 513; Wray v. Furniss, 27 Ala. 471. In Magee v. McMillan, 30 Ala. 420, relief was denied on the ground that insolvency of the vendor was not alleged. Heflin v. Phillips, (Ala.) 11 So. Rep. 729; Frank v. Riggs, 93 Ala. 252, 9 So. Rep. 359; Gilham v. Walker, 135 Ala. 459, 33 So. Rep. 537; Whittey v. Lide, 139 Ala. 177, 35 So. Rep. 705; Hoppes v. Cheek, 21 Ark. 585; Busby v. Treadwell, 24 Ark. 458; Brooks v. Moody, 25 Ark. 452; Young v. McCormick, 6 Fla. 368; Allen v. Thornton, 51 Ga. 594; Mathis v. Crowley, 146 Ga. 749, 92 S. E. 213; Fehrle v. Turner, 77 Ind. 530; Wimberg v. Schwegeman, 97 Ind. 530, where it was also held that the insolvency must be averred in the bill. Morrison v. Beckwith, 4 T. B. Mon. (Ky.) 73, 16 Am. Dec. 136; Vance v. House, 5 B. Mon. (Ky.) 540; Taylor v. Lyons, 2 Dana (Ky.), 276; Rawlins v. Timberlake, 6 T. B. Mon. (Ky.) 225; Simpson v. Hawkins, 3 Dana (Ky.), 303; Vaughn v. Wells, 180 Ky. 484, 203 S. W. 191; Atkinson v. Hager, (Ky.) 121 S. W. 955. It was held that insolvency was no ground for the injunction unless the covenantee filed his bill *quia timet,* requiring all persons having adverse interests to assert or relinquish the same. Jones v. Waggoner, 7 J. J. Marsh, (Ky) 144; Hatcher v.

Andrews, 5 Bush (Ky.), 662; Johnson v. Wilson, 77 Mo. 639. In Jones v. Stanton, 11 Mo. 433, the injunction was granted though the insolvency of the covenantor was doubtful, and though no suit against the covenantee had been prosecuted or threatened. But the injunction was to be dissolved if the vendor should give a bond with security to indemnify the complainant if he should sustain any loss from the defective title. Mitchell v. McMullen, 59 Mo. 252; Miller v. Avery, 2 Barb. Ch. (N. Y.) 582; Woodruff v. Bunce, 9 Paige Ch. (N. Y.) 443, 38 Am. Dec. 559; Young v. Butler, 1 Head (Tenn.), 640; Ingram v. Morgan, 4 Humph. (Tenn.) 66, 40 Am. Dec. 626; Barnett v. Clark, 5 Sneed (Tenn.), 436; Baird v. Goodrich, 5 Heisk. (Tenn.) 24; Merriman v. Norman, 9 Heisk. (Tenn.) 270; Leird v. Abernethy, 10 Heisk. (Tenn.) 626; Saint v. Taylor, 12 Heisk. (Tenn.) 488; Land Company v. Hill, 3 Pick. (Tenn.) 589, 11 S. W. Rep. 797; McElya v. Hill, 105 Tenn. 319, 59 S. W. Rep. 1025; Land Co. v. Hill, 87 Tenn. 598, 11 S. W. Rep. 797; Matthews v. Crowder, (Tenn.) 69 S. W. Rep. 779; Stockton v. Cook, 3 Munf. (Va.) 68, 5 Am. Dec. 504. The Virginia practice is, however, much more favorable to the covenantee than the rule stated in the text. See post, § 337. In Patton v. Taylor, 7 How. (U. S.) 132, the insolvency of the covenantee was held no ground for an injunction against the collection of the purchase money. Little consideration appears to have been given the question, and the authorities cited merely decide that a covenantee who has been disturbed in his possession, cannot resist the payment of the purchase money on the ground that the title is defective. The grounds upon which the injunction is granted where the vendor is insolvent, were forcibly stated by Judge NICHOLAS in his dissenting opinion in the case of Simpson v. Hawkins, 1 Dana (Ky.), 318, as follows: "It is too late now in this court to question the doctrine, that where a vendee has received a conveyance with warranty, and been let into possession he may nevertheless enjoin the collection of the purchase money, when the vendor becomes insolvent, and it turns out that he has no title, or that his title is defective. That doctrine has been incidentally and directly recognized in too many cases to be now shaken, even if it were originally wrong. But it is right in itself, and clearly deducible from the general principle that sustains every injunction *quia timet*. . . . It is said (quoting from the opinion of Judge UNDERWOOD), 'no judge can repose with confidence and rest his opinion upon the events of futurity. Events that have transpired and not those to come, are, in general, the sole and exclusive subjects for the judiciary to act upon.' Admitting all this, still its direct application is not perceived. In granting the purchaser relief the chancellor acts upon no undivulged or untranspired event. He restrains the collection of the purchase money because of the peril in which the purchaser would otherwise be placed from the want or imperfection of title in the vendor. The want of title and insolvency of the vendor are ascertained facts; the peril to the purchaser thence ensuing is an existing evil which the vendor is bound to remove before he can equitably and conscientiously proceed to the tion.[22] Upon a principle similar to that on which a court of equity enjoins the collection of the purchase money by an insolvent cove-

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collection of the purchase money. This is not acting upon a state of the case that may arise, but upon one that already exists. It is not a remedy for breach of warranty, or anything equivalent or similar thereto; but an act of "preventive justice" on the part of the court, the full effectuation of which, under a due attention to the interest of both parties, requires a rescission of the contract. It is a mere exception to the general rule that after taking a conveyance the purchaser will not be allowed to rescind for want or defect of title. As to the uncollected purchase money, it places the purchaser in nearly the same attitude as if the conveyance had not been executed. A perpetual injunction, or at least for so long as the purchaser is in danger, is what his case requires, and all that it requires. But as it would be unjust for him to withhold the purchase money and continue the enjoyment of the land, in which there is a chance be may never be disturbed, the interest of the vendor requires the court to go a step further, rescind the contract, and make the purchaser restore the title and possession." The majority of the court in this case were of opinion that mere insolvency of the grantor, when no suit against the grantee was being prosecuted or threatened by the real owner, did not warrant a perpetual injunction to stay the collection of the purchase money.

[21] Clarke v. Cleghorn, 6 Ga. 225; McGhee v. Jones, 10 Ga. 127. In this case there had been no conveyance, but the vendor had executed a bond for title. Vance v. House, 5 B. Mon. (Ky.) 540; Wiley v. Fitzpatrick, 3 J. J. Marsh. (Ky.) 583; Hatcher v. Andrews, 5 Bush (Ky.), 561. In Cummins v. Boyle, 1 J. J. Marsh. (Ky.) 480, it was held that the removal of one of several covenantors from the State was no ground for an injunction unless it should appear that the remedy against the others would be unavailing. Wofford v. Ashcraft, 47 Miss. 641; Green v. Campbell, 2 Jones Eq. (N. C.) 447. The covenantee will not be driven to seek redress in the courts of another State, when a less circuitous and a better remedy can be given in the courts of his own State. Richardson v. Williams, 3 Jones Eq. (N. C.) 119. It seems that the injunction will not be granted if the sole ground of the application is the non-residency of the covenantor if he have sufficient property within the State to answer his liability on the covenants. The rule was so qualified in Green v. Campbell, 2 Jones Eq. (N. C.) 446. In Falls v. Dickey, 6 Jones Eq. (N. C.) 258, the bill was adjudged fatally defective in not averring that the non-resident had no property within the State. It must be admitted that the ownership of property within the State constitutes a very doubtful security for damages, the right to recover which may not accrue for many years after the payment of the purchase money has been enforced, or not until the vendor has disposed of that property. In Minnesota the mere non-residence of the covenantor has been held insufficient to take a case out of the rule that the covenantee cannot on failure of the title rescind the contract and *recover back* the purchase money. Miller v. Miller, 47 Minn. 546, 50 N. W. Rep. 612.

[22] Hoppes v. Cheek, 21 Ark. 585. If the grantee be constructively evicted by

nantor when the title has failed, it will in a like case restrain him from transferring negotiable securities for the purchase money to an innocent party.[23] It seems that if the title to a portion of the land fail, and that portion be not material or essential to the enjoyment of the rest, there is no ground for an injunction and a rescission of the contract *in toto*, but the covenantee is entitled to an abatement of the purchase money *pro tanto*,[24] or to compensation for the portion lost.[25]

The bill must also allege facts showing a clear outstanding title in a stranger, and that suit is being prosecuted or threatened, or that there is imminent danger from the adverse title. Facts which merely show that the title is doubtful, or is not such as the purchaser could be required to take upon a bill for specific performance, constitute no ground for an injunction to stay the collection of the purchase money after the purchaser has accepted a conveyance with covenants of title.[26] It has also been said that mere threats of suit by an adverse claimant will not justify an injunction, and that it must appear that the suit is being actually prosecuted before relief will be granted,[27] except in cases where the

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being unable to get possession from an adverse claimant, he may detain the purchase money without alleging non-residence, fraud or insolvency on the part of the grantor. Baird v. Laevison, (Ky.) 15 S. W. Rep. 252.

[23] McDunn v. Des Moines, 34 Iowa, 467.

[24] Simpson v. Hawkins, 1 Dana (Ky.), 303.

[25] Key v. Jennings, 66 Mo. 356. In Withers v. Morell, 3 Edw. Ch. (N. Y.) 560, it was held that in a proceeding to foreclose a purchase-money mortgage, the purchaser could not avail himself of failure of the title to a portion of the land, as a defense, but must file his bill in equity to enjoin proceedings at law on his bond, if the vendor should seek to hold him for a deficiency.

[26] Latham v. Morgan, 1 Sm. & M. Ch. (Miss.) 611; Simpson v. Hawkins, 3 Dana (Ky.), 303; Woodruff v. Bunce, 9 Paige Ch. (N. Y.) 443; 38 Am. Dec. 559; Hoag v. Rathbun, Clarke Ch. (N. Y.) 12, where it was said that insolvency was ground for the injunction if the danger of eviction was certain or even imminent. It has been held, however, that in a suit to enjoin a judgment on the ground of defective title, an answer which merely alleges that the defendant's title is good, without setting out facts showing a good title, is insufficient. Boyer v. Porter, 1 Overt. (Tenn.) 258; Moredock v. Williams, 1 Overt. (Tenn.) 325; Moore v. Cook, 4 Hayw. (Tenn.) 84. It is not easy to reconcile these cases with those which hold that the burden is on the complainant to allege and prove a bad title in the vendor. Grantland v. Wight, 5 Munf. (Va.) 295.

[27] Rawle Covts. (5th ed.) § 381, citing Worthington v. Curd, 22 Ark. 284;

adverse claimants as well as the vendor and purchaser are before the court, thereby making possible the adjustment of the rights of all parties in the same suit.[28]

If the application for injunction be made to restrain proceedings at law before judgment, it is usually granted only upon condition that the claimant shall confess judgment at law. The object of this rule is to prevent suits for injunction having no other purpose than to delay proceedings at law.[29] Where the circumstances of the case are such as to entitle the purchaser to an injunction against proceedings to collect the purchase money, it may be maintained against all who claim under the vendor as well as against the vendor himself,[30] except, of course, the purchaser of a negotiable security before maturity, for value, and without notice of equities between the original parties.

The rule that a grantee in undisturbed possession of the premises may enjoin the collection of the purchase money upon a complete failure of the title, where the grantor is insolvent, is equi-

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Wiley v. Fitzpatrick, 3 J. J. Marsh. (Ky.) 583. In the last case it appears, however, that the injunction *was* granted, the covenantor being practically insolvent and a non-resident, though no suit was being prosecuted by the adverse claimant.

[28] Id. (5th ed.) § 382. Morrison v. Beckwith, 4 T. B. Mon. (Ky.) 73; 16 Am. Dec. 136; Davis v. Logan, 5 B. Mon. (Ky.) 341. Here the covenantee had been sued in dower by the widow of the covenantor, and he had filed a cross-bill against the heirs and executor of the covenantor asking compensation for breach of warranty. No question as to the right to an injunction, or to detain purchase money was involved. In Denny v. Wickliffe, 1 Met. (Ky.) 216, 226, the contract was executory, but specific performance by conveying to the purchaser having been decreed, he was considered to occupy the position of a grantee, and it was held that he could only have relief from the defective title, by bringing the adverse claimants before the court. Citing Simpson v. Hawkins, 1 Dana (Ky.), 303; Taylor v. Lyons, 2 Dana (Ky.), 279.

[29] Anon., 1 Vern. 129; 1 Madd. Ch. 132. Warwick v. Norvell, 1 Leigh (Va.), 96; Nelson v. Owen, 3 Ired. Eq. (N. C.) 175, which was an injunction against proceedings to collect a land bond, and where it was said that the granting of injunctions was liable to much abuse, as they are usually obtained upon the *ex parte* statements of the applicant, and often employed to delay the administration of justice; and that to remedy this evil, the complainant must, as a general rule, agree that judgment at law may be entered for the plaintiff.

[30] Gunn v. Thornton, 49 Ga. 380, where a judgment creditor of the vendor was seeking to garnishee the purchase money. Fillingin v. Thornton, 49 Ga. 384.

table and just provided the grantee be required to reconvey the premises to the grantor. But it would be obviously inequitable to permit the grantee to keep both the purchase money and the estate, unless the injunction were merely temporary, and it appeared that the objection to the title could probably be removed by the grantor. A perpetual injunction against the collection of the purchase money would be in substance a rescission of the contract, and it is a cardinal doctrine of equity that a contract will not be rescinded without returning to each party the consideration which passed from him to the other.

§ 332. **Where the estate is encumbered.** In many cases, injunctions against proceedings to collect the purchase money have been granted where an incumbrance on the premises exists, apparently without regard to the imminency of proceedings to enforce the incumbrance, or the non-residency or insolvency of the covenantor.[31] As to actual or threatened proceedings against the covenantee, there would seem to be grounds for a distinction between defects of title and incumbrances. The former may never be asserted, while the enforcement of securities for the payment of money is almost inevitable. As to non-residence and insolvency of the covenantor, even though the covenantee's case be not strengthened by these conditions, it would unquestionably be a great hardship if he might be compelled to pay money, which in all probability he would in a short time be entitled to recover back as damages. If the covenantee pay money to remove incumbrances on the land, he may enjoin the collection of the purchase money to that extent,[32] provided he has had no opportunity to set up that defense at law, but he will be allowed only the amount actually paid by him to remove the incumbrance. He cannot buy in incumbrances and set up an adverse title under them against his vendor.[33]

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[31] Buell v. Tate, 7 Bl. (Ind.) 55; Addleman v. Mormon, 7 Bl. (Ind.) 32, where it was held that a suit to enjoin collection of the purchase money until the covenantee should remove the incumbrance on the premises was in affirmance of the contract, and that consequently the suit could be maintained without tendering a reconveyance of the land, or offering to account for rents and profits. Arnold v. Carl, 18 Ind. 339; Ricker v. Pratt, 48 Ind. 73; Hoke v. Jones, 33 W. Va. 501, *obiter*. Dayton v. Dusenbury, 25 N. J. Eq. 110, where there were unsatisfied judgments binding the premises; Union Nat Bank v. Pinner, 25 N. J. Eq. 495, tax liens; Stiger v. Bacon, 29 N. J. Eq. 442, prior mortgage; White v. Stretch, 7 C. E. Gr. 76, sewer assessment; Woodruff v. Depue, 14 N. J. Eq. 168, prior mortgage. Henderson v. Brown, 18 Grant Ch. (Can.) 79; Lovelace v. Harrington, 27 Grant Ch. (Can.) 178. In Alabama, the right to enjoin the collection of the purchase money where there has been a breach of the covenant against incumbrances is restricted to cases in which it appears that the covenantee is insolvent. McLemore v. Mabson, 20 Ala. 127, citing Parks v. Brooks, 16 Ala. 529; Cullum v. Branch Bank, 4 Ala. 21; 37 Am. Dec. 725. So, also, in Mississippi: Wofford v. Ashcraft, 47 Miss. 641.

But while an outstanding mortgage or other incumbrance is ground for an injunction against the collection of the purchase money where the purchaser holds under a conveyance with a covenant against incumbrances, it is no ground for a rescission of the contract. The injunction will be dissolved if the vendor removes the incumbrance, or reduces it to a sum not exceeding the unpaid purchase money. The purchaser cannot tender a reconveyance and deprive the vendor of the right to perfect the title.[34] Neither is delay in removing the incumbrance ground for rescinding the contract, where the grantee has never been disturbed in his possession, and the enforcement of the incumbrance is barred by the Statute of Limitations.[35]

§ 333. **Foreclosure of purchase-money mortgage.** We have already seen that want of title in the vendor is no ground for resisting the enforcement of a purchase-money mortgage or other security, when no personal judgment against the purchaser for a deficiency is sought. In such a case an injunction, as a general rule, will not be granted to restrain a foreclosure of the mortgage.[36]

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[32] Champlin v. Dotson, 13 Sm. & M. (Miss.) 553; 53 Am. Dec. 102. Detroit R. Co. v. Griggs, 12 Mich. 51. In Rawle Covts. (5th ed.) 642, mention is made of a class of cases which refuse the injunction unless the covenantee has paid off the incumbrance, referring to section 378 of that work. Reference to that section, however, shows that the rule is limited to cases in which the purchaser bought with notice of the incumbrance.

[33] Champlin v. Dotson, 13 Sm. & M. (Miss.) 553; 53 Am. Dec. 102; Paine v. Kemp, (Fla.) 82 So. 53.

[34] Oldfield v. Stevenson, 1 Ind. 153.

[35] Egan v. Yeaman, (Tenn.) 46 S. W. Rep. 1012.

[36] Ante, § 184, and cases there cited. Cartwright v. Briggs, 41 Ind. 184, citing Hubbard v. Chappel, 14 Ind. 601; Hume v. Dessar, 29 Ind. 112; Rogers v. Place, 29 Ind. 577; Hanna v. Shield, 34 Ind. 84. In Wade v. Percy, 24 La.

The fact that the purchaser has paid a considerable portion of the purchase money, seems to place him on no better ground, with respect to his right to an injunction. Where, however, the contract is executory, it will be remembered that the purchaser, on failure of the title, is, in some of the States, permitted to detain the premises, if necessary, to reimburse him for what he has already paid.[37] If the covenantee should be actually evicted by paramount title, there would, of course, be little probability of proceedings by the covenantor to enforce a vendor's lien or purchase-money mortgage, unless he should seek to recover a personal judgment against the covenantee, or should make the adverse claimants parties. In either event the suit would be perpetually enjoined as to the covenantee.[38] But while a defect in the title is, in general, no ground for resisting the enforcement of a purchase-money mortgage where no personal judgment against the mortgagor is sought, a different rule has been held to apply if the vendor conveyed to the mortgagor with a covenant against incumbrances, and an incumbrance on the premises exists. In such a case the enforcement of the mortgage will be enjoined until the vendor removes the incumbrance or reduces it to a sum not exceeding the unpaid purchase money.[39]

The existence of a defect in the title is no defence to a suit by the grantor to enforce a vendor's lien, nor to a suit by the grantee to rescind, where the grantor removes the defect before decree in such suit.[40] In a case in which the title of the grantor was bad

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Ann. 173, it was held that the vendor might be enjoined from enforcing a purchase-money mortgage until he had complied with his agreement to furnish a perfect title. The civil law leans greatly to the side of the purchaser on failure of title, and does not carry, perhaps, to its full extent, the rule that special agreements respecting the title are merged in the conveyance.

[37] Ante, § 261.

[38] Kingsbury v. Milner, 69 Ala. 502.

[39] Ante, § 184. Coffman v. Scoville, 86 Ill. 335; Dayton v. Dusenbury, 25 N. J. Eq. 110; Union Nat. Bank v. Pinner, 25 N. J. Eq. 495; Stiger v. Bacon, 29 N. J. Eq. 442; Bennett v. Pierce, 50 W. Va. 604; 40 S. E. 395.

[40] Stokes v. Acklen, (Tenn.) 46 S. W. Rep. 316; McElya v. Hill, 105 Tenn. 319; 59 S. W. Rep. 1025; Renner v. Marshall, (Tenn. Ch. App.) 58 S. W. Rep. 863.

at the time the vendor's lien was reserved, but had been perfected by the Statute of Limitations at the time of suit to enforce the lien, it was held that the original want of title in the grantor was no bar to the suit.[41]

§ 334. **Where there are no covenants.** If the purchaser accept a conveyance without covenants for title, there is of course no ground for an injunction if the title fails, unless the vendor falsely and fraudulently represented the state of the title.[42] The very fact that the conveyance was without covenants should raise, it would seem, a strong presumption that the purchaser was advised as to the weakness of the title,[43] and that the contract was one of hazard. And if he purchases with knowledge that the title is doubtful, relying for his indemnity on the covenants he is to receive, and afterwards accepts a conveyance with covenants for title, he cannot afterwards enjoin the collection of the purchase money on the ground that the title is bad, but will be left to his remedy on the covenants,[44] unless, it would seem, he has been evicted and has had no opportunity to set up that defense at law.

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[41] Bennett v. Pierce, 50 W. Va. 604; 40 S. E. Rep. 395.

[42] Ante, § 267. Banks v. Walker, 2 Sandf. Ch. (N. Y.) 344; Sutton v. Sutton, 7 Grat. (Va.) 234; 56 Am. Dec. 109; Price v. Ayres, 10 Grat. (Va.) 575.

[43] Of course no such presumption can arise if the purchaser be induced, through fraudulent representations, to accept a conveyance without covenants, as in Denston v. Morris, 2 Edw. Ch. (N. Y.) 37.

[44] Merritt v. Hunt, 4 Ired. Eq. (N. C.) 409. The facts in this case are contained in the opinion delivered by RUFFIN, C. J., and being such as frequently occur in the sale of real property, justify the following copious extract: "The crier at the sale and several of the bidders prove, that the defendant (vendor) gave distinct notice that doubts rested upon the title, as he was unable to trace it or find any evidence of it upon the register's books, and that the defendant, in order to induce persons to bid a fair price for the land, said that he would warrant the title. The witnesses all understood that the purchaser was to take a conveyance for the land at all events, whether the defendant could show a good title or not in his testatrix or himself, provided he would bind himself by a general warranty in the deed. They state that the defendant was known to be a man of substantial and independent property, and that the bidders considered the title good to them by his agreement to make it good in case of an eviction. It is evident that the plaintiff, also, had the same impression and understanding. For, after he was declared the purchaser, he made no inquiry as to the title, nor asked any delay for the purpose of looking into it, but was satisfied to give his bond for the price

§ 335. **Temporary and perpetual injunctions.** Injunctions to restrain the collection of the purchase money are not necessarily in rescission of the contract for the sale of lands. A perpetual injunction would of course have that effect and should not be granted unless the covenantee offers to reconvey the premises.[45] Temporary injunctions are frequently granted on allegations of the insolvency of the covenantor, until the rights of hostile claimants of the land can be decided,[46] or until the covenantor removes incumbrances from the premises, in the latter case, it seems, whether the covenantor is solvent or insolvent.[47]

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immediately, and take a deed purporting, as was then thought, to convey a fee, and containing a general warranty binding the defendant and his heirs. He also sold a part to another person, and conveyed it in fee. If there be a defect in the title, therefore, it cannot affect the contract these persons made, for the contract, in terms, provided for such a possible or probable defect, and for the consequences of it. If a person chooses to buy a doubtful or bad title with his eyes open, and at his own risk, he is as much bound by that, as by any other contract fairly made. So, if he buys such a title with a guaranty of the seller against eviction or disturbance, he must take the title, and look to the vendor's covenants for his security or indemnity. He cannot complain of any injury, for he gets precisely what he bargained for, namely, a conveyance with the warranty of the vendor. In such a case the court will not look into the title at all, because the bargain was, that it was immaterial whether it was good or bad, provided the vendee had a covenant of indemnity." Livingston v. Short, 77 Ill. 587; Rawlins v. Timberlake, 6 T. B. Mon. (Ky.) 225; Hall v. Priest, 6 Bush (Ky.), 14; Miller v. Owens, Walker Ch. (Miss.) 244; Anderson v. Lincoln, 5 How. (Miss.) 279. In Wailes v. Cooper, 24 Miss. 232, it was held that the right to a perpetual injunction against the collection of the purchase money was not affected by the fact that the purchaser bought with notice of defects and took a conveyance with warranty, if the vendor was insolvent. It was further held, however, that the purchaser was not entitled to an injunction under these circumstances, though actually evicted, unless the vendor was insolvent. Parkins v. Williams, 5 Cold. (Tenn.) 512. Demarett v. Bennett, 29 Tex. 267. Rawle Covts. for Titles (5th ed.), § 378, where it is said that while knowledge of an incumbrance or defect in the title, is no bar to a recovery on the covenants themselves in a court of law, it should operate strongly, if not conclusively, against his right to equitable relief where they are not yet so broken as to give a present right to actual damages.

[45] Jackson v. Norton, 6 Cal. 137. Of course if the covenantee has been actually evicted from the entire premises, the injunction will be perpetual. Shelby v. Williams, 1 Bl. (Ind.) 384; Luckett v. Triplett, 2 B. Mon. (Ky.) 39.

[46] Gay v. Hancock, 1 Rand. (Va.) 72; Morrison v. Beckwith, 4 T. B. Mon. (Ky.) 73; 16 Am. Dec. 136; Houston v. Hurley, 2 Del. Ch. 247.

[47] Ante, § 184.

On dissolving an injunction against proceedings to collect the purchase money, if it appear that the injunction was sought in good faith and not merely for purposes of delay, as where a third person was asserting a hostile claim to the land, the court should not give damages against the purchaser.[48]

§ 336. **Resume.** While there are cases which apparently concede the right of the covenantee, upon a complete failure of the title and before eviction, to rescind the contract and reconvey the premises to the grantor, and to have a perpetual injunction against the collection of the purchase money, the weight of authority in America undoubtedly establishes the rule, that where there has been no such breach of the grantor's covenants for title as to give a present right to recover substantial damages at law, and no suit is being actually prosecuted or threatened by an adverse claimant, and the covenantor is neither insolvent nor a non-resident, a perpetual injunction to stay the collection of the purchase money will not be granted.[49]

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[48] Massie v. Sebastian, 4 Bibb (Ky.), 436; Morris v. McMillan, 3 A. K. Marsh. (Ky.) 565.

[49] Rawle Covts. for Title (5th ed.), § 375; High on Injunctions (3d ed.) § 384. The books contain many cases, cited to this proposition, in which the question of insolvency and non-residence of the vendor, and of the imminency of proceedings by the adverse claimant, was not raised; and in which no more was decided than that the mere want of title is no ground for detaining the purchase money where the purchaser holds under a conveyance with covenants for title, and has not been disturbed in the possession. The author has collected many such cases. Ante, chap. 16. Magee v. McMillan, 30 Ala. 420; McLemore v. Mabson, 20 Ala. 137; Busby v. Treadwell, 24 Ark. 457; Trumbo v. Lockridge, 4 Bush (Ky.), 416; English v. Thomasson, 82 Ky. 281. The Kentucky decisions on this and kindred points, are collected in this case. See, also, Abner v. York, 19 Ky. Law R. 643; 41 S. W. Rep. 309; Foster v. Lyons, 19 Ky. Law R. 1906; 44 S. W. Rep. 625. A judgment for the purchase money cannot be enjoined on the ground that the vendor's lien on the property has not been released, since payment of the judgment extinguishes the lien. Wilder v. Smith, 12 B. Mon. (Ky) 94; Gayle v. Fattle, 14 Md. 69. Here a suit by an adverse claimant against the covenantor was being actually prosecuted, but there was no allegation or proof of non-residency or insolvency of the covenantor. Vick v. Percy, 7 Sm. & M. (Miss.) 256; 45 Am. Dec. 303. In McDonald v. Green, 9 Sm. & M. (Miss.) 138, the point was queried, but was admitted in Johnson v. Jones, 13 Sm. & M. (Miss.) 582, citing Wilty v. Hightower, 6 Sm. & M. (Miss.) 350; Wailes v. Cooper, 24 Miss. 232; Henry v. Elliott, 6 Jones Eq. (N. C.) 175, where the conveyance with warranty purported to carry a fee, but the purchaser got

§ 337. **WHERE THERE IS NO PRESENT RIGHT TO RECOVER SUBSTANTIAL DAMAGES ON THE COVENANTS.** 4. *Where there is no present right to recover substantial damages on the covenants for title, but there is a clear outstanding title in a stranger.* In a few of the States injunctions against proceedings to collect the purchase money have been granted upon a complete failure of the title though the covenantee is in the undisturbed possession of the premises, and the covenantor is neither insolvent nor non-resident, and though no suit by the real owner against the covenantee has been prosecuted or threatened.[50] In a case of this kind, as we have

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only a life estate. Bumpus v. Platner, 1 Johns. Ch. (N. Y.) 213; Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519; 7 Am. Dec. 554; Miller v. Avery, 2 Barb. Ch. (N. Y.) 118; Platt v. Gilchrist, 3 Sandf. (N. Y. S. C.) 118. One who takes a conveyance from a person other than the vendor, cannot enjoin the collection of the purchase money on the ground of defective title. He must look to the covenants of his grantor. Holeman v. Maupin, 3 T. B. Mon. (Ky.) 380; Abner v. York, 19 Ky. Law R. 643; 41 S. W. Rep. 309. Remote possibilities that the covenantee will at some time in the future be disturbed in his possession, constitute no ground for an injunction. Collins v. Clayton, 53 Ga. 649. In many cases relief by injunction has been denied upon the ground that the remedy at law by action upon the covenants for title is adequate and complete, though no right to recover substantial damages on those covenants exists, the covenantee being still in the possession of the premises. Wilkins v. Hogue, 2 Jones Eq. (N. C.) 479. In Swain v. Burnley, 1 Mo. 404, it was said that the purchaser was entitled to an injunction against a judgment for the purchase money until he could prosecute a suit at law on the vendor's covenants.

[50] Yancey v. Lewis, 4 H. & M. (Va.) 390; Ralston v. Miller, 3 Rand. (Va.) 44, 15 Am. Dec. 704; Grantland v. Wight, 5 Munf. (Va.) 295; Keyton v. Brawford, 5 Leigh (Va.), 39; Koger v. Kane, 5 Leigh (Va.), 606; Beale v. Seiveley, 8 Leigh (Va.), 675; Long v. Israel, 9 Leigh (Va.), 556, *obiter;* Clark v. Hardgrove, 7 Grat. (Va.) 399; Renick v. Renick, 5 W. Va. 291; Walmsley v. Stalnaker, 24 W. Va. 214; Hoke v. Jones, 33 W. Va. 501, 10 S. E. Rep. 775; Kinports v. Rawson, 29 W. Va. 487, 2 S. E. Rep. 85; Jackson v. Walsh Land Co., 51 W. Va. 482, 41 S. E. Rep. 920; Smith v. Ward, 66 W. Va. 190, 66 S. E. 234, 33 L. R. A. (N. S.) 1030; Smith v. White, 71 W. Va. 639, 78 S. E. 378, 48 L. R. A. (N. S.) 623. In Stead v. Baker, 13 Grat. (Va.) 380, and Lange v. Jones, 5 Leigh (Va.), 192, it was held that equity would not enjoin the collection of the purchase money if a part of the premises was in the hands of an adverse claimant whose title the covenantee denied. In such case his remedy is by ejectment against the claimant. Where the purchaser is mistaken as to the sufficiency of a deed, under which he holds, to convey title (*e. g.*, a deed defectively acknowledged by a married woman), and the defect is clear and admitted, he should not be compelled to rely on the covenant of warranty and take the risk of the solvency of the vendor's estate after his death. Renick v. Renick, 5 W. Va. 285.

already seen, it would not seem inequitable to permit the covenantee to resist the payment of the purchase money, provided he reconveyed the premises to the grantor, and placed him substantially in the same condition in which he was before the contract was made.[51] But the equity of the cases which sustain the first-mentioned position is open to serious doubt, in that they impose no terms nor conditions upon the covenantee under which he may resist the payment of the purchase money on failure of the title, nor, as a general rule, limit the time during which the injunction shall be operative.[52] It is obviously unjust that the covenantee should detain both the purchase money and the premises indefinitely.

The doctrine that the covenantee may detain the purchase money on a clear failure of the title, without suit prosecuted or threatened by the real owner, and with a solvent covenantor to make good the damages when a substantial breach of the covenants has occurred, has received little, if any, recognition without the States of Virginia and West Virginia, where it prevails. It is there rested upon the ground that the covenantee has no adequate remedy at law, there being no right of action on the covenant affirmatively or negatively by way of recoupment or equitable set-off until an eviction occurs.[53] Hence it appears that in those States there may be a condition of the title which would justify an injunction against the collection of the purchase money, and yet would not support the defense of recoupment or set-off at law.

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[51] Ante, chap. 26. In Clark v. Hardgrove, 7 Grat. (Va.) 407, it was held that the covenantee, on failure of the title, might enjoin the collection of the purchase money though the covenantor was seeking to collect the same from one whose obligation the covenantee had assigned to the covenantor as collateral security for the purchase money. In Max Meadows L. & Imp. Co. v. Brady, 92 Va. 71, 22 S. E. 845, it is said that equity will not rescind a contract for the sale of land on the ground of a defective title where the grantee is in undisturbed possession under a warranty deed, and the grantor is not insolvent and has taken no steps to enforce collection of the purchase money. Distinguished in Perrow v. Webster, (Va.) 97 S. E. 770.

[52] Examination of the Virginia decisions cited, supra, will show that in few, if any, of them is there any attempt to fix the length of time during which the injunction shall be operative. Obviously it would be impracticable to fix any such time where the covenantee is allowed to avail himself of dormant rights as well as those that are being actively asserted. In Gay v. Hancock, 1 Rand. (Va.) 72, where the adverse claimant had actually brought suit to enforce his rights, it was of course held that the collection of the purchase money should be stayed until that suit should be decided. In Grantland v. Wight, 2 Munf. (Va.) 179, it was held that the injunction should not be dissolved until a good and sufficient deed had been tendered to the purchaser.

The injunction will not be granted unless the complainant alleges facts showing a clear outstanding title in a stranger, and the burden will be on him to prove the existence of that title.[54] Allegations that the title is defective, without showing in what respect, or facts which establish nothing more than that the title is doubtful or unmarketable, will not support the application for an injunction;[55] nor will he be entitled to relief if the claims of the owner of the outstanding title are barred by the Statute of Limitations.[56] Care must be taken, however, to distinguish from these cases a class in which injunctions to prevent a sale under a deed of trust, whether executed to secure deferred payments of the purchase money for land, or to secure general indebtedness, have been freely granted in Virginia and West Virginia upon an allegation that there is a cloud upon the title to the land about to be sold. In such a case the injunction is granted until the cloud on the title is removed. This is done in the interest of all parties that there may be no sacrifice of the property and that the title of the purchaser may be assured.[57] If the purchaser accept a conveyance from his vendor's vendor, with the agreement between all parties that he shall pay the purchase money to his immediate vendor, he cannot, on failure of the title, enjoin the collection of the purchase money. He will be forced to his action on the covenants of his grantor.[58]

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[53] Koger v. Kane, 5 Leigh (Va.), 608, where it was said by TUCKER, P., in respect to the practice in Virginia of enjoining the collection of the purchase money on failure of the title: "The jurisdiction thus confessedly exercised by the courts of equity with us results from what may be called the preventive justice of those tribunals. It arrests the compulsory payment of the purchase money when the purchaser can show that there is a certainty or a strong probability that he must lose that for which he is paying his money. It gives him relief too, though his demand may be in the nature of unliquidated damages, because he has no other means of ascertaining them. Thus, if the purchaser can show that he has received a deed with general warranty, and that the title is bad, yet if he has not been evicted he cannot maintain covenant at law and ascertain his damages before that tribunal in order then to set them off against the demand. If, indeed, there are covenants for good title, etc., it may be otherwise; and so it may often happen that an action may be brought where there are such covenants of good title, etc., upon which the validity of the title may be tested and damages of the party ascertained. Whether in these cases relief could be given in equity it is not necessary here to say. But, where there is only a covenant this cannot be done; and, hence, I conceive, the party would be entitled to the assistance of a court of equity where he is full-handed with proof that his title is defective, although he has not yet been evicted."

[54] Grantland v. Wight, 5 Munf. (Va.) 295.

[55] Kinports v. Rawson, 29 W. Va. 487, where it was also held that idle and groundless claims to the land, though suit had been brought upon them, would not support the injunction. The court must be able to see that there is some foundation for the claim. Bennett v. Pierce, 50 W. Va. 604, 40 S. E. Rep. 395; French v. Howard, 3 Bibb (Ky.), 301. The complainant must allege such facts in his bill as will *affirmatively* show such an incumbrance or outstanding title as will defeat the vendor's title under which the complainant holds. Cantrell v. Mobb, 43 Ga. 193. In Rosenberger v. Keller, 33 Grat. (Va.) 494, it was said by STAPLES, J.: "The numerous adjudged cases show that this court has gone very far in staying the collection of the purchase money for land upon proof of a defect of the title where no suit is

The Statute of Limitations does not run against the right of the covenantee to detain the purchase money where the covenantor had no title.[59]

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pending or even threatened. But even here a distinction has always been made between an injunction to a judgment for the purchase money and an injunction to a sale under a deed of trust. In the latter case the court interferes the more readily upon the ground of removing a cloud upon the title in order to prevent a sacrifice of the property, whereas, in a like case, the court will not interfere with the vendor in enforcing his judgment since the doubt about the title may eventually turn out to be frivolous and groundless."

[56] Bennett v. Pierce, 50 W. Va. 604, 40 S. E. 395.

[57] Miller v. Argyle, 5 Leigh (Va.), 460 (508); Gay v. Hancock, 1 Rand. (Va.) 72. See, also, the cases cited, ante, § 337, n. 50. Lane v. Tidball, Gilm. (Va.) 130; Peers v. Barnett, 12 Grat. (Va.) 416; Morgan v. Glendy, 92 Va. 86, 22 S. E. Rep. 854. But in this case the fact that the vendor held under a deed of trust sale, which the trustee had improperly made, he being one of the creditors secured by the trust, was held no such defect in the title as would justify an injunction against a sale under a trust to secure the purchase money, where the evidence satisfactorily showed that the proceeds of sale under the first mentioned trust had all been properly accounted for, except a trifling amount.

[58] Price v. Ayres, 10 Grat. (Va.) 575.

[59] Smith v. Ward, 66 W. Va. 190, 66 S. E. 234, 33 L. R. A. (N. S.) 1030.

CHAPTER XXXV.

RESCISSION IN CASES OF FRAUD AND MISTAKE.

FRAUD ON THE PART OF THE GRANTOR. § 338.
- **General principles.**
- **Damages in equity.** § 339.

MISTAKE OF FACT. § 340.
- **General rule.**
- **Negligence of purchaser.** § 341.
- **Immaterial mistakes.** § 342.
- **Mistakes as to quantity.** § 343.

MISTAKE OF LAW. § 344.
- **General rule.**
- **Distinction between ignorance of law and mistake of law.** § 345.
- **Erroneous construction of devise or grant.** § 346.
- **Where the construction of the law is doubtful.** § 347.
- **Misrepresentation of the law by the vendor.** § 348.

§ 338. **FRAUD ON THE PART OF THE GRANTOR. General principles.** Equity accomplishes the rescission of an executed contract by cancelling the written evidence thereof, and decreeing that either party shall restore to the other whatever he has received in performance of the contract. Few cases, it has been said, turn on greater niceties than those which involve the question whether a contract ought to be delivered up to be canceled, or whether the parties should be left to their legal remedy.[1] The jurisdiction of equity in such cases has been reduced to very narrow limits; and, where it has been invoked by the purchaser on failure of the title, has been, with certain seeming exceptions, invariably denied, unless the purchaser was induced to accept the conveyance by a fraudulent misrepresentation or concealment of facts on the part of the vendor, or unless the parties were mutually mistaken as to the existence of some fact or facts upon which the validity of the title depended.[2] The exceptions to this rule are those cases in which the purchaser is permitted to enjoin the collection of the purchase money where the grantor is insolvent or a non-resident so that recovery against him will be either impossible or unavailing when an eviction shall have occurred.[3] Other exceptions, indicated rather than positively declared, by a line of authorities already referred to, are those cases in which the grantee upon a clear and acknowledged failure of the title accompanied by a moral certainty of eviction will be permitted to detain the purchase money provided he reconveys the premises to the grantor.[4] In one of the States, and possibly in others, having paid the purchase money in full and received a conveyance with covenants for title, the grantee will, on a clear failure of the title, be allowed to file his bill in equity for a rescission of the contract and return of the purchase money if the grantor is insolvent or a non-resident.[5]

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[1] 1 Sugd. Vend. 243.

[2] Ante, § 267. Willan v. Willan, 16 Ves. 83; Madden v. Leak, 5 J. J. Marsh. (Ky.) 95; Ogden v. Yoder, 5 J. J. Marsh. (Ky.) 424.

A decree for the rescission of an executed contract must provide that within a reasonable time the grantee shall execute a reconveyance duly probated for registration in the State in which the land lies.[6] But a mere delivery of a deed to the purchaser without acceptance thereof by him, will not oblige him to execute a reconveyance before he can recover the purchase money, the deed having misdescribed the property.[7] Of course a covenantee who has been evicted from the premises, cannot maintain a suit in equity to rescind the contract and recover back the purchase money. His remedy at law is adequate and complete. He has a present right to recover substantial damages for breach of the covenant.[8]

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[3] Ante, ch. 34. Where the grantor is insolvent, and a recovery on his covenants for title would prove unavailing, equity will decree a rescission of the contract. Parker v. Parker, 93 Ala. 80, 9 So. Rep. 426. *Aliter*, where there was no fraud and no insolvency. Fields v. Clayton, 117 Ala. 538, 23 So. Rep. 530.

[4] Ante, ch. 26.

[5] Brannen v. Curtis, (Tenn. Ch. App.) 53 S. W. Rep. 234. In this case the purchaser was held entitled to the return of the purchase money and interest, taxes paid by him, and the value of his improvements, and was charged with the annual rental value of the land.

[6] Winfrey v. Drake, 4 Lea (Tenn.), 290.

[7] Fenton v. Alsop, 79 Cal. 402, 21 Pac. Rep. 839.

[8] Ohling v. Luitjens, 32 Ill. 23. See, also, Bradley v. Dibrell, 3 Heisk. (Tenn.) 522, where the complainant setting out facts showing a breach of warranty only, amended his bill charging fraud and misrepresentation by the vendor.

The jurisdiction of a court of equity to rescind a contract for the sale of lands which has been executed by a conveyance, on the ground of fraudulent misrepresentation or concealment of facts respecting the title, is clear and undoubted.[9] We have already seen what acts, conduct and declarations of the vendor in relation to the title during the negotiations of the parties, are to be deemed fraudulent; also, when the purchaser will be deemed to have waived his right to rescind because of the fraud, and that fraud, of which he was ignorant, cannot be regarded as merged in the conveyance which he accepts; also when the purchase money may be detained or recovered back, or damages recovered at law, or the collection of the purchase money stayed by injunction, in cases of fraud.[10] We have seen that one who has been induced to accept a conveyance of lands through the fraudulent representations of the grantor respecting the title, is not limited to his action on the covenants contained in the deed. Equity has concurrent jurisdiction with courts of law in cases of fraud, and the objection that a grantee, seeking rescission of the contract, should sue at law on his warranty, or in trespass for deceit, will not be entertained.[11]

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[9] 1 Sugd. Vend. (8th Am. ed.) 375 (246); Dart V. & P. 377; Bigelow on Fraud, 415. Berry v. Armistead, 2 Keen, 221; Gibson v. D'Este, 2 Y. & C. 542; Greenlee v. Gaines, 13 Ala. 198, 48 Am. Dec. 49; Read v. Walker, 18 Ala. 323; Lanier v. Hill, 25 Ala. 554, where an administrator, *c. t. a.*, fraudulently represented that he had authority under the will to sell. Foster v. Gresset, 29 Ala. 393; Bryant v. Boothe, 30 Ala. 311, 68 Am. Dec. 117; Williams v. Mitchell, 30 Ala. 299; Prout v. Roberts, 32 Ala. 427; Parham v. Randolph, 4 How. (Miss.) 451, 35 Am. Dec. 403; Davidson v. Moss, 5 How. (Miss.) 673; English v. Benedict, 25 Miss. 167; Rimer v. Dugan, 39 Miss. 477, 77 Am. Dec. 687; Fitch v. Baldwin, 17 Johns. (N. Y.) 161; Shackelford v. Handly, 1 A. K. Marsh. (Ky.) 495; 10 Am. Dec. 753; Peebles v. Stephens, 3 Bibb (Ky.), 324, 6 Am. Dec. 660; Glass v. Brown, 6 T. B. Mon. (Ky.) 356; Bank v. Bank, 7 Lea (Tenn.), 420; Rice v. Silverton, 170 Ill. 342, 48 N. E. Rep. 969; Zuenker v. Kuehn, 113 Wis. 421, 88 N. W. Rep. 605; Ramirez v. Barton, (Tex. Civ. App.) 41 S. W. Rep. 508; Corbett v. McGregor. (Tex. Civ. App.) 84 S. W. Rep. 278; Buchanan v. Burnett, 102 Tex. 492, 119 S. W. 1141, 132 Am. St. Rep. 900; Brader v. Zbranek, (Tex. Civ. App.), 213 S. W. 331; Ison v. Saunders, 163 Ky. 605, 174 S. W. 505; Fisher v. Hurley, (N. J. Eq.) 100 Atl. 566, a case of knowingly false representation by the grantor that she had a right of way over adjoining premises.

[10] Ante, §§ 102, 270, 329. The fact that a railway company, as grantor in a quit-claim deed, refers to a certain public land grant as the source of its title, which grant turns out to be invalid, is not sufficient to fix fraud upon the company. Union Pac. R. Co. v. Barnes, 64 Fed. Rep. 80. The grantee is entitled to rescind whether the grantor did, or did not, know that his representations were false. Buchanan v. Burnett, 52 Tex. Civ. App. 68. 114 S. W. 406. The representation of the grantor that he had a fee simple title, when his only interest was under a contract of sale to him subject to overdue mortgages, entitled the grantee to rescission of the executed contract. Allen v. Talbot, 170 Mich. 664, 137 N. W. 97.

The general rule is that on application for the rescission of an executed contract in case of fraud, the purchaser must reconvey or offer to reconvey the estate to the grantor, just as he must restore the premises to the vendor and place him *in statu quo* on rescission of an executory contract. But this rule has been held not to apply where the purchaser has never been in possession and the vendor had absolutely no title. In such a case the title is considered worthless, and the rule is the same whether the subject of the contract be real or personal property; if the thing, the consideration of which is sought to be recovered back, is entirely worthless, there is no duty to return it.[12] Neither does the rule apply if it be clear that the seller will not receive back the premises.[13] It has been held in a case in which the conveyance was a forgery, and the alleged owner of the property a fictitious person, that the grantee was under no obligation to execute a reconveyance of the premises.[14] The purchaser will be entitled to a decree for the value of his improvements, upon rescission of an executed contract for the sale of lands on the ground of fraud or mistake respecting the title; also for taxes paid by him, with interest thereon, and on the sums expended in good faith by him for permanent improvements.[15] But he must account for the rents and profits.[16] He is also entitled to a lien on such interest as the grantor has in the land, to secure the return of the purchase money paid by him.[17]

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[11] Ante, § 270. 1 Story Eq. Jur. § 193; Adams Eq. 177; 3 Pars. Cont. 177; Meek v. Spracher, 87 Va. 162, 12 S. E. Rep. 397; Perry v. Boyd, 126 Ala. 162, 28 So. Rep. 711. But even in those jurisdictions in which the distinctions between legal and equitable procedure have been abolished, an action to rescind for fraud cannot be joined with an action on the covenants for title, since the former disaffirms, while the latter affirms, the contract. McLennan v. Prentice, (Wis.) 55 N. W. Rep. 764.

[12] Bond v. Ramsey, 89 Ill. 29; Babcock v. Case, 61 Pa. St. 427, 100 Am. Dec. 651. Here the vendor conveyed land which he held under a tax deed, but it appeared that the land had been sold for taxes when none were due thereon. Jandorf v. Patterson, 90 Mich. 40, 51 N. W. Rep. 352.

[13] Ante, § 261. Culbertson v. Blanchard, 79 Tex. 486, 15 S. W. Rep. 700.

[14] Wheeler v. Standley, 50 Mo. 509. See also Mills v. Morris, 156 Wisc. 38, 145 N. W. 369, where the title to the property was in a step-son of the grantor, who was fraudulently represented by her to be dead.

If the grantee intends to rely upon the grantor's fraud as ground for rescinding the contract, he must distinctly allege the fraud in his pleadings, so that issue may be taken thereon.[18] But it will suffice to allege the specific fraudulent representation that was made, without setting out facts showing a want of title.[19]

We have seen that a purchaser electing to rescind the contract on the ground of fraudulent representations as to the title, must act promptly on discovery of the fraud.[20] Whether he has or has not waived his right to rescind must of course be determined by the circumstances of each particular case.

§ 339. **Damages in equity.** According to the English equity practice, until within a comparatively recent period, no damages could be awarded to a purchaser, upon the rescission of a contract induced by the fraud of the defendant. But now by statute in England equity may give damages in such a case.[21] In America, the rule seems to be that equity will not take jurisdiction of a suit for damages, when that is the sole object of the bill, and when no other relief can be given; but if other relief is sought by the bill which a court of equity is alone competent to grant, and damages are claimed as incidental to that relief, the court, being properly in possession of the cause, will, to prevent multiplicity of suits, proceed to determine the whole cause.[22] This rule, doubtless, prevails at the present time in those States in which the distinction between legal and equitable procedure is still maintained. In other States, where that distinction has been swept away or has never existed, it is presumed that the courts in rescinding a contract, voidable on the ground of fraud, have power to give judgment for whatever damages the party defrauded may have sustained. In Kentucky it has been held that equity will not entertain a bill seeking damages for fraudulent representations by the vendor as to his title. In such a case equity relieves by setting aside the contract entirely, and not by awarding compensation in damages, except, perhaps, where the complainant has, for some reason, an inadequate remedy at law.[23]

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[15] Perry v. Boyd, 126 Ala. 162, 28 So. Rep. 711.

[16] Baptiste v. Peters, 51 Ala. 158; Allen v. Talbot, 170 Mich. 664, 137 N. W. 97.

[17] Ramirez v. Barton, (Tex. Civ. App.), 41 S. W. Rep. 508.

[18] Hart v. Hannibal & St. Jo. R. Co., 65 Mo. 509; James v. McKernon, 6 Johns. (N. Y.) 543; Patton v. Taylor, 7 How. (U. S.) 159.

[19] Orendorff v. Tallman, 90 Ala. 641, 7 So. Rep. 821.

[20] Ante, § 276. Where it appeared that the purchasers were non-residents, and that the prevalence of yellow fever in the vendor's locality prevented an earlier offer, it was held that an offer to rescind made six months after discovery of the fraud, was made within a reasonable time. Orendorff v. Tallman, 90 Ala. 641, 7 So. Rep. 821. See Allen v. Talbot, 170 Mich. 664, 137 N. W. 97, for circumstances excusing the failure of the grantee to act promptly.

[21] 1 Sugd. Vend. (14th ed.) 55, 233, 251, 21 & 22 Vict. c. 27.

§ 340. **MISTAKE OF FACT. General rules.** Mistake of fact, and in some cases mistake of law, has been held clear ground for rescinding an executed contract for the sale of lands, and for refusing specific performance of those which are executory.[24] The question of mistake, as it affects the right to rescind an *executory* contract, is lowered in importance by the general rule which permits the rescission of such a contract on a clear failure of the title irrespective of other considerations, unless that right has been waived, or the vendor is allowed to perfect the title.[25] But *exe-*

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[22] Ferson v. Sanger, Davies (U. S.), 252, 261. In Alger v. Anderson, 92 Fed. Rep. 696, it was held that the grantee, holding under a deed with a covenant of warranty, who had, by his laches, waived his right to a rescission of the executed contract on the ground of fraudulent misrepresentations as to the title, could not maintain a bill in equity to recover damages for failure of title to part of the property, he not having been disturbed in the possession of the property.

[23] Colyer v. Thompson, 2 T. B. Mon. (Ky.) 16, citing Hardwick v. Forbes, 1 Bibb (Ky.), 212; Waters v. Mattingly, 1 Bibb (Ky.), 244. 4 Am. Dec. 631; Robinson v. Galbreath, 4 Bibb (Ky.), 183, which were all cases in which the contract was for the sale of personal property.

[24] By the civil law an action of redhibition to rescind a sale and to compel the vendor to take back the property and restore the purchase money, could be brought by the vendee wherever there was error in the essentials of the agreement, although both parties were ignorant of the defect which rendered the property unavailable to the purchaser for the purposes for which it was intended. Bates v. Delavan, 5 Paige Ch. (N. Y.) 307.

[25] As to the right to rescind an *executory* contract on the ground of mistake

cuted contracts can, as a general rule, be rescinded only upon the ground of fraud or mistake. A distinction then is to be observed between the cases which have arisen under these two heads.[26] The cases in which rescission of an executed contract for the sale of land on the ground of mistake as to the title has been sought, may be divided into two classes: (1) Those in which there was a mutual mistake of the parties as to the existence or non-existence of some particular fact or facts upon which the validity of the title depends, and which the parties must be presumed to have had in contemplation at the time the conveyance was made.[27] (2) Those in which the parties were correctly informed as to all the facts, but were mistaken in their application of the law thereto. Of the former class are cases in which the purchase is of an interest or estate liable to be divested upon the happening of a particular event, and that event has already transpired without the knowledge of the parties,[28] as where the purchaser of an estate, *pur autre*

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as to the title, see Mead v. Johnson, 3 Conn. 597; Smith v. Robertson, 23 Ala. 312; Smith v. Mackin, 4 Lans. (N. Y.) 41; Post v. Leet. 8 Paige Ch. (N. Y.) 336; Davis v. Heard, 44 Miss. 51; Armistead v. Hundley, 7 Grat. (Va.) 64; Gilroy v. Alis, 22 Iowa, 174.

[26] Hurd v. Hall, 12 Wis. 125.

[27] Nabours v. Cocke, 24 Miss. 44, where the validity of the title acquired under a sheriff's deed depended upon the fact that a forthcoming bond had been given by the execution defendant, and the parties acted under the mistaken belief that the bond had been given. Martin v. McCormick, 8 N. Y. 331. In this case, the plaintiff purchased a tax title from the defendant, both being ignorant that the premises had been redeemed by a party entitled. It was held that the plaintiff might recover back the purchase money. A mistake in the belief that a tract of land claimed under the preemption law is within a district in which the lands may be preempted, is a mistake of fact and not a mistake of law. Moreland v. Atchison, 19 Tex. 303. In Baptiste v. Peters, 51 Ala. 158, land conveyed was supposed to be the separate estate of a married woman, when in fact it belonged to her deceased husband's estate, and adjoined the separate property of the wife. The contract was rescinded on the ground that there was a mistake of fact. Where an administrator sold an estate supposing his title to be in fee, and the purchaser supposed he was buying a fee, and nothing passed but an equity of redemption, it was held "a case of mixed and mutual mistake of law and fact," and that the purchaser was entitled to relief. Griffith v. Townley, 69 Mo. 13, 33 Am. Rep. 476.

[28] 1 Story Eq. Jur. (13th ed.) § 143; Hitchcock v. Giddings, 4 Price, 135. This is the leading English case on the point. The purchaser bought an interest in a remainder in fee expectant on an estate tail. At the time of

vie, takes a conveyance in ignorance of the fact that the person on whose life the estate depends is dead.[29] Of the same class is a case in which, at the time of the sale, the parties were ignorant that the land had previously been sold and conveyed by one acting under a power of attorney from the vendor,[30] or that the deed under which the grantor held was a forgery.[31] In all such cases, the subject-matter of the contract has no existence; there is no estate nor title, *de facto* or *de jure,* in the grantor, and the grantee is as much entitled to rescission as the buyer of a chattel which, at the time of the sale, had been destroyed without the knowledge of either party.[32] But care must be taken to distinguish between

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the purchase, the tenant in tail had barred the remainder by suffering a common recovery, of which fact the parties were ignorant until after a conveyance had been executed. The court rescinded the contract on the ground of mistake, resting the decision on the fact that the vendor had no interest in the subject-matter at the time of the sale. Lord ST. LEONARDS has expressed himself in guarded terms about this case, and Lord ELDON doubted its authority. 1 Sugd. Vend. (8th Am. ed.) 376 (247).

[29] Allen v. Hammond, 11 Pet. (U. S.) 63, *ob. dict.*

[30] Armstead v. Hudley, 7 Grat. (Va.) 52.

[31] Horne v. Hughes, 19 Cal. App. 6, 124 Pac. 736. Case in which the purchaser was granted relief though vendor had conveyed to him by quitclaim only. Holden v. Reed, 45 Tex. Civ. App. 465, 101 S. W. 288. Where two persons erroneously believed themselves to be the heirs of A. by adoption, and one conveyed to the other his supposed interest in the lands of A., it was held that the mistake was one of fact, and that the grantee was entitled to a cancellation of the deed. Lewis v. Mote, 140 Iowa 698, 119 N. Y. 152.

[32] It will be found that in nearly all of the cases cited below no possession was ever given to, or taken by, the purchaser, and in some that the supposed subject-matter of the contract had not even a physical existence. The rule stated in the text has been applied in the following cases, among others: Gardner v. Mayo, 26 Barb. (N. Y.) 423, where a municipal corporation sold a lot to enforce an assessment, and owing to a defect in the assessment proceedings, the title was bad. Martin v. McCormick, 4 Seld. (N. Y.) 331, where a tax title had been purchased under the mistaken belief that the time for redemption had expired. In Granger v. Olcott, 1 Lans. (N. Y.) 169, the principle stated in the text was recognized, but relief was refused the purchaser of a defective tax title on the ground that the parties considered the title to be doubtful when the contract and conveyance were made. In Goettel v. Sage, 117 Pa. St. 298, 10 Atl. Rep. 889, through a blunder on the part of a tax assessor, land had been sold for taxes on which none were in fact due. The holder of the tax deed sold and conveyed the premises to a third person, the parties acting upon the advice of an attorney, who had

mistake as to the existence of an estate of any kind in the grantor, *de facto* or *de jure*, and mere ignorance of the existence of a paramount title to the estate in a stranger, *e. g.*, mere ignorance of the fact that a deed in the grantor's chain of title is, for any reason, inoperative to pass the title. In such a case, the ignorance of the defect is no ground for rescinding the contract, for one of the chief purposes of taking a conveyance with general warranty is to provide against defects of title of which the parties are ignorant.[33]

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examined the title and pronounced it good. It was held that the subject-matter of the contract having no existence, there was a mistake of fact which entitled the purchaser to relief. In Hyne v. Campbell, 6 T. B. Mon. (Ky.) 286, the grantor held under a conveyance from William May, whom he believed, and innocently represented to the grantee, to have been the patentee of the land, whereas the patent had been issued to George May, and William May had no title whatever. The conveyance was canceled on the ground of mistake. So, also, in Bowlin v. Pollock, 7 T. B. Mon. (Ky.) 26, where a testator devised certain public lands which he claimed, but had not entered upon or entitled himself to a patent when he died, and his devisee sold and conveyed the land, all parties believing the title to be good. In Hurd v. Hall, 12 Wis. 112, A. purchased certain school-land certificates, in ignorance of the fact that they were void because the school commissioners had not complied with certain provisions of the law relating to such sales, and it was held that, there being a mistake of fact, the purchaser was entitled to a rescission of the contract. Cited and approved in Lawton v. Howe, 14 Wis. 241; Costigan v. Hawkins, 22 Wis. 74, 94 Am. Dec. 583; Paul v. Kenosha, 22 Wis. 266, 94 Am. Dec. 598.

[33] Middlekauff v. Barrick, 4 Gill (Md.), 290, 299; Bates v. Delavan, 5 Paige (N. Y.), 299; Sutton v. Sutton, 7 Grat. (Va.) 234, 56 Am. Dec. 109. See the remarks of the court in Hurd v. Hall, 12 Wis. 125, 133; Trevino v. Cantu, 61 Tex. 88, where it is said that covenants are intended to cover such cases. A purchaser, who is evicted because his legal adviser overlooks a defect in the title, cannot rescind the contract on the ground of mistake and recover back the purchase money. Urmston v. Pate, cited in Wakeman v. Duchess of Rutland, 3 Ves. 235, n.

The reasoning of the text is satisfactory where the paramount title is found to be in a stranger. But suppose that the title is in the purchaser himself, as where the vendor held under a conveyance from a married woman insufficiently executed and acknowledged to pass her estate, and upon her death her heir, in ignorance of the facts, purchased the estate from her grantee, and took a conveyance without warranty. In such a case, according to the authorities, there is no doubt that equity would rescind the contract at the suit of the purchaser; yet it would be difficult to distinguish such a case from one in which the title, for a like reason, is found to be outstanding in a stranger. See, in this connection, the observation of Lord COTTENHAM, in Stewart v. Stewart, 6 Cl. & Fin. 968, that "it might not be easy to

The words "mistake of fact," used in this connection, would seem to imply some particular fact or facts to which the attention of the parties was specially drawn, and which must be supposed to have been necessarily contemplated by them at the time the conveyance was made.[34] If this were not true, any conveyance would be liable to rescission on the ground of mistake, if, after it had been executed, the title should be first discovered to be bad.[35]

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distinguish a case where the purchaser buys his own estate by mistake from any other purchaser in which the vendor turns out to have no title. In both there is a mistake, and the effect of it on both is that the vendor receives and the purchaser pays money without the intended equivalent." Without attempting to discover a principle upon which the two cases may be distinguished, we content ourselves with stating the rule as we find it, namely, that if a man part with or purchase property in ignorance of facts showing the title to such property to be in himself, equity will rescind the contract and restore the property to him, or relieve him from any liability or loss incurred in the premises. Where there has been a breach of the covenant of warranty, there generally has been a mistake as to the title of the grantor, but it is hardly a ground on which the grantor can expect to be relieved of his covenant. Language of the court in Comstock v. Son, 154 Mass. 389, 28 N. E. Rep. 596. The fact that the grantor believed he had a good title cannot relieve him from liability on his covenants. Sanborn v. Gunter, (Tex.) 17 S. W. Rep. 117.

[34] It is scarcely necessary to say that if the fact rendering void the title is known to the vendor and unknown to the purchaser, the right of the latter to relief is grounded not so much upon mistake or ignorance of facts upon his part as upon a fraudulent concealment of the facts by the vendor. 1 Story's Eq. Jur. (13th ed.) § 147.

[35] In Whittemore v. Farrington, 76 N. Y. 452, the court stated the facts and the law thus: "The question is then reduced to this: A party who, under a verbal agreement for the conveyance to him of lands is entitled to insist upon a good title and a deed with covenants, pays the consideration and is then tendered a deed without covenants. He demands a deed with covenants, and this is refused. He then accepts the deed without covenants, and, believing the title to be clear, records it and continues to occupy and improve the property. An incumbrance unknown at the time to both parties is afterwards discovered. Both parties are innocent of any fraud. It is conceded that no legal liability rests upon the grantor in such a case. Bates v. Delavan, 5 Paige (N. Y.), 300; Burwell v. Jackson, 9 N. Y. 535. In the absence of fraud or covenants a purchaser takes the title at his own risk. Then do the facts stated entitle the plaintiff to any equitable relief? We think not. The theory of the judgment is that the acceptance of the quitclaim deed in performance of the contract of exchange may be set aside on the ground of mistake, and the contract treated as still executory, and a new performance in a different manner decreed. The theory is ingenious, but is not founded upon any legal precedent or principle. In the first place

If a man purchase his own estate in ignorance of facts which would show his right, he will be relieved in equity.[36] Thus, if an heir were to take a conveyance of his own inheritance, ignorant of the fact that he was heir, there is no doubt that equity would rescind the contract.

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there was no mistake as to the character of the deed which was tendered and accepted. The grantee knew that by accepting it he took the risk of any defect in the title which might be discovered. He was not led into accepting it by any deception or suppression on the part of the grantor. Secondly, the delivery and acceptance of the deed constituted a full execution of the prior parol contract. The title to the land passed under the deed, and the original contract was merged in it. After a contract has been thus fully performed, there can be no jurisdiction in equity to decree a second performance. In a proper case equity has jurisdiction, on the ground of mistake, to reform the instrument or deed by which a prior contract has been executed or performed, but to authorize the exercise of this jurisdiction there must have been a mutual mistake as to the contents of the instrument sought to be reformed, or else mistake on one part and fraud upon the other. Where both parties are innocent of fraud, and both know the character and contents of the instrument, it cannot be reformed in equity merely on the ground that one of the parties would have exacted and would have been entitled to exact a different instrument had he been acquainted with facts rendering it to his interest to do so, or which, if he had known them, would have caused him to reject the instrument which he accepted. It is beyond the power even of a court of equity to make contracts for parties. The jurisdiction to reform written instruments in cases free from fraud is exercised only where the instrument actually executed differs from what both parties intended to execute and supposed they were executing or accepting, and this mistake will be corrected in equity only on the clearest proof, and then only by making the instrument conform to what both parties intended. But an instrument or covenant, the nature and contents of which are fully comprehended by both parties at the time of its execution, cannot be altered in its terms by the court. See Wilson v. Deen, 74 N. Y. 531, and authorities there cited. If the decision of the trial court in this case can be sustained, any purchaser of lands who accepts a deed without covenants may have recourse against his grantor for a subsequently-discovered incumbrance or defect in the title, provided he can show that under his contract of purchase he might have insisted on a deed with covenants, and that he believed the title to be clear when he accepted one without covenants. If the grantor and grantee had both intended that this deed should contain covenants, and supposed at the time of its delivery that it did contain them, but through a mistake of the scrivener they had been omitted, the court might insert them."

[36] 1 Sugd. Vend. (14th Eng. ed.) 245. Bingham v. Bingham, 1 Ves. Sen. 126; Cooper v. Phibbs, L. R., 2 H. L. 170. These, however, were cases in which the mistake was rather as to the law applicable to known facts than mistake as to the facts themselves. The rule is thus broadly stated by Lord

It has been held that the purchaser cannot recover back the purchase money in a court of law where there is a mutual mistake as to title, and that his remedy is in equity by suit for rescission, the reason being that the grantor cannot recover back the purchase money and at the same time retain the legal title.[37] Of course, such an action may be maintained in those States in which the distinction between legal and equitable jurisdiction no longer exists, or where the courts have power to enter judgment with a condition that it shall not operate until the plaintiff reconveys the premises to the grantor. And, also, where no such land is in existence as that which the deed purports to convey.[38]

The fact that lands which are no part of the premises actually purchased, and to which the vendor has no title, are by mistake included in the conveyance, is no ground for a rescission of the contract on the application of the grantee.[39] If by mistake there be no such land as the deed purports to convey, the grantee may

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St. Leonards (1 Sugd. Vend. [8th Am. ed.] 533): "If a person having a right to an estate purchase it of another person, being ignorant of his own title, equity will compel the vendor to refund the purchase money with interest, though no fraud appears." It is obvious that such "ignorance of title" may consist in ignorance not of the fact of title, but of a fact or facts on which the title depends, or of ignorance of the law applicable to known facts respecting the title. Little distinction seems to have been made between ignorance of fact and ignorance of law in cases in which the party has acted upon the mistaken belief that he had no interest in the premises. Newl. Cont. in Eq. ch. 28, 432. See, also, Fitch v. Baldwin, 17 Johns. (N. Y.) 161. Where A. set up an adverse claim to certain land and afterwards compromised it, and a deed was made to him upon valuable consideration to be paid by him, the fact that at the time of the compromise his claim had ripened into a perfect title under the Statute of Limitations, was held not to entitle A. to rescind the contract and detain the consideration. Little v. Allen, 56 Tex. 133.

[37] Homer v. Purser, 20 Ala. 573. The reason assigned in this case was that the legal title to the land was still in the plaintiff, and that he could not recover back the purchase money and retain the legal title. The fact was that the vendor, intending to convey a lot belonging to himself, conveyed one by mistake belonging to a stranger, who was in possession, and the grantee never had possession. Under such circumstances, at the first glance a reconveyance would seem unnecessary. If, however, the grantor had conveyed with general warranty and had afterwards acquired title to the premises, it would inure to the benefit of the grantee; hence the necessity of a reconveyance.

[38] D'Utricht v. Melchior, 1 Dall. (Pa.) 428.

[39] Butler v. Miller, 15 B. Mon. (Ky.) 617.

rescind the contract and recover back the purchase money, whether the deed was with or without covenants for title.[40] The acceptance of a deed which, by mistake, does not convey the lands purchased does not preclude the grantee from detaining the purchase money nor from recovering it back. But if the deed conveyed lands not intended to be included therein, the grantee would, of course, be required to reconvey the same.[41] And it may be stated, as a general rule, that the grantee cannot maintain an action to recover back the purchase money on the ground of mistake in a deed which may be reformed, unless he has first applied to the grantor for a correction of the error.[42] Of course, if the land conveyed be not that which was purchased, the grantee will be relieved in equity; and it is immaterial in such cases whether the conveyance was with or without covenants of title.[43] On the other hand, if the vendee gets the land he actually purchased, the fact that it is misdescribed in the contract will not entitle him to rescind until he has given the vendor an opportunity to correct the mistake, and the latter refuses so to do.[44]

If, by mistake, the deed includes land to which the grantor has no title, the grantee may elect to retain the portion to which the title is good; the grantor is not entitled to rescission as to the entire property on the ground of mistake.[45]

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[40] D'Utricht v. Melchior, 1 Dall. (Pa.) 429; Marvin v. Bennett, 8 Paige Ch. (N. Y.) 311. In Morse v. Elmendorff, 11 Paige Ch. (N. Y.) 277, it appeared that the parties contracted for the sale and conveyance of a supposed gore of land which had in fact no existence, there being a mistake by both parties as to that fact. It was held that the vendor could not compel specific performance by the purchaser, and neither could the latter require the vendor to convey an adjoining lot of land to which he had title.

[41] Frazier v. Tubb, 2 Heisk. (Tenn.) 662. The fact that a deed, by mistake, does not convey the land intended to be conveyed, does not avoid the deed; and the grantee may recover on a covenant of seisin therein contained without first having the deed reformed. Calton v. Lewis, 119 Ind. 181, 21 N. E. Rep. 475; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. Rep. 345; Gordon v. Goodman, 98 Ind. 269.

[42] Johnson v. Houghton, 19 Ind. 359. See ante, ch. 12, "Reformation of Deeds."

[43] Kyle v. Kavanaugh, 103 Mass. 356, 4 Am. Rep. 560; Spurr v. Benedict, 99 Mass. 463.

[44] Lamkin v. Reese, 7 Ala. 170, citing Long v. Brown, 4 Ala. 622; Evans v. Bolling, 5 Ala. 550.

[45] Dorr v. Middleburg, 65 W. Va. 778, 65 S. E. 97, 23 L. R. A. (N. S.) 987.

The rule that the grantee on rescission of the contract must reconvey and restore the premises to the grantor and place him substantially *in statu quo*, applies as well where the contract is rescinded on the ground of mistake as for other reasons. On discovery of the mistake the purchaser has the right to elect to rescind and reconvey, or to affirm the contract, pay the purchase money, and look to his covenants for relief.[46] But it has been held that if by mutual mistake a part of the warranted premises is embraced within the limits of an older and superior grant, the purchaser is entitled to detain the purchase money or to recover it back *pro tanto* without offering to restore the premises to the grantor.[47]

§ 341. **Negligence of purchaser.** If by reasonable diligence the party seeking relief on the ground of mistake of fact could have been correctly informed as to such fact he will not be entitled to relief. The mistake must not have arisen from negligence, the means of knowledge being easily accessible.[48] Thus it is apprehended that the purchaser could not complain that there was a mutual mistake of the parties as to the sufficiency of the title, if it could be discovered from the public records that the paramount title was outstanding in a stranger; for example, if there was a conveyance of the premises by the vendor's grantor on record prior to that under which the vendor held.[49]

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[46] Sandford v. Travis, 7 Bosw. (N. Y.) 498; Crosier v. Acer, 7 Paige (N. Y.), 137. In a case in which it appeared that the situation of the parties had so materially changed in consequence of the lapse of time, that the defendant could not be placed *in statu quo*, rescission was denied. Mullreed v. Clark, 119 Mich. 578, 78 N. W. Rep. 658.

[47] Doyle v. Hord, 67 Tex. 621, 4 S. W. Rep. 241; Gass v. Sanger, (Tex. Civ. App.) 30 S. W. Rep. 502.

[48] Bispham's Eq. (3d ed.) § 191; Story Eq. Jur. (13th ed.) p. 153; Kerr F. & M. 407; Trigg v. Reade, 5 Humph. (Tenn.) 541, 42 Am. Dec. 447; Norman v. Norman, 26 S. C. 41, 11 S. E. Rep. 1096.

[49] The case of Hitchcock v. Giddings, 4 Price, 135, where the purchaser took a conveyance from a remainderman in ignorance that the remainder had been barred, has been doubted by Sir EDWARD SUGDEN on this ground. The purchaser might have ascertained the fact by a search. 1 Sugd. Vend. (8th Am. ed.) 376 (247). It is not easy to distinguish such a case from any other in which the title of the grantor turns out to have been entirely worthless at the time of the contract. There would, however, seem to be no room for the application of the doctrine of mistake in a case in which the vendor was in possession and *prima facie* owner of the estate. If there were, a covenant

§ 342. **Immaterial mistakes.** The mistake as to a matter of fact which will entitle the purchaser to relief must be material. The fact must have been essential, and not merely incidental, to the validity of the contract, and the mistake must have been such that but for it the purchaser would not have accepted the title, or the vendor have parted with his rights.[50]

§ 343. **Mistakes as to quantity.** Mistakes in the quantity of land conveyed have frequently been made the ground of application by the purchaser for relief, either in the rescission of the entire contract or in the ratable abatement of the purchase money. Ordinarily no question of title is involved when the grantee merely complains that the boundaries set forth in the deed do not contain the number of acres therein purported to be conveyed, or which the purchaser, under the contract, is entitled to require.[51] If, however, there be a mutual mistake as to the location of adjoining surveys, by which the land is encroached upon, the title to the full tract bargained for does not pass, and the purchaser is entitled to relief, though the conveyance was without warranty.[52]

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of warranty would be a useless formality. In Campbell v. Carter, 14 Ill. 286, a creditor who had a lien on the land of his debtor took the land in satisfaction of the debt, and entered satisfaction of his lien on the record, in ignorance of a junior incumbrance on the premises. It was held that he was not entitled to relief on the ground of mistake, as against the junior incumbrancer, nor to reinstate the lien which he had released.

[50] Kerr F. & M. 408; Bispham's Eq. (2d ed.) § 191; 1 Story Eq. Jur. (18th ed.) § 141; Trigg v. Reade, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447; Grymes v. Saunders, 93 U. S. 55.

[51] Thompson v. Jackson, 3 Rand. (Va.) 504, 509, 15 Am. Dec. 721. See Zuenker v. Kuehn, 113 Wis. 421, 88 N. W. Rep. 605.

[52] Moore v. Hazelwood, 67 Tex. 624, citing Daughtry v. Knolle, 44 Tex. 450; O'Connell v. Duke, 29 Tex. 300, 94 Am. Dec. 282; Smith v. Fly, 24 Tex. 345, 76 Am. Dec. 109. In Brooks v. Riding, 46 Ind. 15, it appeared that both the grantor and grantee were ignorant of the fact that five feet of the width of the property sold was a part of an adjacent street. The purchase money was abated to the extent of the value of the five feet lost. See, also, 2 Warvelle Vend. 840. In Butcher v. Peterson, 26 W. Va. 447, the covenantee was evicted from a portion of the premises, and the covenantor claimed that as there was a mutual mistake of the parties as to the title to that part the entire contract must be rescinded, but the court held that the covenantee might keep that part to which the title was good, and have an abatement of the purchase money as to the other part.

§ 344. **MISTAKE OF LAW. General principles.** (2) The second class of cases in which relief on the ground of mistake as to the title has been sought by the purchaser, consists of those in which the parties were correctly informed of all the facts material to the validity of the title, but were mistaken in their application of the law to those facts; in other words, cases in which relief is asked on the ground of a mistake of the law. This is a much vexed question. It is a legal maxim that ignorance of the law excuses no one, and again, that every one is presumed to know the law. It would be extremely inconvenient to permit a party to set up a defense of ignorance or mistake of the law, because such a rule would encourage the parties to be careless in ascertaining their legal rights at the time of entering upon the contract; and further, because it would be a great inducement to fraud and perjury, if an unscrupulous party knew that he might at any time escape the obligation of his contract by declaring his ignorance of the law in the premises. Consequently it has been decided in many cases that ignorance or mistake of the law affecting the validity of the title to real estate is no ground for relieving the purchaser from his bargain.[53]

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[53] 1 Fonbl. Eq. ch. 2, § 7. 1 Story Eq. Jur. (13th ed.) § 137, where it is said that whatever exceptions there may be to the rule are not only few in number, but will be found to have something peculiar in their character, and to involve other elements of decision. Shotwell v. Murray, 1 Johns. Ch. (N. Y.) 512, one of Chancellor KENT's decisions, is a leading case on this point. A. purchased at an execution sale to enforce a judgment lien. There was a prior judgment binding the land, but the judgment creditor was the same in both cases, and of that fact the purchaser was informed. After the first sale an execution was issued under the senior judgment, and against this the purchaser sought an injunction, claiming that he was mistaken in believing the one judgment to be merged in the other. Relief was denied on the ground that the mistake was merely one of law. So, in Norman v. Norman, 26 S. C. 41, 11 S. E. Rep. 1096, it was held that a purchaser at a sale under a judgment bidding in the mistaken belief that the lien of the judgment was superior to that of a mortgage lien of record, could not be relieved from his bid. In McMurray v. St. Louis Oil Co., 33 Mo. 377, the purchaser bought at a sale under a judgment which was void because confessed by the president of a corporation, no process having been served upon him. The purchaser was aware of the facts, but ignorant that the judgment was void. Relief was denied. In McAninch v. Laughlin, 13 Pa. St. 370, the purchaser was aware of all the facts, but mistaken as to the right of a

On the other hand, there have been many cases in which parties have been permitted to avail themselves of a mistake of the law relating to their private rights. Most of these cases, so far as they have arisen between vendor and purchaser, have been those in which relief was sought by the vendor or grantor on the ground

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widow to claim dower in the land, and relief on the ground of mistake was refused. The fact that a purchaser at a judicial sale was ignorant of the want of jurisdiction in the court to decree the sale, will not excuse him from payment of the purchase money, after confirmation of the sale. Burns v. Hamilton, 33 Ala. 210, 50 Am. Dec. 570. This seems a great hardship. We have seen, however, that in cases in which the proceeds of the sale went to the discharge of liens or charges upon the land, the purchaser, as a general rule, is subrogated to the benefit of the lien. Ante, § 204. In Smith v. Winn, (So. Car.) 17 S. E. Rep. 717, it was held that a purchaser's mistake in supposing that a contingent remainderman was not a necessary party to a suit for the sale of an estate, did not entitle him to relief. Upon the general proposition that mistake of the law, whether relating to title or to other matters, furnishes no ground for relief, see Hunt v. Rousmaniere, 1 Pet. (U. S.) 1 (this case has been cited both ways). Lyon v. Richmond, 2 Johns. Ch. (N. Y.) 51; Storrs v. Barker, 6 Johns. Ch. (N. Y.) 169, 10 Am. Dec. 316, per KENT, Ch.; Wheaton v. Wheaton, 9 Cow. (N. Y.) 96; Gwynn v. Hamilton, 29 Ala. 233; Good v. Herr, 7 W. & S. (Pa.) 253, 42 Am. Dec. 236. In Bank of U. S. v. Daniel, 12 Pet. (U. S.) 55, it was said: "Vexed as the question formerly was, and delicate as it now is, from the confusion in which numerous and conflicting decisions have involved it, no discussion of cases can be gone into, without hazarding the introduction of exceptions which will be likely to sap the direct principle we intend to apply; indeed, the remedial power claimed by courts of chancery to relieve against mistakes of law, is a doctrine rather grounded upon exceptions, than upon established rules. To this course of adjudication we are unwilling to yield. That mere mistakes of law are not remedial is well established, as was declared by this court in Hunt v. Rousmaniere, 1 Pet. (U. S.) 15, and we can only repeat what was there said: 'That whatever exceptions there may be to the rule will be found few in number, and to have something peculiar in their character,' and to involve other elements of decision." Story Eq. Jur. (13th ed.) § 137. For a contrary and recent expression of opinion on this point by the Supreme Court of the United States, see Griswold v. Hazard, 141 U. S. 260. See Kyle v. Febley, 81 Wis. 67, 61 N. W. Rep. 257. Judge STORY closes his review of the cases upon this point with the following observations: "We have thus gone over the principal cases supposed to contain contradictions of, or exceptions to, the general rule, that ignorance of the law, with a full knowledge of the facts, furnishes no ground to rescind agreements or to set aside solemn acts of the parties. Without undertaking to assert that there are none of these cases which are inconsistent with the rule, it may be affirmed that the real exceptions to it are very few, and generally stand upon some very urgent pressure of circumstances." Eq. Jur. (13th ed.) § 137.

that he had parted with his estate or interest in the premises under a mistake of law as to the quantity and extent, or even the existence, of that interest.[54] And in some cases the purchaser has been relieved from the obligation of his contract on the ground of a mutual mistake of the law in respect to some fact upon which the validity of the title he was to receive depended.[55] The principle upon which relief was granted was the same in either case.

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[54] 1 Story Eq. Jur. § 121. Landsdowne v. Landsdowne, Mos. 364; 2 Jac. & W. 205; Naylor v. Winch, 1 Sim. & Stu. 555; Turner v. Turner, 2 Ch. Rep. 81. Kornegay v. Everett, 99 N. C. 30, 34, 5 S. E. Rep. 418. This rule was applied in Lammot v. Bowly, 6 Harr. & J. (Md.) 500, where one parted with property upon a misconstruction of the legal effect of a devise. So, also, in Irick v. Fulton, 3 Grat. (Va.) 193, which was a suit by the vendor to rescind, she having conveyed her entire interest in the premises, supposing it to be an undivided moiety, when, in fact, she owned the whole as surviving joint tenant. Zollman v. Moore, 21 Grat. (Va.) 313, 324, apparently conflicts with this case, but is distinguished from it by STAPLES, J., who points out that, in the first case, the purchaser bought only one-half of the estate and got the whole, while in the case at bar the purchaser believed he was buying, and actually paid for, the whole. This fact, of course, would make a difference in the vendor's measure of relief, but it is not clearly perceived how any change in the *principle* upon which relief should be afforded, is thereby produced. In the latter case the vendor would not be permitted to rescind, without refunding the purchase money for that part of the estate which the purchaser loses.

[55] Fry Sp. Perf. (3d Am. ed.) § 768, 15 Am. & Eng. Encyc. of L. 634. State v. Paup, 13 Ark. 129, 56 Am. Dec. 303. The leading English case upon the point is Bingham v. Bingham, 1 Ves. Sen. 126; Betts' Supp. 79. The plaintiff held under a devise from A., and having been persuaded by the defendant and a scrivener that A. had no power to devise, and that the title was in defendant, purchased his alleged interest for eighty pounds. Afterwards he brought his bill in equity to rescind the contract, alleging that all parties were mistaken in their belief that the devise was invalid. The contract was rescinded and the restoration of the purchase money decreed. Mr. Pomeroy (2 Eq. Jur. § 849) concedes that relief should be afforded in such a case, but treats the mistake as one of fact. He formulates this rule: "Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relations, either of property, or of contract, or of personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, healing the mistake as analogous to, if not identical with, a mistake of fact." All of this seems capable of reduction to the simple observation by Judge STORY (1 Eq. Jur. [13th ed.] § 122), that where the party acts upon the misappre-

§ 345. Distinction between ignorance of law and mistakes of law. In some cases a distinction has been drawn between mere

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hension that he has no title at all in the property, it seems to involve in some measure a mistake of fact, that is, of the fact of ownership arising from a mistake of law." But the learned judge does not commit himself to this view, for he asks in a note, "Is ignorance of the title when all the facts on which it legally depends are known, ignorance of a fact or of law?" There is some plausibility in the idea that ignorance of title resulting from ignorance of a particular law on which the title depends, is a mistake of fact; in one sense it undoubtedly is, but that is in the same sense in which it might be said that ignorance of a particular law is ignorance of the fact that such a law exists, and that, of course, is a palpable sophism when applied to the question under consideration. If a stranger comes to our shores, parts with his inheritance or incurs a liability upon the assumption that the law of primogeniture exists among us, can any one doubt that this is a mistake of law pure and simple? Judge STORY says: "A party can hardly be said to intend to part with a right or title of whose existence he is wholly ignorant" (Eq. Jur. [13th ed.] p. 131), and if to that should be added "whether such ignorance arise from mistake of a particular fact or from mistake of a particular law," we would have what is believed to be a true expression of the rule to be deduced from many decisions. See Prof. Bigelow's note, Story's Eq. Jur. (13th ed.) p. 112. In Lowndes v. Chisholm, 2 McCord Ch. (S. C.) 455, 16 Am. Dec. 667, a mortgagee obtained a judgment against the mortgagor and sold the premises under a *fi. fa.* without foreclosing the mortgage. The purchaser was aware of the facts, but was mistaken as to the law, by which he acquired only the mortgagor's equity of redemption instead of the fee. It was held that he was entitled to rescind. In Champlin v. Laytin, 6 Paige Ch. (N. Y.) 197, 31 Am. Dec. 382, the grantor conveyed a lot embraced within the bounds of a public street which had been laid out on a map but not opened. The parties were aware of the facts, but mistaken as to the legal right of the owner of the land so conveyed, to receive compensation for it when the street should be opened. There was in fact no such right of compensation, and the contract was rescinded on the ground of mistake of law. In Lawrence v. Beaubien, 2 Bailey L. (S. C.) 623, 23 Am. Dec. 155, real property had been devised to an alien, and the devisee, apprehensive that the devise was void and that the property would pass to the heir, executed a bond to the latter in consideration of a release of all his rights in the premises. The devise, however, was valid, and the devisee was permitted to show that he was mistaken as to the law in that respect, and relieved from his liability on the bond. On the general proposition that equity will relieve against a plain mistake of the law, see 1 Beach Mod. Eq. Jur. § 35; Kerr F. & M. (Bump's ed.) 398; 2 Warvelle Vend. 756; Fry on Sp. Perf. (3d Am. ed.) 768; Bispham's Eq. (3d ed.) § 187; Prof. Bigelow's note, Story's Eq. Jur. (13th ed.) p. 112, and the same writer's monograph "Mistake of Law as a Ground of Equitable Relief," 1 L. Quart. Rev. 298. Drew v. Clarke, Cook (Tenn.), 374; Fitzgerald v. Peck, 4 Litt. (Ky.) 125; Benson v. Markoe, 37 Minn. 30, 33 N. W. Rep. 38. In Griswold ignorance of the law and mistakes of the law, relief being refused in the former case and granted in the latter.[56] One of the prin-

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v. Hazard, 141 U. S. 260, 284, a surety on a bail bond in a civil suit was permitted to show that it was understood by him at the time the bond was given that he was to be liable only in case the defendant did not appear before the court at the time specified in the bond, and that he was not to be a surety for the payment of any judgment or decree for money which might be pronounced against the defendant, though the undertaking of the surety was "to abide and perform the decrees and orders of the court." The penalty of the bond was $53,000, and the surety, a stranger to the defendant, had executed it at the request of a mutual friend, and as a matter of courtesy and good will. This was a case of much difficulty. BROWN, J., rendered a dissenting opinion.

[56] Lawrence v. Beaubien, 2 Bailey L. (S. C.) 623, 23 Am. Dec. 155; Lowndes v. Chisholm, 2 McCord Ch. (S. C.) 455, 16 Am. Dec. 667; reaffirmed in Brock v. O'Dell, (S. C.) 21 S. E. Rep. 976. The concurring opinion of PAIGE, Senator, in Chāmplin v. Laytin, 18 Wend. (N. Y.) 422, 31 Am. Dec. 382, contains an instructive review of the authorities upon this point, and for that reason is here quoted at considerable length: "I am prepared to assent to the proposition of the vice-chancellor, that a contract entered into under an actual *mistake of the law* on the part of both contracting parties, by which the object and end of their contract, according to its intent and meaning, cannot be accomplished, is as liable to be set aside as a contract founded in mistake of matters of fact. The proper distinction, in my judgment, is taken in the case of Lawrence v. Beaubien, 2 Bailey Eq. (S. C.) 623, 23 Am. Dec. 155; and Lowndes v. Chisholm, 2 McCord Eq. (S. C.) 455, 16 Am. Dec. 667, and Hopkins v. Mazyek, 1 Hill Eq. (S. C.) 250, between a *mistake* of the law and a mere *ignorance* of the law. The question, it seems to me, was in these cases correctly decided. Several of the cases from the English reports cited on the argument were cases where relief was granted against mere mistake of law. Such were the cases of Willan v. Willan, 16 Ves. 72; Bingham v. Bingham, 1 Ves. 126; Pusey v. Desbourne, 3 P. Wms. 320; Landsdowne v. Landsdowne, Mos. 364. The cases of Onions v. Tyrer, 1 P. Wms. 345, and Perrot v. Perrot, 14 East, 439, also recognize the principle that relief may be afforded in cases of mere mistakes of law. The case of Naylor v. Wench, 1 Sim. & Stu. 561, is to the same effect. So is the case of Fitzgerald v. Peck, 4 Litt. (Ky.) 127. I cannot see any good sense in the distinction of granting relief against mistakes of fact and refusing it in cases of acknowledged mistakes of law. Both, in my judgment, ought to be placed on the same footing. If the principles of justice require relief in the one case, they equally do in the other. The vice-chancellor, Sir JOHN LEACH, in Naylor v. Wench, 1 Sim. & Stu. 555, says: 'If a party acting in ignorance of a plain and settled principle of law is induced to give up a portion of his indisputable property to another under the name of a compromise, a court of equity will relieve him from the effect of his mistake.' Although the case of Hunt v. Rousmaniere, 1 Pet. (U. S.) 13, ultimately turned on another question, yet the opinion of Chief Judge MARSHALL in

cipal reasons why a party will not be heard to allege his ignorance of the law in support of his demand or defense, is that there is in most cases no way of determining the truth or falsehood of the allegation. But if it appear that the law applicable to the case

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that case, as reported in 8 Wheat. (U. S.) 205, clearly shows which way was the inclination of his mind. He says, speaking of the case of Landsdowne v. Landsdowne, Mos. 364, 'that, as a case in which relief has been granted on a mistake of law, cannot be entirely disregarded.' And he further says: 'Although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which it has been decided that a plain acknowledged mistake of law is beyond the reach of equity.' And again, page 216, he says: 'We are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say a court of equity is incapable of affording relief.' And Washington, J., in the same case (1 Pet. 15), in the conclusion of his opinion, says: 'It is not the intention of the court to lay down that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of law.' Johnson, J., in Lawrence v. Beaubien, 2 Bailey Eq. (S. C.) 623, 23 Am. Dec. 155, says: 'All the difficulty and confusion which have grown out of the application of the maxim, *ignorantia juris neminem excusat*, appears to me to have originated in confounding the terms *ignorance* and *mistake*. The former is passive and does not presume to reason, but the latter presumes to know when it does not, and supplies palpable evidence of its existence.' He further says, in Hopkins v. Mayzek, 1 Hill Eq. (S. C.) 250, that a mere ignorance of the law is not susceptible of proof, and, therefore, cannot be relieved; but that a mistake of law may be proven, and when proved relief may be afforded. If relief was to be granted upon every allegation of a mere ignorance of law, great embarrassment would arise in discriminating between the cases of actual ignorance and those of feigned ignorance. So, where the ignorance or mistake of the law is only in one of the contracting parties, and the other party has not taken any advantage of the circumstances in making the contract, it would not be proper to grant relief against such ignorance or mistake. But where a contract is entered into under an actual and reciprocal mistake of law in both the contracting parties, by which the manifest intention of the parties cannot be accomplished, and which *ex æquo et bono* ought not to be binding, and where such mistake is either acknowledged or undoubted evidence of it is produced, I cannot see any good reason why relief should not be granted in equity to the same extent as is done in cases of mistakes in matter of fact. The principles of natural justice require that the like relief should be granted in both cases. I would qualify the rule, however, as was done by Johnson, J., in Lawrence v. Beaubien, and deny relief if it appeared the contract was the compromise of doubtful right, or was entered into as a speculating bargain. By adopting the rule with these qualifications, in my judgment no mischievous consequences would follow, but, on the contrary, the interests of justice would be advanced."

was adverted to by the parties and an erroneous conclusion reached, there is little or no ground to impute bad faith to either of them in afterwards averring that he was mistaken as to the law when he entered into the contract.[57] These observations would apply, of course, to all cases where the parties had been erroneously or falsely advised as to the law by third persons. If a man, upon erroneous advice as to the law applicable to known facts, or upon the erroneous conclusion of himself and another as to what that law is, part with property under the impression or belief that the title thereto is not in himself, equity will relieve him from the obligation or loss incurred by that act. This being so, no reason is perceived why one who *purchases* property upon a mistaken representation or conclusion as to what is the law applicable to some fact or facts upon which the validity of the title depends, should not be afforded a like relief.[58] If a clear, *bona fide*, mistake of the law be established by evidence other than the uncorroborated testimony of the purchaser himself, there would seem to be no reasons of public policy, convenience or expedience upon which relief should be denied to him, unless it should be intended to punish him for his mistake of the law.

The maxim that ignorance of the law excuses no one applies only to the general public laws. It has no application to private or special acts of the legislature, nor to foreign laws, nor to the laws of the other States of the Union.[59]

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[57] As an illustration, let it be supposed that the deed of a married woman, not executed as the law requires, is void, and I, having the deed before my eyes, accept a title derived through it without having the invalidity of the title occur to my mind. Here there is a plain case of ignorance of the law. But it is obviously not the same case as where the invalidity of the title is suggested to me, and I declare my belief, or should be advised, that the law does not invalidate the deed, and that the title is sufficient. In the first case I am ignorant of any law affecting the title; in the second case I know the letter of the law, but am mistaken in its application to my case. Whether the legal consequences are to be the same in either case is another question. See Prof. Bigelow's note, Story's Eq. Jur. (13th ed.) 113.

[58] Howard v. Sebastian, 143 Ky. 237, 136 S. W. 226.

[59] 1 Story Eq. Jur. 140; King v. Doolittle, 1 Head (Tenn.), 77; Moreland v. Atchison, 19 Tex. 303, 311; Havens v. Foster, 9 Pick. (Mass.) 112, 130; 19 Am. Dec. 353; Norton v. Marten, 3 Shep. (Me.) 45.

§ 346. **Erroneous construction of devise or grant.** If the ignorance of the law applicable to some fact upon which the title depends, consist in the erroneous construction of a devise or grant through which title is claimed, it seems according to several English decisions, that the purchaser will be relieved.[60] It has been held that the maxim "*Ignorantia juris haud excusat*" has no application when the word "*jus*" denotes private rights,[61] that is, that a mistake as to the general law cannot be remedied in equity, but that a mistake as to individual rights may be a ground of relief.[62] It has also been said that the rule "ignorance of the law is no excuse," applies only in criminal cases,[63] but that *dictum* is not regarded as authority.

§ 347. **Where the true construction of the law is doubtful.** "Ignorance of the law," as used in the foregoing connection, means ignorance of the law as settled by the decisions of the courts, though such decisions be themselves erroneous, and be afterwards reversed. A subsequent decision of a higher court in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect, and overturn such settlement.[64]

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[60] Beauchamp v. Winn. L. R., 6 H. L. 234, Lord CHELMSFORD saying that ignorance of the law arising upon the doubtful construction of a grant is very different from the ignorance of a well-known rule of law. and that there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake. But see the apparently conflicting language of the same judge in Midland Great West., etc., R. Co. v. Johnson, 6 H. L. C. 810, 811, and Story's Eq. Jur. (13th ed.) § 127.

[61] Per Lord WESTBURY in Cooper v. Phibbs, 2 H. L. 149, 17 Ir. Ch. 73. This interpretation of the maxim was criticized in Hunt v. Rousmaniere, 1 Pet. (U. S.) 15, and Wintermute v. Snyder, 3 N. J. Eq. 499. It is also obscure, when we remember that private rights are governed by the general law.

[62] Bispham's Eq. (3d ed.) § 187.

[63] Per Lord KING in Landsdowne v. Landsdowne, Mos. 364; criticized, 1 Story Eq. Jur. (13th ed.) § 116.

[64] Language of Chancellor KENT in Lyon v. Richmond, 2 Johns. Ch. (N. Y.) 59. Hardigree v. Mitchum, 51 Ala. 151. In this case the vendor had agreed to pay off a judgment lien on the premises at a time when the lien was believed, by the parties, to be valid. Afterwards the law creating the lien was

§ 348. **Misrepresentation of law by vendor.** It is a general rule that if a party is induced to execute a contract by representations which are untrue, but innocently made, he will be entitled to a rescission.[65] Such a state of facts frequently appears in suits for rescission by grantees alleging false and fraudulent representations in respect to the title. If the vendor knew the representation was false, the purchaser would be entitled to rescind on the ground of fraud. If the representation was innocently made, then the purchaser would be relieved on the ground of mistake.[66] The question whether the mistake in such cases was one of law or of fact seems not to have been considered important, it being apparently conceded that the falsity of the representation alone entitled the purchaser to relief. And, generally, it may be said that if, in a case of mistake or ignorance of law affecting the title on the part of the purchaser, there are circumstances indicating fraud, imposition, deceit or unconscionable advantage on the part of the vendor, a court of equity will gladly lay hold of them as an escape from the arbitrary maxim, *ignorantia legis neminem excusat*.[67]

The mistake, to be a ground for relief, must, of course, be the mistake of both parties. The importance of this rule is chiefly

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decided to be unconstitutional, and the vendor refused to indemnify the vendee who had bought the premises at a sale under the judgment to protect himself. The court said: "No diligence on the part of the purchaser could have imparted to him any knowledge of the legal invalidity of the supposed incumbrance. No notice to him of that invalidity, or that it was so regarded by the purchaser, was given. On the contrary, the vendor shared in his ignorance or mistake of the law, and had promised performance of the duty primary upon him in legal contemplation — the removal of the incumbrance. It would be a reproach to the law if the vendor could resist the claim of the purchaser."

[65] See cases cited, ante, § 105. Bigelow on Fraud, 488; Lanier v. Hill, 25 Ala. 554, where the vendor and administrator *c. t. a.* falsely but innocently represented that he had authority under the will to sell. In Drew v. Clarke, Cooke (Tenn.), 374, 5 Am. Dec. 698, it was laid down that if a man is clearly under a mistake in point of law, which mistake is produced by the representation of the other party, he can be relieved as well as if the mistake were as to a matter of fact. See, also, Moreland v. Atchison, 19 Tex. 303; 2 Warvelle Vend. 812.

[66] Fane v. Fane, L. R. 20 Eq. Cas. 698.

[67] 1 Beach Mod. Eq. Jur. § 36; 1 Story Eq. Jur. (13th ed.) § 133; Bispham Eq. Princ. (3d ed.) § 185.

felt in those cases in which the purchaser seeks to have the contract reformed. Its importance, where the rescission of an executed contract is sought, is lessened by the consideration that if the vendor, knowing of matters of law or fact rendering the title worthless, allowed the vendee to proceed without communicating such knowledge, he would, as a general rule, be deemed guilty of fraud, and upon that ground alone the vendee would be relieved.

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